CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

AMITY PARTNERS *v.* WOODBRIDGE ASSOCIATES, L.P., ET AL. (AC 42400)

Alvord, Elgo and Devlin, Js.

Syllabus

The plaintiff sought to recover damages from the defendants W Co. and A, for, inter alia, breach of contract in connection with a dispute arising from a transaction in which C Co. sold a shopping plaza to M Co., and, in return, C Co. took back certain purchase money notes from M Co., including an amended and restated third promissory note, which contained the terms of the sale of the plaza. The notes subsequently were assigned to the plaintiff. Prior to the sale of the plaza, W Co., M Co. and S Co., the sole tenant in the plaza, had entered into a restriction agreement pursuant to which S Co. agreed to pay W Co. an annual cash rental subsidy in exchange for its promise not to lease a nearby property to S Co.'s competitor. Thereafter, M Co. and S Co. signed a letter agreement pursuant to which the cash rental subsidy payments under the restriction agreement were redirected and applied to pay down the amounts owed on the first and second purchase money notes. Subsequently, B, individually and on behalf of H Co., the general partner of M Co., and the plaintiff, as the successor in interest to C Co., entered into a first modification agreement pursuant to which the cash rental subsidy payments were directed to pay off the second note prior to paying off the first note. Both the first and second notes thereafter were paid in full; no payments were directed toward the third note. In its breach of contract claim, the plaintiff alleged that the defendants failed to direct the cash rental subsidy payments to pay off the third note pursuant to an alleged letter of direction, which purportedly provided for those payments to be applied toward paying off the third note once the first and second notes were paid in full. The defendants filed a

motion for summary judgment, and the plaintiff filed a memorandum of law in opposition thereto to which it attached the deposition testimony of B, a signatory to all of the relevant agreements, to establish the existence and terms of the alleged letter of direction. The plaintiff did not submit a copy of the letter of direction. The trial court granted the defendants' motion for summary judgment and rendered judgment thereon, determining, inter alia, that B's testimony was barred by the best evidence rule. *Held* that the plaintiff could not prevail on its claim that the trial court improperly determined that the best evidence rule barred the plaintiff's reliance on B's deposition testimony in support of its opposition to the defendants' motion for summary judgment; the plaintiff failed to satisfy its burden, pursuant to the applicable rule (§ 10-3) of the Connecticut Code of Evidence, to prove that B's testimony was sufficient to establish the former existence, present unavailability and contents of the letter of direction, as his testimony lacked specific details regarding the letter's signatories and terms and neither B nor the plaintiff could locate a copy of the letter, and, therefore, the production of the letter at trial would not have been excused.

Argued February 18—officially released July 14, 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, where Remedios Rogel, executrix of the estate of Monqidh M. Al-Sawwaf, was substituted as a defendant; thereafter, the court, *Lee, J.*, granted the motion for summary judgment filed by the named defendant et al. and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

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

Barbara M. Schellenberg, with whom were *David A. Ball* and *Philip C. Pires*, for the appellees (named defendant et al.).

Opinion

ALVORD, J. The plaintiff, Amity Partners, appeals from the summary judgment rendered by the trial court in favor of the defendants Woodbridge Associates, L.P.,

and Monqidh M. Al-Sawwaf.[1] On appeal, the plaintiff claims that the court improperly determined that the best evidence rule barred the plaintiff's reliance on certain deposition testimony in support of its opposition to the defendants' motion for summary judgment. We disagree with the plaintiff and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. In 1993, Madison Square Associates, L.P. (Madison), and Amity Road Shopping Center, Inc. (Amity), engaged in a transaction in which Amity sold to Madison the Amity Plaza Shopping Center in New Haven (plaza) and, in return, Amity took back certain purchase money notes from Madison. Included in these purchase money notes was the "Amended and Restated Third Promissory Note" (third note), which contained the terms of the sale of the plaza. In 1998, Amity assigned the notes to Viliam Frankel and Magdalena Franklin, as personal representatives of the estate of Harry Franklin, who then assigned the notes to the plaintiff.[2]

Prior to the sale of the plaza, on May 13, 1992, Woodbridge Associates, L.P., Madison, and The Stop & Shop Supermarket Company (Stop & Shop)—the sole tenant in the plaza—had entered into a restriction agreement,

[1] Al-Sawwaf was a general partner of Woodbridge Associates, L.P. He died during the pendency of this action, and Remedios Rogel, the executrix of his estate, was substituted as a defendant. Woodbridge Associates, Inc., was also named as a defendant but is nonappearing. For simplicity, we refer to those parties collectively as the defendants and individually by name where appropriate.

[2] Harry Franklin owned 100 percent of the issued stock in Amity. After his death on March 10, 1993, his ownership interest, including the three notes acquired from the sale of the plaza to Madison, became assets of his estate. The plaintiff was formed to distribute assets of the Franklin estate to family members of Harry Franklin. The plaintiff's membership consists of all the siblings who were to inherit shares of the notes held by Viliam Frankel and Magdalena Franklin, as personal representatives of the estate of Harry Franklin. Viliam Frankel was a partner of the plaintiff and was involved in the sale of the plaza to Madison.

under which Stop & Shop had agreed to pay to Woodbridge Associates, L.P., a cash rental subsidy of no more than $134,000 per annum in exchange for its promise not to lease a nearby property it owned to a competitor of Stop & Shop. On December 21, 1993, Stop & Shop and Madison signed a letter agreement regarding a construction loan Stop & Shop earlier had given to Madison to renovate the plaza. The letter agreement provided for the cash rental subsidy payments under the restriction agreement, originally payable to Woodbridge Associates, L.P., to be redirected and applied to pay down the amounts owed on the first purchase money note (first note) and the second purchase money note (second note) held by Amity and, later, held by the plaintiff as the successor in interest to Amity.[3]

On May 7, 1999, Martin G. Berger, individually and on behalf of McCann Real Equities Investment Holding Company, along with the plaintiff, as successor in interest to Amity, entered into a first modification agreement, under which the parties agreed that the cash rental subsidy paid by Stop & Shop would be directed to pay down the second note prior to paying down the first note. Both the first and second notes were paid in full as of 2007. No payments were directed toward the third note.

The plaintiff brought this action for, inter alia, breach of contract against the defendants, alleging, among other things, that the defendants failed to direct payment to pay off the third note, pursuant to an alleged letter of direction, which purportedly provided for the

[3] The record on appeal includes the deposition of Martin G. Berger, vice president of McCann Real Equities Series 10, Inc. (McCann), a real estate development firm which was the managing member and general partner of Madison. McCann created Woodbridge Associates, L.P., to develop property located near the plaza in Woodbridge. As testified to by Berger, Woodbridge Associates, L.P., and Madison were "related entities" and, due to their ownership congruence, Woodbridge Associates, L.P., would receive "the benefit of having [Madison] benefit" when "Stop & Shop us[ed] the funds [of the rental subsidy payments] to retire the [first and second] notes."

cash rental subsidy payments to be applied toward paying off the third note once the first and second notes were paid in full. In the operative complaint,[4] the plaintiff alleges that its breach of contract claim is supported by the contents of the restriction agreement, the letter agreement, and the first modification agreement.[5] On June 22, 2018, the defendants filed a motion for summary judgment. On August 17, 2018, the plaintiff filed a memorandum of law in opposition to the defendants' motion for summary judgment. In support of its opposition, the plaintiff attached the deposition transcript of Berger, a former partner of Woodbridge Associates, L.P., and signatory to the relevant documents,[6] in order to establish the existence and terms of the alleged letter of direction. Berger testified that a letter of direction "directed Stop & Shop to apply the restriction payment to the third note, and it was required [to do so] to [his] recollection, by Amity . . . as a condition of accepting the third note or the amended and restated third note." The plaintiff did not submit a copy of the letter of direction.

[4] The operative complaint alleged fourteen counts against the various defendants. Count one alleged breach of contract against Woodbridge Associates, L.P., and Woodbridge Associates, Inc. Count two alleged liability of Al-Sawwaf, the general partner of Woodbridge Associates, L.P. Count three sought to impose liability on Al-Sawwaf by piercing the corporate veil of Woodbridge Associates, L.P. Counts four through fourteen alleged misrepresentation, conversion, unjust enrichment, statutory theft, violations of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., and civil conspiracy. The plaintiff did not oppose the defendants' motion for summary judgment as to counts four through fourteen and, on appeal, does not challenge the judgment rendered on those counts.

[5] As the court noted during the hearing on the defendants' motion for summary judgment, and as is readily apparent after our review of the relevant documents, nowhere in the three documents is there any reference to the third note.

[6] On behalf of Madison and Woodbridge Associates, L.P., Berger signed the restriction agreement and the letter agreement. He signed the third note and the agreement modifying the third note on behalf of Madison, and signed the first modification agreement individually and on behalf of McCann Real Equities Investment Holding Company, the general partner of Madison.

The court, *Lee, J.*, granted the defendants' motion for summary judgment on October 1, 2018. In its memorandum of decision, the court stated that the "[p]laintiff cites to no authority under which [Berger's] testimony would be admissible. Indeed, it is barred by the best evidence rule as set forth in [§ 10-1 of the Connecticut Code of Evidence], which provides, [t]o prove the content of a writing . . . the original writing . . . must be admitted in evidence, except as otherwise provided . . . . As the [c]ommentary to the [r]ule provides, [t]he proponent must produce the original of a writing . . . when attempting to prove the contents thereof, unless production is excused. See also [C. Tait & E. Prescott] Tait's Handbook of Connecticut Evidence (5th Ed. [2014]) § 10.1.2. If a document is not yet in evidence, a witness cannot testify concerning the contents of a document not yet in evidence. Id., § 10.1.3. Here, [the] plaintiff is trying to prove the content of this letter of direction. But, by failing to attach this document to its opposition papers (or elsewhere), it has not adduced admissible evidence in opposition to [the] defendants' motion for summary judgment." (Internal quotation marks omitted.) The plaintiff filed a motion for reconsideration on October 22, 2018, which was denied by the court on December 5, 2018. This appeal followed.

Before we address the plaintiff's claim, we first set forth the applicable standard of review of a trial court's ruling on a motion for summary judgment, along with relevant legal principles. "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 to a judgment as a matter of law. . . . Once the moving party has met its burden [of production] . . . the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . [I]t [is] incumbent [on] the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists. . . . The presence . . . of an alleged adverse claim is not sufficient to defeat a motion for summary judgment. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Citations omitted; internal quotation marks omitted.) *Ferrari* v. *Johnson & Johnson, Inc.*, 190 Conn. App. 152, 156–57, 210 A.3d 115 (2019).

"Practice Book § 17-45 provides in relevant part that [a] motion for summary judgment shall be supported by such documents as may be appropriate, including but not limited to affidavits, certified transcripts of testimony under oath, disclosures, written admissions and the like. . . . That section does not mandate that those documents be attached in all cases, but we note that [o]nly evidence that would be admissible at trial may be used to support or oppose a motion for summary judgment. . . . Practice Book § [17-45], although containing the phrase *including but not limited to*, contemplates that supporting documents to a motion for summary judgment be made under oath or be otherwise reliable. . . . [The] rules would be meaningless if they could be circumvented by filing [unauthenticated documents] in support of or in opposition to summary judgment." (Emphasis in original; internal quotation marks omitted.) *Gianetti* v. *Anthem Blue Cross & Blue Shield of Connecticut*, 111 Conn. App. 68, 72–73, 957 A.2d 541 (2008), cert. denied, 290 Conn. 915, 965 A.2d 553 (2009).

On appeal, the plaintiff claims that "[t]he testimony of [Berger] established the existence of a document directing the payments of the [third note] from the Stop & Shop payment stream." The plaintiff further claims that "[t]he testimony of [Berger] is case determinative in connection with the motion for summary judgment . . . [and] . . . in and of itself, establishes a genuine issue of material fact as to whether there was a written agreement obligating the payment of the [third note] from the Stop & Shop payments."[7] Accordingly, the plaintiff argues that the court erred in determining that Berger's testimony would be inadmissible at trial and that it, therefore, could not support its opposition to the defendants' motion for summary judgment. The plaintiff argues that the testimony would not be barred by the best evidence rule because "[t]he parties [agree that] neither one had possession of the alleged document," and, therefore, Berger's testimony is admissible under an exception to the best evidence rule. In response, the defendants argue that the testimony would be inadmissible at trial because it would be barred by the best evidence rule.[8] We agree with the defendants.

"As defined by our Supreme Court, the best evidence rule forces a party to produce the original writing, if it

[7] The plaintiff also claims that the court erred in denying its motion for reconsideration. Because the plaintiff does not provide any legal analysis of this claim to support its assertion, we consider this claim to be inadequately briefed, and, therefore, we decline to review it. "Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Internal quotation marks omitted.) *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016).

[8] The defendants argue in the alternative that the court's judgment can be affirmed on the ground that Berger's deposition testimony would be inadmissible under our hearsay rules. Because we agree with the defendants that the testimony is inadmissible under the best evidence rule, we affirm the court's judgment on that ground and need not consider the defendants' alternative argument.

is available, when the terms of that writing are material and must be proved. . . . The best evidence rule typically applies when attempting to prove the contents of instruments such as deeds, wills or contracts, where a slight variation of words may mean a great difference in rights. . . . The basic premise justifying the rule is the central position which the written word occupies in the law." (Citations omitted; internal quotation marks omitted.) *Coelm* v. *Imperato*, 23 Conn. App. 146, 150, 579 A.2d 573, cert. denied, 216 Conn. 823, 581 A.2d 1054 (1990).

Section 10-3 of the Connecticut Code of Evidence provides four situations in which secondary evidence may be introduced to establish the contents of a document. Those situations include (1) when the originals are lost or destroyed, (2) when the originals are not reasonably obtainable, (3) when the originals are in the possession or control of the opponent, or (4) when the contents relate to a collateral matter. Conn. Code Evid. § 10-3. "[Our] cases and the commentaries are . . . in substantial agreement that a party must undertake a twofold burden in order to recover on a document that he cannot produce. Such a party must demonstrate both (a) the former existence and the present unavailability of the missing document, and (b) the contents of the missing document." *Connecticut Bank & Trust Co.* v. *Wilcox*, 201 Conn. 570, 573, 518 A.2d 928 (1986); see also *Host America Corp.* v. *Ramsey*, 107 Conn. App. 849, 855, 947 A.2d 957, cert. denied, 289 Conn. 904, 957 A.2d 870 (2008). Whether a party sufficiently has demonstrated former existence and present unavailability is a question of fact. See *Central National Bank of New York* v. *Bernstein*, 15 Conn. App. 90, 92, 544 A.2d 239, cert. denied, 209 Conn. 806, 548 A.2d 436 (1988).

In the present case, the plaintiff claims that the defendants failed to direct payment of the cash rental subsidy to the third note in accordance with the terms of the alleged letter of direction. The plaintiff, however, has

failed to provide that letter of direction to the court as evidence of the terms requiring such direction of payment. The plaintiff's counsel explained at oral argument on summary judgment and before this court that neither he nor the plaintiff had possession of the letter of direction, nor could the plaintiff identify any person who knew of its whereabouts. The plaintiff accordingly seeks to introduce secondary evidence of the letter of direction under an exception to the best evidence rule, claiming that neither party had possession of the document.

In support of the letter of direction's former existence, present unavailability and contents; see *Connecticut Bank & Trust Co.* v. *Wilcox*, supra, 201 Conn. 573; the plaintiff attached Berger's deposition testimony as an exhibit to its opposition to the defendants' motion for summary judgment. In his deposition, Berger testified that the letter of direction "directed Stop & Shop to apply the restriction payment to the third note, and it was required [to do so] to [his] recollection, by Amity . . . as a condition of accepting the third note or the amended and restated third note." When asked if he had a copy of the letter of direction in his possession, he testified that he did not. The plaintiff did not provide any further evidence in this regard.

The plaintiff has not satisfied its burden to establish the grounds for admission of secondary evidence, pursuant to § 10-3 of the Connecticut Code of Evidence. Berger's deposition testimony fails to establish that the document once existed. He testified during his deposition that he "remember[s] an agreement called, I think it was entitled 'Letter of Direction' . . . ." As the trial court found, however, he failed to identify the date of the letter, as well as the parties to the letter. Additionally, in clarifying what he remembered about the letter of direction, he said: "I may be remembering incorrectly, but I don't think so," and, as the trial court noted, he admitted: "I could possibly be wrong." In accordance

with *Connecticut Bank & Trust Co.* v. *Wilcox*, supra, 201 Conn. 573, it was the plaintiff's burden to prove that the secondary evidence presented to the court was sufficient to establish the former existence, present unavailability and contents of the letter of direction. Because Berger's testimony lacks specific details regarding the document's signatories and terms, and because neither Berger nor the plaintiff could locate a copy of the letter of direction, we conclude that the plaintiff has not met this burden and that the production of the letter of direction, at trial, would not be excused.

Accordingly, the court did not err when it declined to consider Berger's testimony in ruling on the defendants' motion for summary judgment, as his testimony is barred by the best evidence rule.

The judgment is affirmed.

In this opinion the other judges concurred.

D. S. *v.* R. S.*
(AC 43109)

Bright, Devlin and Harper, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court granting the application for relief from abuse filed by his daughter, the plaintiff, and issuing a domestic violence restraining order against him. The trial court granted the plaintiff's ex parte application for relief from abuse on behalf of herself, her minor child and her mother, and issued a restraining order against the defendant that required him, inter alia, not to harass, follow, interfere with or stalk the plaintiff or her minor child. The court thereafter conducted a hearing on whether to extend

* In accordance with our policy of protecting the privacy interests of the victims of family violence, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

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

the ex parte order, at which the plaintiff testified that the defendant's actions were affecting the child's behavior and schoolwork, and that the child did not want to be around the defendant and was afraid that the defendant was following him. The defendant testified that he went to the area across the street from the child's school bus stop two to three times a week and waved and said hello to the child. The court rendered judgment denying the continuation of the ex parte order as it pertained to the plaintiff and continuing it as to the child. In continuing the ex parte order as to the child, the court stated that, rather than using the dictionary definition of stalking, it would use the statutory (§ 53a-181d) definition set forth in the crime of stalking in the second degree, which defined stalking as to follow, lie in wait for, observe, surveil, communicate with or to send unwanted gifts to a person that results in emotional distress. On appeal, the plaintiff claimed that the trial court used the wrong definition of stalking and that it should have used the definition of stalking in *Princess Q. H.* v. *Robert H.* (150 Conn. App. 105), and erroneously relied on testimony that the plaintiff gave on behalf of the child. *Held*:

1. The trial court did not err in issuing the domestic violence restraining order against the defendant: although the court's reference to the definition in § 53a-181d was incorrect, that narrower definition was not inconsistent with the common understanding of stalking relied on in *Princess Q. H.*, in which the court articulated a broader standard of stalking in the civil protection order context than in the criminal context, and evidence establishing that the defendant's conduct met the criminal standard was more than sufficient to satisfy the civil standard; moreover, the court credited the plaintiff's testimony that the defendant surveilled her and the child and surreptitiously attempted to gather information about the child from the plaintiff and her mother, and the court credited the testimony of the plaintiff and her landlord that the defendant stood across the street from the bus stop to see and to attempt to interact with the child, who did not want the same with the defendant.
2. The defendant's claim that the trial court erroneously relied on testimony that the plaintiff gave on behalf of the child was unreviewable, the defendant having failed to properly preserve his objection at the hearing: although the defendant objected to the plaintiff's testimony about the child's fears, the court overruled the objection, which was not stated precisely, and the defendant made no further objections specific to that claim after he declined the court's invitation to have the child testify; moreover, as there was substantial evidence before the court that established that the child feared the defendant, any error in the court's having overruled the defendant's objection to such testimony was harmless.

Argued March 12—officially released July 14, 2020

Procedural History

Application for relief from abuse, brought to the Superior Court in the judicial district of Danbury, where

the court, *Hon. Sidney Axelrod*, judge trial referee, granted the application in part and issued a restraining order, from which the defendant appealed to this court. *Affirmed.*

Norman J. Voog, for the appellant (defendant).

Opinion

HARPER, J. The defendant, R. S., appeals from the judgment of the trial court granting the application of the self-represented plaintiff, D. S., for relief from abuse and issuing a domestic violence restraining order pursuant to General Statutes § 46b-15.[1] On appeal, the defendant claims that the court incorrectly based its decision on (1) the wrong definition of stalking and (2) testimony of the plaintiff given on behalf of her minor child (child). We affirm the judgment of the trial court.[2]

The record reveals the following relevant facts and procedural history. On May 29, 2019, the plaintiff filed an ex parte application for relief from abuse against the defendant, pursuant to § 46b-15, on behalf of herself, her child, and her mother. The defendant is the plaintiff's father and the former husband of the plaintiff's mother. In her application, the plaintiff averred under oath that the defendant engaged in threatening behavior, stalking, and harassment. Specifically, she alleged that the defendant had continued to try to make contact with the child (1) by showing up at the child's school bus stop, school, summer camp, and Cub Scout meetings, and by watching him from a distance, (2) by trespassing onto the plaintiff's property, and (3) by using

[1] General Statutes § 46b-15 provides in relevant part: "Any family or household member . . . who has been subjected to a continuous threat of present physical pain or physical injury, stalking or a pattern of threatening . . . by another family or household member may make an application to the Superior Court for relief under this section. . . ."

[2] The plaintiff did not file a brief in this appeal. We, therefore, decide the appeal on the basis of the defendant's brief and the record. See *Murphy* v. *Murphy*, 181 Conn. App. 716, 721 n.6, 188 A.3d 144 (2018).

the "Find My iPhone"[3] application on the child's iPad in order to locate the plaintiff's new home. The plaintiff further alleged that the child is afraid of the defendant and, more specifically, afraid that the defendant will try to take him away from the plaintiff. According to the plaintiff, the child gets "extremely upset" whenever the defendant arrives at the bus stop, school, and other events, and the child wants no further contact with the defendant. Additionally, the plaintiff alleged that the defendant sent harassing text messages to the plaintiff's mother and sent threatening letters, e-mails, and text messages to the plaintiff.

On May 29, 2019, the court issued an ex parte restraining order that the defendant, among other things, not harass, follow, interfere with, or stalk the plaintiff and her child. The court further ordered that the defendant stay away from the plaintiff's home, that he stay 100 yards away from the plaintiff and her child, and that he stay 100 yards away from the child's bus stop. The court set a hearing date of June 7, 2019, in order to determine whether to extend the order.

At the hearing, both the defendant and the self-represented plaintiff appeared, testified, and submitted evidence on the issue of the plaintiff's application for relief from abuse. During the hearing, the plaintiff's testimony, in large part, mirrored the statements she had made in her application. More specifically, she testified that the child did not want the defendant at his bus stop; the child was always looking over his shoulder, afraid that the defendant was following him; the defendant appeared at the child's new bus stop, despite not

[3] "Find My iPhone" is a preinstalled smart phone application that utilizes cell phone tower and satellite technology to track the location of a particular iPhone when that phone is powered on. See *A. A. C.* v. *Miller-Pomlee*, 296 Or. App. 816, 820 n.2, 440 P.3d 106 (2019); see also *Jones* v. *United States*, 168 A.3d 703, 735 (D.C. App. 2017) (Thompson, J., dissenting) ("case law is replete with references to iPhone owners . . . locating . . . iPhones by using the Find My iPhone app").

having been told previously about the new bus stop location; the child, once at the bus stop, was afraid to exit the car until the bus arrived; the child has told the plaintiff that he does not want to be around the defendant; the defendant showed up uninvited to the child's Cub Scout meeting and was asked to leave because his presence upset the child; the defendant's actions are affecting the child's behavior and schoolwork; and the defendant, despite the plaintiff's instructions to cease and desist, continued to stand near the bus stop to wave at and speak to the child. The plaintiff also testified that one of her child's friends, during a sleepover at her house, told her that her child was afraid that the defendant was going to take him away and was crying about it. She further testified that her mother told her that, when the plaintiff was not at home, her child would close the shades because he was afraid that the defendant would show up at the house. The plaintiff also testified that since the issuance of the restraining order, the child is the calmest he has ever been but that he still closes the window shades.

The defendant also testified at the hearing. Specifically, he admitted to going to the area across the street from the bus stop, with balloons, two to three times per week. According to the defendant, he waves and says "hello" as the child enters and exits the bus. The defendant further testified that he stands out in the open as he waits for and waves at the child, and sometimes parks his car and stands on the property of a neighbor, with the neighbor's permission.

Gail Howard, the plaintiff's landlord, also testified at the hearing. According to Howard, the defendant waits at the bottom of the driveway for the child to get off the bus. She further testified that when the child sees the defendant, the child does not smile and he "behav[es] in a tense fashion." Howard also testified that she has seen the child "rush away from the defendant."

The plaintiff also entered into evidence several exhibits, including a series of text messages from the defendant to the plaintiff's mother, exhibit 1, and a report she filed with the Redding Police Department, exhibit 4. The text messages show the defendant's efforts to gain information surreptitiously from the plaintiff's mother about the child's travels to school. Additionally, the text messages show that the defendant gave the plaintiff's mother $1400 for that information. The report filed by the plaintiff sets forth that the child does not want to see the defendant, that the child refuses to acknowledge the defendant, and that the defendant's conduct "ha[s] become emotionally draining and damaging to my child."

At the conclusion of the evidence, the court bifurcated final arguments and its decision regarding the extension of the restraining order into two parts: the application of the order as it applied to the plaintiff, and the order as it applied to the child. After the court heard argument with regard to the restraining order as it applied to the plaintiff, the court denied the continuation of the order as it applied to her. Prior to hearing argument about the restraining order as it applied to the child, the court stated that it was not using the dictionary definition of stalking but, rather, the statutory definition set forth in General Statutes § 53a-181d, which defines the crime of stalking in the second degree.[4] Specifically, the court stated that stalking

[4] General Statutes § 53a-181d provides in relevant part: "(a) For the purposes of this section, 'course of conduct' means two or more acts, including, but not limited to, acts in which a person directly, indirectly or through a third party, by any action, method, device or means, including, but not limited to, electronic or social media, (1) follows, lies in wait for, monitors, observes, surveils, threatens, harasses, communicates with or sends unwanted gifts to, a person, or (2) interferes with a person's property, and 'emotional distress' means significant mental or psychological suffering or distress that may or may not require medical or other professional treatment or counseling.

"(b) A person is guilty of stalking in the second degree when:

"(1) Such person knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to (A) fear for such

means "follows, lies in wait for, observes, surveils, communicates with or sends unwanted gifts to a person that results in suffering emotional distress."

The court then heard argument with regard to the restraining order as it applied to the child. At the conclusion of oral argument, the court stated: "I'm continuing the order insofar as it relates to the minor child on the grounds that there's been stalking as a result of the course of conduct by the defendant in which two or more times he has laid in wait for, observed or surveilled, or sent unwanted gifts, and [that] has resulted in emotional distress to the child. . . . [O]ne, [the defendant is] to stay 100 yards away from the bus stop of the minor child; two, he's to stay 100 yards away from the minor child; three, he's not to stalk the minor child." This appeal followed. Additional facts will be set forth as necessary.

I

The defendant claims that the trial court erred when it issued a domestic violence restraining order pursuant to the definition of stalking provided in § 53a-181d and not the definition provided by this court in *Princess Q. H.* v. *Robert H.*, 150 Conn. App. 105, 115, 89 A.3d 896 (2014). We agree that the court relied on the statutory definition of stalking rather than the common meaning of the word; however, following our careful review of the record, we cannot conclude that the court erred in concluding that the defendant engaged in stalking as to the child.

We first set forth the well settled standard of review in family matters, along with other relevant legal principles. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not

person's physical safety or the physical safety of a third person, or (B) suffer emotional distress . . . ."

reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . 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. . . . Our deferential standard of review, however, does not extend to the court's interpretation of and application of the law to the facts. It is axiomatic that a matter of law is entitled to plenary review on appeal." (Citation omitted; internal quotation marks omitted.) Id., 111–12.

Additionally, as we often have noted, "[w]e do not retry the facts or evaluate the credibility of witnesses." (Internal quotation marks omitted.) *Margarita O.* v. *Fernando I.*, 189 Conn. App. 448, 463, 207 A.3d 548, cert. denied, 331 Conn. 930, 207 A.3d 1051, cert. denied, U.S. , 140 S. Ct. 72, 205 L. Ed. 2d 130 (2019). Rather, "[i]n pursuit of its fact-finding function, [i]t is within the province of the trial court . . . to weigh the evidence presented and determine the credibility and effect to be given the evidence. . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Internal quotation marks omitted.) *Kathrynne S.* v. *Swetz*, 191 Conn. App. 850, 857, 216 A.3d 858 (2019).

Furthermore, given the nature of this appeal, it is important to underscore that "[w]e have long held that this court may affirm a trial court's proper decision, although it may have been founded on a wrong reason." (Internal quotation marks omitted.) *Geremia* v. *Geremia*, 159 Conn. App. 751, 779, 125 A.3d 549 (2015); see also *Flagg Energy Development Corp*. v. *General Motors Corp*., 244 Conn. 126, 151, 709 A.2d 1075 (1998) (appellate court not required to reverse trial court ruling that reached correct result but for wrong reason), overruled in part on other grounds by *Ulbrich* v. *Groth*, 310 Conn. 375, 412 n.32, 78 A.3d 76 (2013).

Stalking is not defined in § 46b-15. In *Princess Q. H*. v. *Robert H*., supra, 150 Conn. App. 105, this court analyzed § 46b-15 (a). This court reasoned: "The legislature did not provide a definition of stalking as that word is used in § 46b-15 (a). Although it could have done so, it did not incorporate by reference the definitions of stalking that are contained in the Penal Code, specifically, § 53a-181d . . . ." (Footnotes omitted; internal quotation marks omitted.) Id., 114–15. This court further stated that "[w]e interpret the statute in accordance with these commonly accepted definitions, satisfied that the plain meaning of the statute does not yield an unworkable or absurd result. We reject . . . reliance on the narrower definitions of stalking codified in our Penal Code. In so doing, we are mindful that our legislature reasonably may have chosen to rely on a narrower definition of stalking in delineating criminal liability, while deciding that a broader definition of stalking was appropriate in the dissimilar context of affording immediate relief to victims under § 46b-15." Id., 115. As a result, this court looked to and provided the commonly approved usage of the word and defined stalking as follows: "[T]he act or an instance of following another by stealth. . . . The offense of following or loitering near another, often surreptitiously, to annoy or harass

that person or to commit a further crime such as assault or battery. Black's Law Dictionary (9th Ed. 2009). To loiter means to remain in an area for no obvious reason. Merriam-Webster's Collegiate Dictionary (11th Ed. 2011).'' (Internal quotation marks omitted.) *Princess Q. H.* v. *Robert H.*, supra, 115.

Employing the aforementioned legal principles along with the definition of stalking as it is commonly defined and applied, this court held, in *Princess Q. H.*, that the trial court did not abuse its discretion when it concluded ''that the defendant's conduct in driving past [the plaintiff's] home, turning around, and immediately driving past [the plaintiff's] home a second time constituted an act of stalking.'' Id., 116. With *Princess Q. H.* and our standard of review in mind, we now turn to the defendant's claim.

At the § 46b-15 hearing in the present case, the court stated that it would use the definition of stalking set forth in § 53a-181d. In its oral decision, the court found, consistent with the plaintiff's testimony, that the defendant ''two or more times . . . has laid in wait for, observed or surveilled, or sent unwanted gifts, and [that] has resulted in emotional distress to the child.''

Consistent with this court's decision in *Princess Q. H.*, we note that the trial court's reference to the statutory definition of stalking was incorrect. The narrower statutory definition set forth in § 53a-181d, however, is not inconsistent with the common understanding of stalking relied on by this court in *Princess Q. H.* We further note that, in *Princess Q. H.*, this court intentionally articulated a broader standard of stalking in the civil protection order context than the one employed in the criminal context. See *Princess Q. H.* v. *Robert H.*, supra, 150 Conn. App. 115. Accordingly, evidence establishing that the defendant's conduct met the criminal standard of stalking is more than sufficient to satisfy

the civil standard. In other words, in proving the requisite elements of the criminal definition, the elements of the civil definition necessarily are satisfied.

It is clear from the record that the court credited the plaintiff's testimony that the defendant had surveilled her and her child, perhaps surreptitiously, in order to ascertain the location of the plaintiff's new home and the child's new bus stop, despite the plaintiff's having told the defendant to leave the child alone. The court also credited the testimony of the plaintiff and Howard that the defendant stood across the street from the bus stop, two to three times a week, in order to see and attempt to interact with the child, who did not want the same with the defendant. The evidence also shows the defendant's surreptitious attempts to gather information from the plaintiff's mother about the child's travels to school. We see little difference between the defendant's actions of surveilling the child from near the plaintiff's home and the defendant's actions in *Princess Q. H.* of repeatedly driving past the plaintiff's home. Consequently, we conclude that the defendant's actions, as specifically found by the trial court, constituted stalking as that term is commonly defined and applied.

In light of the foregoing, including the court's findings and the breadth afforded the definition of stalking espoused in *Princess Q. H.*, we cannot conclude that the court erred when it continued the restraining order against the defendant as it pertains to the child.

II

The defendant also claims that the court erroneously based its decision on testimony that the plaintiff gave on behalf of the child. The defendant's claim is evidentiary in nature and, because he did not properly preserve his objection at the hearing, we decline to review it.

Furthermore, in light of the other evidence submitted to the trial court, without objection, the court's admission of the limited testimony to which the plaintiff did object, even if in error, was harmless.

Our Supreme Court has held that "[o]ur rules of practice make it clear that when an objection to evidence is made, a succinct statement of the grounds forming the basis for the objection must be made in such form as counsel desires it to be preserved and included in the record. . . . This court reviews rulings solely on the ground on which the party's objection is based. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the *precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling*. . . . The purpose of such a requirement is apparent since we have consistently stated that we will not consider . . . evidentiary rulings . . . where no claim of error was preserved for review on appeal by proper objection and exception. . . . Moreover, once the authority and the ground for an objection is stated, our review of the trial court's ruling is limited to the ground asserted." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Braman*, 191 Conn. 670, 684–85, 469 A.2d 760 (1983).

Additionally, if there were an erroneous evidentiary ruling, "[b]efore a party is entitled to a new trial . . . he or she has the burden of demonstrating that the error was harmful. . . . The harmless error standard in a civil case is whether the improper ruling would likely affect the result." (Internal quotation marks omitted.) *Iino* v. *Spalter*, 192 Conn. App. 421, 431, 218 A.3d 152 (2019).

The following additional facts are relevant to our review. Early in the plaintiff's testimony, while testifying that her child fears that the defendant will take

him away, the defendant's counsel objected, stating, "how does she know—if the son has fears; doesn't the son have to say he has some type of fear?" Counsel further argued that the defendant did not "want his grandson to be quoted without any way of verifying it." Following the objection, the court stated that if the defendant wanted the child brought to court to testify, the court would arrange to do so. The defendant declined the court's invitation. The court then overruled the defendant's objection. The plaintiff resumed her testimony without any further objections by the defendant specific to this claim, during direct examination and cross-examination. Consequently, as previously noted, the plaintiff testified, without objection, that her child told her that he did not want the defendant at his bus stop, that her mother told her that the child closed the shades because he is afraid of the defendant, that the child's friend told the plaintiff that her child was afraid that the defendant would take him away, that the child was upset that the defendant showed up at his Cub Scout meeting, and that the defendant's actions were affecting the child's schoolwork and behavior. The defendant also did not object to the admission of exhibit 4, in which the plaintiff also described the negative effects that the defendant's conduct was having on the child. Additionally, the defendant did not object to Howard's testimony regarding the child's efforts to avoid interacting with the defendant at the bus stop. Furthermore, during oral argument before this court, the defendant's counsel conceded that he did not object to the plaintiff's testimony beyond his initial objection.

The defendant's objection, and subsequent argument in support of that objection, is not a model of clarity— he did not state the precise nature of his objection. Although, in support of this claim, the defendant's

appellate brief sets forth several arguments sounding in hearsay, the defendant did not object to the testimony of the plaintiff on hearsay grounds and, therefore, makes this argument for the first time on appeal. The question of whether the limited testimony of the plaintiff to which the defendant objected constituted hearsay is not a matter properly before this court because "to review [a] defendant's [hearsay] claim, which has been articulated for the first time on appeal and not before the trial court, would result in a trial by ambuscade of the trial judge. . . . We . . . do not address the merits of [such a claim]." (Citation omitted; internal quotation marks omitted.) *State* v. *Braman*, supra, 191 Conn. 685.

Furthermore, as noted, the court had before it substantial evidence, to which the defendant did not object, that separately established that the child fears the defendant. Thus, even if the court erred in overruling the defendant's objection to the plaintiff's testimony that her child told her that he fears the defendant, any such error was harmless. See *Iino* v. *Spalter*, supra, 192 Conn. App. 438–44 (any error in admitting testimony was harmless where defendant did not object to similar testimony).

Accordingly, because the defendant did not state the specific reason for his objection to the plaintiff's testimony, we conclude that his claim is unpreserved and, thus, unreviewable. We further conclude that any error was harmless.

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN P. MENDES *v.* ADMINISTRATOR, UNEMPLOYMENT COMPENSATION ACT ET AL. (AC 42442)

Alvord, Elgo and Bright, Js.

Syllabus

The defendant administrator of the Unemployment Compensation Act appealed to this court from the judgment of the Superior Court sustaining the plaintiff's appeal from the decision of the Board of Review of the Employment Security Appeals Division, which affirmed the determination by an appeals referee that the plaintiff was not entitled to certain unemployment benefits. The plaintiff, who had been employed by A Co., had been found eligible for unemployment benefits by the administrator. A Co. appealed from that decision, and the appeals referee, following a hearing, reversed the decision of the administrator to award benefits to the plaintiff. The plaintiff, who did not attend the hearing before the appeals referee, thereafter filed a motion to open the referee's decision, arguing that he had not received notice of the hearing. The referee denied the plaintiff's motion on the ground that he had not established good cause for his failure to participate in the hearing, finding that, the notice had been properly mailed to the plaintiff at his usual address where he had received all other notices, the notice had not been returned as undeliverable, and the plaintiff had admitted that he may have inadvertently discarded the notice. The board subsequently affirmed the decision of the referee, concluding that the evidence supported the referee's findings and conclusion. Thereafter, the plaintiff appealed to the Superior Court, which found that there was no evidence that the defendant had properly mailed notice of the hearing before the appeals referee and remanded the case for a de novo appeal hearing before the referee. *Held* that the Superior Court exceeded its scope of authority by assessing the factual findings of the referee, as adopted by the board, and determining that because there was no evidence to support the referee's findings, the board had acted unreasonably, illegally, or in abuse of its discretion by denying the plaintiff's motion to open; in an appeal from the decision of the board, the trial court is bound by the board's factual findings and, therefore, it was improper for the trial court to review the subordinate findings of the referee, which had been adopted by the board, in the absence of the plaintiff's filing a motion to correct pursuant to the applicable rule of practice (§ 22-4); moreover, the evidence supported the referee's factual findings that notice had been properly mailed to the plaintiff at his address of record and received by the plaintiff and, therefore, the board acted properly in accepting those findings and affirming the referee's decision.

Submitted on briefs April 15—officially released July 14, 2020

Procedural History

Appeal from the decision of the Board of Review of the Employment Security Appeals Division affirming the decision by an appeals referee that the plaintiff was not entitled to certain unemployment compensation benefits, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Hon. Jon C. Blue*, judge trial referee; judgment sustaining the appeal and remanding the case for further proceedings, from which the named defendant appealed to this court. *Reversed*; *judgment directed.*

Krista D. O'Brien and *Philip M. Schulz*, assistant attorneys general, and *William Tong*, attorney general, filed a brief for the appellant (named defendant).

John P. Mendes, self-represented, filed a brief as the appellee (plaintiff).

Opinion

BRIGHT, J. The defendant Administrator of the Unemployment Compensation Act (administrator)[1] appeals from the judgment of the Superior Court sustaining the appeal of the plaintiff, John P. Mendes, from the decision of the Board of Review of the Employment Security Appeals Division (board), which had dismissed the plaintiff's appeal from the decision of the referee at the Employment Security Appeals Division (referee). In short, the Superior Court concluded that the board had no evidence that the defendant had mailed notice to the plaintiff of a January 16, 2018 appeal hearing before the referee, and that the plaintiff, therefore, was entitled to a de novo hearing before the referee. On appeal, the defendant claims this was error. We agree and, accordingly, reverse the judgment of the Superior Court.

[1] Also named as defendants in the Superior Court were the Board of Review of the Employment Security Appeals Division and A & E Glass, the former employer of the plaintiff.

The following facts and procedural history are relevant to our resolution of the defendant's appeal. The defendant determined that the plaintiff was eligible for unemployment benefits effective October 22, 2017, and, on November 7, 2017, notified the plaintiff's former employer, A & E Glass (employer), of its chargeability. Two days later, the employer appealed to the referee from the defendant's decision. On January 16, 2018, the referee conducted a hearing, at which the employer appeared but the plaintiff did not. On January 17, 2018, the referee reversed the defendant's decision to award benefits to the plaintiff, and, on February 6, 2018, the plaintiff timely filed a motion to open the referee's decision on the ground that he had not received notice of the January 16, 2018 hearing.

On February 16, 2018, the referee conditionally granted the motion to open and, on May 14, 2018, she held a hearing on the issue of notice, in which both the employer and the plaintiff participated. In a May 29, 2018 decision, the referee found that staff at the appeals division of the defendant, on January 3, 2018, properly had mailed the January 16, 2018 hearing notice to the plaintiff at his usual address where he had received all other notices, and that the notice had not been returned as undeliverable. She further found that that the plaintiff, on the basis of his own admission, may have discarded that notice, inadvertently. She found that the plaintiff's receipt of all other notices that had been mailed to the same address as the notice in question, and the plaintiff's admission that he inadvertently may have discarded the notice in question, "belie the [plaintiff's] claim of nonreceipt." Consequently, she found that the plaintiff had failed to establish good cause for opening her decision and granting a rehearing, and she, therefore, denied the plaintiff's motion to open and reinstated her January 17, 2018 decision. On June 15, 2018, the plaintiff timely filed an appeal to the board

on the ground that he "disagree[d] with the referee's decision because [he] was not aware of [his] original hearing date of January 16, 2018." On July 20, 2018, the board affirmed the decision of the referee, concluding that the evidence supported the referee's findings and conclusion. On August 20, 2018, the plaintiff appealed to the Superior Court. The plaintiff did not file a motion to correct the board's findings pursuant to Practice Book § 22-4.[2]

In a December 20, 2018 memorandum of decision, the court, relying on the mailbox rule,[3] reasoned that the failure of the plaintiff to file a motion to correct the board's findings was not fatal to his claim because the board had acted unreasonably, arbitrarily, illegally or in abuse of its discretion when it affirmed the decision of the referee because there was *no evidence* that the defendant properly had mailed notice of the referee's January 16, 2018 hearing to the plaintiff at his address of record. The court held, in relevant part, that the "evidentiary basis for the referee's finding nowhere appears. The only parties appearing at the hearing to address the issues raised by the [plaintiff's] motion were [the plaintiff] and his employer. . . . Neither of those parties could possibly have had any knowledge of the

[2] Practice Book § 22-4 provides: "If the appellant desires to have the finding of the board corrected, he or she must, within two weeks after the record has been filed in the Superior Court, unless the time is extended for cause by the board, file with the board a motion for the correction of the finding and with it such portions of the evidence as he or she deems relevant and material to the corrections asked for, certified by the stenographer who took it; but if the appellant claims that substantially all the evidence is relevant and material to the corrections sought, he or she may file all of it, so certified, indicating in the motion so far as possible the portion applicable to each correction sought. The board shall forthwith upon the filing of the motion and of the transcript of the evidence, give notice to the adverse party or parties."

[3] Under the mailbox rule, "a properly stamped and addressed letter that is placed into a mailbox or handed over to the United States Postal Service raises a rebuttable presumption that it will be received." *Echavarria* v. *National Grange Mutual Ins. Co.*, 275 Conn. 408, 418, 880 A.2d 882 (2005).

circumstances of mailing of the notice by the Middletown Appeals Division office staff." (Citation omitted.) The court also explained: "The lack of an evidentiary basis for the findings . . . is alone dispositive of the present appeal. . . . The record in this case reveals no evidence for the finding of notice in question." (Citation omitted; emphasis omitted.) Accordingly, the court reversed the decision of the board, and remanded the case for a de novo appeal hearing before the referee. This appeal followed. Facts and additional procedural history will be set forth as necessary.

We first set forth the general principles regarding an appeal involving unemployment compensation. "In the processing of unemployment compensation claims . . . the administrator, the referee and the [board] decide the facts and then apply the appropriate law. . . . [The administrator] is charged with the initial responsibility of determining whether claimants are entitled to unemployment benefits. . . . This initial determination becomes final unless the claimant or the employer files an appeal within twenty-one days after notification of the determination is mailed. . . . Appeals are taken to the employment security appeals division which consists of a referee section and the board of review. . . . The first stage of claims review lies with a referee who hears the claim de novo. The referee's function in conducting this hearing is to make inquiry in such manner, through oral testimony or written and printed records, as is best calculated to ascertain the substantial rights of the parties and carry out justly the provisions . . . of the law. . . . This decision is appealable to the board . . . . Such appeals are heard on the record of the hearing before the referee although the board may take additional evidence or testimony if justice so requires. . . . Any party, including the administrator, may thereafter continue the appellate process by appealing to the Superior Court and, ultimately, to [the Appellate and Supreme Courts] . . . .

"The standard of review for judicial review of this type of case is well established. In appeals under . . . [General Statutes] § 31-249b, the Superior Court does not retry the facts or hear evidence but rather sits as an appellate court to review only the record certified and filed by the board of review. . . . The court is bound by the findings of subordinate facts and reasonable factual conclusions made by the appeals referee where, as here, the board . . . adopted the findings and affirmed the decision of the referee. . . . Judicial review of the conclusions of law reached administratively is also limited. The court's ultimate duty is only to decide whether, in light of the evidence, the board . . . has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Nonetheless, issues of law afford a reviewing court a broader standard of review when compared to a challenge to the factual findings of the referee." (Citations omitted; internal quotation marks omitted.) *Seward* v. *Administrator, Unemployment Compensation Act*, 191 Conn. App. 578, 584–85, 215 A.3d 202 (2019); see also General Statutes § 31-222 et seq. A plaintiff's "failure to file a timely motion for correction of the board's findings in accordance with [Practice Book] § 22-4 prevents further review of those facts found by the board." *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, 265 Conn. 413, 422, 828 A.2d 609 (2003).

In this appeal, the defendant claims that the Superior Court "clearly exceeded its authority when it disregarded the [board's] factual findings, credibility determinations, and conclusions of law that the plaintiff failed to demonstrate *good cause* for his failure to attend the referee's hearing because the . . . court *found* inadequate notice, and ordered another *de novo* hearing on the merits." (Emphasis in original.) He argues: "[I]n light of all the evidence, and *in the absence of a motion to correct*, the . . . court rejected the board's

conclusion that the plaintiff received the hearing notice because the . . . court determined that 'this case reveals *no* evidence for the finding of notice in question' . . . . [The court] . . . failed to afford the proper deference to the board with respect to determining whether . . . a claimant received notice of [a] . . . hearing." (Emphasis in original.) We agree.

The following facts, as revealed by the record or as found by the referee and adopted by the board, assist with our review. After the defendant found the plaintiff eligible for benefits, the employer appealed to the referee. In the file maintained by the defendant, there is a document entitled "notice of hearing before a referee." That document provides that, on January 3, 2018, it was mailed to the plaintiff at his address of record, the employer, and the president of the employer, notifying them that there was an appeal hearing scheduled for Tuesday, January 16, 2018, at 11 a.m., in Middletown. The defendant attended that January 16, 2018 hearing, but the plaintiff did not attend. The referee, thereafter, rendered a decision in which she reversed the defendant's decision to award benefits to the plaintiff.[4] After

[4] Section 31-237g-26 of the Regulations of Connecticut State Agencies provides in relevant part: "(c) If the appealing party appears at a scheduled hearing, but any non-appealing party fails to appear, the Referee shall proceed with the hearing and take the testimony, evidence, and argument put forward by those present, consider the documentary record established by the Administrator and thereafter issue a decision on the merits of the appeal provided that the Referee may reschedule the hearing if the Referee determines that good cause exists for doing so. . . .

"(g) For purposes of this section, good cause shall include such factors listed in Section 31-237g-15 (b) of these regulations as may be relevant to a party's failure to appear."

Section 31-237g-15 (b) of the Regulations of Connecticut State Agencies provides in relevant part: "[T]he Referee shall consider all relevant factors, including but not limited to:

"(i) The extent to which the party has demonstrated diligence in its previous dealings with Administrator and the Employment Security Appeals Division;

"(ii) Whether the party was represented;

"(iii) The degree of the party's familiarity with the procedures of the Appeals Division;

receiving notice of the referee's decision, the plaintiff filed a motion to open on the ground that he had not received notice of the January 16, 2018 appeal hearing.[5]

"(iv) Whether the party received timely and adequate notice of the need to act;

"(v) Administrative error by the Administrator or Employment Security Appeals Division; or the failure of the Administrator, the Appeals Division, or any other party to discharge its responsibilities;

"(vi) Factors outside the control of the party which prevented a timely action;

"(vii) The party's physical or mental impairment;

"(viii) Whether the party acted diligently in filing an appeal once the reason for the late filing no longer existed:

"(ix) Where there is substantial prejudice to an adverse party which prevents such party from adequately presenting its case, the total length of time that the action was untimely;

"(x) Coercion or intimidation which prevented the party from promptly filing its appeal.

"(xi) Good faith error, provided that in determining whether good faith error constitutes good cause the Referee shall consider the extent of prejudice to any other party, any prior history of late filing due to such error, whether the appeal is excessively late, and whether the party otherwise acted with due diligence."

[5] Section 31-237g-35 of the Regulations of Connecticut State Agencies provides in relevant part: "(a) The Referee may, within the time limits set forth in Section 31-237g-34 above, reopen, vacate, set aside or modify a decision on an appeal if the Referee determines, for good cause shown, that new evidence or the ends of justice so require. . . .

"(c) No hearing shall be held upon such motions unless the Referee determines that good cause exists for such a hearing, except that no such motion shall be dismissed as untimely without a hearing if the motion recites a reason for the untimely filing that would constitute good cause pursuant to Section 31-237g-15 of these regulations. The Referee shall, with reasonable promptness, review each such motion and issue a written decision thereon. The Referee's decision on any such motions shall be prepared and delivered in accordance with Section 31-237g-13 (a) of these regulations and shall include a statement as to the reasons for the decision. In any case wherein a further hearing is not scheduled as a consequence of a Referee's decision reopening, vacating, setting aside or modifying a Referee's decision, the Referee shall provide all non-moving parties to such case with (1) a copy of such motion, together with all supplemental documentation filed in support of such motion, and (2) a reasonable opportunity to file a written response to such motion prior to the Referee's issuance of a new decision in the case.

"(d) The Referee may deny any such motion based upon the allegations of new evidence if the Referee determines that the new evidence is unnecessarily duplicative or is not likely to affect the result in the case, or that the exercise of reasonable diligence by the moving party would have resulted

At the hearing on the motion to open, the plaintiff admitted that it was possible that he inadvertently had thrown away the notice, thinking it was junk mail. The referee found that notice had been sent to the plaintiff at his address of record, that he had received all other notices at the address, that he had received this notice, and that he, therefore, failed to prove that there was good cause for her to open and change her decision. The board later adopted the referee's findings and affirmed her decision. In particular, the board concurred in the referee's determination that the plaintiff had failed to submit credible evidence that he had not received the referee's hearing notice, and that he failed to establish good cause to open the referee's decision and to rehear the case. The plaintiff then appealed to the Superior Court without filing a motion to correct the board's findings pursuant to Practice Book § 22-4.

The Superior Court, relying on the mailbox rule and *Cragg* v. *Administrator, Unemployment Compensation Act*, 160 Conn. App. 430, 437, 125 A.3d 650 (2015), reasoned that the failure of the plaintiff to file a motion to correct the board's findings was not fatal to his claim because the board had acted unreasonably, arbitrarily, illegally or in abuse of its discretion when it affirmed the decision of the referee because there was *no evidence* in the record to support the referee's finding that the defendant properly had mailed notice of the January 16, 2018 hearing. The court reviewed the record of the hearing on the motion to open and concluded that there was no one present at that hearing who was competent to testify that the defendant properly had mailed notice to the plaintiff. We conclude that the court was bound

in the presentation of such evidence at the hearing previously scheduled and the moving party does not otherwise show good cause for such party's failure to present such evidence.

"(e) Any party aggrieved by a decision of a Referee with regard to any such motion may appeal to the Board within twenty-one calendar days of the mailing of such decision as set forth in Section 31-237g-34 (b) and (c)."

by the factual findings of the board because the plaintiff failed to file a motion to correct those findings. See Practice Book § 22-4 ("[i]f the appellant desires to have the finding of the board corrected, he or she must, within two weeks after the record has been filed in the Superior Court . . . file with the board a motion for the correction of the finding"); *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 265 Conn. 422 (in absence of Practice Book § 22-4 motion to correct, "board's factual findings are not subject to further review by this court or by the trial court").

Pursuant to General Statutes § 31-249b: "In any appeal, any finding of the referee or the board shall be subject to correction only to the extent provided by section 22-9 of the Connecticut Practice Book."[6] In *Cragg*, this court stated that, when considering an appeal from the board, "[a] plaintiff's failure to file a timely motion [to correct] the board's findings in accordance with [Practice Book] § 22-4 *prevents fur-*

[6] Practice Book § 22-9 provides: "(a) Such appeals are heard by the court upon the certified copy of the record filed by the board. The court does not retry the facts or hear evidence. It considers no evidence other than that certified to it by the board, and then for the limited purpose of determining whether the finding should be corrected, or whether there was any evidence to support in law the conclusions reached. It cannot review the conclusions of the board when these depend upon the weight of the evidence and the credibility of witnesses. In addition to rendering judgment on the appeal, the court may order the board to remand the case to a referee for any further proceedings deemed necessary by the court. The court may remand the case to the board for proceedings de novo, or for further proceedings on the record, or for such limited purposes as the court may prescribe. The court may retain jurisdiction by ordering a return to the court of the proceedings conducted in accordance with the order of the court, or may order final disposition. A party aggrieved by a final disposition made in compliance with an order of the Superior Court may, by the filing of an appropriate motion, request the court to review the disposition of the case.

"(b) Corrections by the court of the board's finding will only be made upon the refusal to find a material fact which was an admitted or undisputed fact, upon the finding of a fact in language of doubtful meaning so that its real significance may not clearly appear, or upon the finding of a material fact without evidence."

ther review of those facts found by the board. . . . In the absence of a motion to correct the findings of the board, *the court is not entitled to retry the facts* or hear evidence. It considers no evidence other than that certified to it by the board, and then for the limited purpose of determining whether . . . there was any evidence to support in law the conclusions reached." (Emphasis added; internal quotation marks omitted.) *Cragg* v. *Administrator, Unemployment Compensation Act*, supra, 160 Conn. App. 437. "[The court] cannot review the conclusions of the board when these depend upon the weight of the evidence and the credibility of witnesses . . . . Practice Book § 22-9 [(a)]." (Internal quotation marks omitted.) Id., 444. On the basis of this quoted language, without analyzing the meaning of that language, the Superior Court focused on the question of whether there was any evidence to support the referee's factual findings that notice of the January 16, 2018 hearing properly had been mailed to the plaintiff and that he had received that notice, and it concluded there was no such evidence.

In its memorandum of decision, the court did not discuss *JSF Promotions, Inc.*, or other appellate level cases, including *Cragg*, that have applied the prohibition on reviewing factual findings made by the referee and the board in the absence of a § 22-4 motion to correct. See, e.g., *Seward* v. *Administrator, Unemployment Compensation Act*, supra, 191 Conn. App. 586 ("'In an appeal to the court from a decision of the board, the court is not to find facts. . . . In the absence of a motion to correct the finding of the board, the court is bound by the board's finding.' "); *Ray* v. *Administrator, Unemployment Compensation Act*, 133 Conn. App. 527, 533, 36 A.3d 269 (2012) (same); *Belica* v. *Administrator, Unemployment Compensation Act*, 126 Conn. App. 779, 786, 12 A.3d 1067 (2011) (failure to file timely motion for correction of board's findings in accordance with

Practice Book § 22-4 prevents further review of facts found by board); *Shah* v. *Administrator, Unemployment Compensation Act*, 114 Conn. App. 170, 176, 968 A.2d 971 (2009) (failure to file timely motion for correction was determinative of appeal); *Kaplan* v. *Administrator, Unemployment Compensation Act*, 4 Conn. App. 152, 153, 493 A.2d 248 (Superior Court does not try appeal de novo, and its function is not to adjudicate questions of fact), cert. denied, 197 Conn. 802, 495 A.2d 281 (1985). Instead, the trial court proceeded to examine the record of the May 14, 2018 hearing to see if the referee's subordinate factual findings, which were adopted by the board, had an evidentiary foundation.

We conclude that the Superior Court exceeded the permitted scope of review by assessing the factual findings of the referee, as adopted by the board. The court, then, reversed the decision of the board and remanded the case for a de novo hearing before the referee on the employer's appeal from the defendant's initial award of benefits to the plaintiff. This was improper. The referee made specific factual findings, including that staff at the appeals division had mailed the notice to the plaintiff's address of record, where he, admittedly, had received all previous notices, that the plaintiff had received the mailed notice, and that he may have thrown it away, inadvertently, thinking it was junk mail. The board adopted those factual findings, concluding that they were supported by the evidence, and that the referee's ultimate finding—that the plaintiff had failed to establish good cause to open her decision and to rehear the case—was consistent with those factual findings. The plaintiff did not file a motion to correct those factual findings or the board's ultimate finding. The Superior Court, therefore, was bound by the factual findings and was called on to assess only whether the board's ultimate finding, namely, whether the plaintiff had failed to establish good cause, was reasonable and logical in light of the factual findings.

Our Supreme Court's holding in *JSF Promotions, Inc.*, is clear that, in the absence of a Practice Book § 22-4 motion to correct, the Superior Court is *bound by* the factual findings of the board. *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 265 Conn. 422 (in absence of motion to correct findings, "board's factual findings are not subject to further review by . . . the trial court"). Nevertheless, in the present case, the Superior Court, instead of accepting the referee's factual findings, considered who attended the hearing on the motion to open and concluded that there was no one in attendance at the hearing who was competent to testify that notice properly had been mailed to the plaintiff and that the referee's factual finding had no basis in evidence. We conclude that this was beyond the court's permitted scope of review.

Furthermore, notwithstanding the Supreme Court's holding in *JSF Promotions, Inc.*, and the many appellate level cases to have discussed this issue, we also have reviewed the evidence in this case, and we conclude that there was evidence to support the referee's factual findings that notice properly had been mailed to the plaintiff at his address of record and that he received such notice.

General Statutes § 31-244a provides: "The conduct of hearings and appeals, including notice thereof, shall be in accordance with rules of procedure prescribed by the board in regulations adopted pursuant to section 31-237g.[7] No formal pleadings shall be required beyond such notices as the board provides for by its rules of procedure. *The referees and the board shall not be bound by the ordinary common law or statutory rules*

[7] General Statutes § 31-237g provides: "The board shall adopt regulations, in accordance with the provisions of chapter 54, concerning the rules of procedure for the hearing and disposition of appeals under the provisions of this chapter. The board shall also undertake such investigations as it deems necessary and consistent with this chapter."

of evidence or procedure. They shall make inquiry in such manner, through oral testimony and *written, electronic and printed records*, as is best calculated to ascertain the substantial rights of the parties and carry out justly the provisions of this chapter. A record shall be prepared of all testimony and proceedings at any hearing before a referee and before the board but need not be transcribed unless an appeal is taken from the referee's or board's decision, as the case may be." (Emphasis added; footnote added.)

Section 31-237g-30 of the Regulations of Connecticut State Agencies provides in relevant part: "(a) The Referee shall hear the case de novo, and shall not be bound by the previous decision of the administrator. The Referee shall conduct and control the hearing informally and shall not be bound by the ordinary common law or statutory rules of evidence or procedure. The Referee shall make inquiry in such manner, through oral testimony and written and printed records, and take any action consistent with the impartial discharge of his duties, as is best calculated to ascertain the relevant facts and the substantial rights of the parties, furnish a fair and expeditious hearing, and render a proper and complete decision. . . .

"(c) The hearing shall be confined to the issues which the notice of hearing issued pursuant to Section 31-237g-17 (e) of these regulations indicates may be covered at the hearing. The hearing may also cover, at the discretion of the Referee, any separate issue which the parties are prepared and willing to go forward on and on which they expressly waive right to notice of. . . .

"(e) *The relevant Administrator's documents in the file record shall be considered as evidence by the Referee subject to the right of any party to object to the introduction of such documents or any part of such documents*. . . ." (Emphasis added.)

In the present case, in accordance with the relevant regulations cited, the "notice of hearing before a ref-

eree" was evidence sufficient to demonstrate that the defendant properly mailed to the plaintiff, at his address of record, notice of the January 16, 2018 appeals hearing. There was no need for the testimony of the person who had mailed the document because no one had objected to the referee's consideration of the documents in the file. As a matter of fact, the plaintiff has never contested whether the notice properly had been mailed; he has contested only his receipt of it. Once this evidence was considered, and the plaintiff failed to rebut it, instead admitting that he may have received the notice and then discarded it, inadvertently, thinking it was junk mail, the referee certainly had the authority to make the factual findings that staff of the appeals division had mailed the notice to the plaintiff and that the plaintiff had received the notice. Thereafter, the board acted properly in accepting those findings and affirming the referee's decision.

The judgment is reversed and the case is remanded with direction to render judgment affirming the decision of the board.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* CARLOS A. ROMERO (AC 42213)

Alvord, Keller and Elgo, Js.

Syllabus

The defendant, who had been on probation in connection with a prior conviction, appealed to this court from the judgment of the trial court revoking his probation and sentencing him to thirty months of incarceration. Following a stop of a van in which the defendant was a passenger and a subsequent search of his hotel room, the defendant was arrested and charged with possession of narcotics with intent to sell and possession of drug paraphernalia. At his probation revocation proceeding, certain evidence was admitted that had been obtained from the stop and the search of his hotel room. After the close of evidence, the trial

court denied the defendant's motion to suppress, declining to recognize an exception to the general inapplicability of the exclusionary rule to probation revocation proceedings, and ruled that the search of the defendant's hotel room was lawful. On appeal, the defendant claimed that under the circumstances of the case, the trial court improperly declined to apply the exclusionary rule pursuant to article first, § 7, of the Connecticut constitution. *Held* that the defendant could not prevail on his claim that the trial court improperly declined to apply the exclusionary rule, as the warrantless search at issue did not violate the Connecticut constitution; a standard condition of the defendant's probation provided that he submit to a search of his person, possessions, vehicle or residence when a probation officer has a reasonable suspicion that he was violating conditions of his probation, which diminished his reasonable expectation of privacy and furthered the state's dual interests in facilitating the defendant's rehabilitation and protecting society from any future criminal violations by him, and there was no requirement in the defendant's probation search condition that a warrant be procured before a search was conducted, and the probation officer and investigator in this case possessed sufficient reasonable suspicion to suspect that the defendant was engaged in a sale of narcotics and that his hotel room might contain further evidence of such criminality to conduct their search of the defendant's hotel room, the defendant having been observed leaving a hotel parking lot, walking to the parking lot of certain neighboring apartments, approaching a driver of a van and reaching his hand into the van's front driver side window, and entering the van, and, after a motor vehicle stop of the van was conducted, the driver of the van was observed visibly shaking and beginning to cry, a needle and glassine bags were discovered on the driver's person, the driver admitted to purchasing $50 worth of heroin, the sum of $50 was found in one of the defendant's pockets, a room card key for the hotel was found on the defendant, and a hotel clerk stated that the defendant had been staying at the hotel.

Submitted on briefs March 18—officially released July 14, 2020

Procedural History

Substitute information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of New London, geographical area number eleven, where the case was tried to the court, *Jongbloed, J.*; thereafter, the court denied the defendant's motion to suppress; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed.*

J. Christopher Llinas, filed a brief for the appellant (defendant).

Mitchell S. Brody, senior assistant state's attorney, *Michael L. Regan*, state's attorney, and *Lawrence Tytla*, former supervisory assistant state's attorney, filed a brief for the appellee (state).

Opinion

ALVORD, J. The defendant, Carlos A. Romero, appeals from the judgment of the trial court finding him in violation of probation under General Statutes § 53a-32. On appeal, the defendant claims that, under the facts of his case, the court improperly declined to apply the exclusionary rule pursuant to article first, § 7, of the Connecticut constitution in his probation revocation hearing. Because we conclude that the search at issue in this case did not violate article first, § 7, of the Connecticut constitution, we do not reach the defendant's claim that the exclusionary rule applies under the particular circumstances of his case.[1] Accordingly, we affirm the judgment of the court.

The following facts and procedural history are relevant to this appeal. On June 2, 2015, the defendant pleaded guilty to assault in the second degree under General Statutes § 53a-60 (a) (1) and received a sentence of five years incarceration, suspended after two years, followed by three years of probation. The defendant's probation commenced on August 10, 2016. On July 18 and September 1, 2016, the defendant signed his conditions of probation, demonstrating that he understood them and would follow them. The standard

[1] The defendant further claims that the court improperly concluded that there was sufficient evidence that he violated his probation. The defendant concedes that if we disagree that the exclusionary rule applies under the facts of his case, there is sufficient evidence to find him in violation of probation. In light of our conclusion that the evidence presented at his probation revocation proceeding was not collected from an unlawful search, we need not reach the defendant's sufficiency of the evidence claim.

conditions of the defendant's probation required that he, inter alia, "not violate any criminal law of the United States, this state or any other state or territory," "[k]eep the [p]robation [o]fficer informed of where you are, tell your probation officer immediately about any change to your . . . address," and "[s]ubmit to a search of [his] person, possessions, vehicle or residence when the [p]robation [o]fficer has a reasonable suspicion to do so." In addition to the standard conditions, under a section of the conditions of probation form titled "Court Ordered Special Conditions," the defendant was required to avoid "new arrests."

On March 17, 2017, the defendant was arrested and charged with possession of narcotics with intent to sell in violation of General Statutes § 21a-278 (b) and possession of drug paraphernalia in violation of General Statutes § 21a-267 (a). In May, 2017, the defendant was charged with violation of probation under § 53a-32. On June 13, 2018, the defendant filed a motion to suppress in his violation of probation proceedings. The court reserved ruling on the defendant's motion to suppress until after the close of evidence. After the presentation of all evidence, the court found the following facts.

On March 17, 2017, Investigator Bridget Nordstrom of the Groton Police Department was on duty and accompanied by Parole Officer Ray Belville in an unmarked police vehicle. Nordstrom and Belville were assigned to a regional task force that was formed to combat the heroin epidemic by actively looking for narcotic and prostitution related criminal activity. The focus of the task force required Nordstrom and Belville to frequently surveil local hotels. On March 17, Nordstrom and Belville observed the defendant exit the parking lot of the Rodeway Inn (hotel) in Groton and walk through a wooded area to the parking lot of the Groton Towers, an apartment complex (apartments) adjacent to the hotel. Nordstrom recognized the defendant and believed him to be a resident of the hotel because she

had seen him there approximately eight to ten times over the prior two months. The defendant walked up to the driver side window of a van that had just entered the parking lot. The defendant reached his hand into the driver side window; he then proceeded to enter the van through its front passenger side door. The van exited the parking lot and was followed by Nordstrom and Belville.

The van was driven from the parking lot to the Ninety-Nine Restaurant (restaurant), approximately one-eighth to one-quarter of a mile along Bridge Street. The van entered the restaurant's parking lot and parked. Nordstrom and Belville exited their vehicle and approached the van to identify the driver and the defendant because they believed that they had witnessed a "hand-to-hand" drug transaction.[2] As they made their approach, Nordstrom and Belville were in plain clothes and displayed their badges to the driver and the defendant. The driver, who was later identified as Luis Rosario, was visibly shaking and began to cry. Rosario exited the vehicle upon request by Nordstrom and Belville. Rosario was asked if he had anything illegal in his van or on his person, to which he admitted to possessing a needle in his sock. Belville removed the needle from Rosario's sock and, as he was doing so, discovered glassine baggies inside one of Rosario's socks. Rosario was asked by Nordstrom whether he had purchased the bags from the defendant, to which he responded, "are you trying to get me killed?"

Nordstrom approached the defendant, who was "compliant" and had his hands on the van's dashboard. The defendant was ordered out of the van, handcuffed, and searched. The defendant was found to possess $50 in one pocket, approximately $57 in the other pocket, and a room card key for the hotel. Nordstrom asked

[2] A young child was discovered in a car seat in the van's second row of seating.

the defendant if he was staying at the hotel, which he denied. Nordstrom asked the defendant if he was on probation, to which he responded affirmatively; Nordstrom further confirmed that the defendant was on probation by conducting a criminal history search in the National Crime Information Center database.

Following her discovery that the defendant was on probation, Nordstrom contacted a New London county probation officer and part-time member of the regional task force, Terry Granatek. Granatek arrived on the scene in fewer than ten minutes. While waiting for Granatek, the defendant denied selling drugs to Rosario. Rosario admitted to having purchased $50 worth of heroin, the same amount of money found on the defendant in one of his pockets.

Following Granatek's arrival on the scene, Nordstrom informed him of her reasons for stopping the van, that she suspected a sale of narcotics had occurred, and that the defendant was on probation and asserted that he was residing in Hartford. Granatek recognized the defendant because he had previously seen him outside of the hotel on a few occasions. Granatek confirmed with the defendant that he was on probation. Granatek asked the defendant if he was staying at the hotel, which the defendant denied. The defendant was transported to the hotel because the officers had a reasonable basis to believe that he was residing there due to his possession of a card key to the hotel. Nordstrom and Granatek approached the clerk at the hotel's front desk to inquire whether the defendant was staying at the hotel. The clerk informed Nordstrom and Granatek that the defendant had been staying at the hotel with his girlfriend, Adaly Estrella, and provided them with the room number. Nordstrom, Granatek, and Police Officer Sean O'Brien, walked to the hotel room, knocked on its door, and were greeted by Estrella. Estrella pointed out possessions of the defendant.

With some assistance from Nordstrom, Granatek performed a search of the room, from which the following items were discovered: plastic sandwich bags, the corners of which can be used for packaging narcotics;[3] seven cell phones, five of which were the defendant's; and a black duffel bag containing mail addressed to the defendant, men's clothing, a cylindrical pill container with a white powder residue within, glassine bags stamped with a red devil, a digital scale, and a jar containing marijuana residue. One of the defendant's cell phones displayed an incoming text message that referenced "fire," a term that can be associated with heroin. A subsequent lab test of the residue found in the cylindrical pill container determined that it consisted of fentanyl, heroin, and tramadol.

Following the close of evidence, the defendant argued that his motion to suppress should be granted because the stop of the van and the search of his hotel room were unconstitutional under the fourth amendment to the United States constitution and article first, § 7, of the Connecticut constitution. The defendant further argued that, under the circumstances of his case, an exception to the general inapplicability of the exclusionary rule in probation revocation proceedings should be recognized, and that the evidence collected from the stop of the van and the search of his hotel room should be suppressed. The state opposed the motion to suppress, arguing that (1) the defendant, as a passenger in the van, had no reasonable expectation of privacy—and, thus, no standing—to contest the stop of the van and (2) the search of his hotel room was "specifically authorized by the conditions of probation that [the] defendant assented to."

In its ruling on the defendant's motion to suppress, the court declined to recognize an exception to the

[3] The plastic sandwich bags were found without their corners cut off.

general inapplicability of the exclusionary rule in the defendant's probation revocation hearing. The court further ruled that the search of the defendant's hotel room was lawful, stating that "condition number twelve of the defendant's conditions of probation require[d] [him] to submit to a search of his person, possessions, and residence when there's a reasonable suspicion to do so. Here there was a reasonable suspicion to do so." The court found, by a preponderance of the evidence, that the defendant committed a violation of probation, revoked his probation, and sentenced him to thirty months of incarceration.[4] This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendant claims that, under the circumstances of his case, the court improperly declined to apply the exclusionary rule pursuant to article first, § 7, of the Connecticut constitution in his probation revocation hearing. Specifically, the defendant argues that an exception to the general inapplicability of the exclusionary rule in probation revocation hearings is warranted under the state constitution when officers conduct a search of a probationer *after* learning of that individual's probation status.[5] In support of this argument, the defendant cites *Payne* v. *Robinson*, 207 Conn.

[4] Thereafter, the state entered a nolle prosequi of the charges pending in the underlying criminal case.

[5] In *Pennsylvania Board of Probation & Parole* v. *Scott*, 524 U.S. 357, 368–69, 118 S. Ct. 2014, 141 L. Ed. 2d 344 (1998), the United States Supreme Court refused to recognize an exception to the general inapplicability of the exclusionary rule in parole revocation hearings. The holding in *Scott* has been interpreted to apply in probation revocation hearings. See *United States* v. *Hightower*, 950 F.3d 33, 37 (2d Cir. 2020); *United States* v. *Hebert*, 201 F.3d 1103, 1104 and n.2 (9th Cir. 2000); *United States* v. *Armstrong*, 187 F.3d 392, 394 (4th Cir. 1999); *State* v. *Foster*, 258 Conn. 501, 508–509 n.6, 782 A.2d 98 (2001).

The fourth amendment to the United States constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

565, 541 A.2d 504, cert. denied, 488 U.S. 898, 109 S. Ct. 242, 102 L. Ed. 2d 230 (1988), a case in which our Supreme Court considered "[w]hether the exclusionary rule of the fourth amendment to the United States constitution applies to probation revocation hearings . . . ." (Footnote omitted.) Id., 570. To address this question, the court balanced the state's interest in accurate fact-finding, which would have been impaired by an application of the exclusionary rule, against the deterrent benefits of the rule. Id., 571. The court concluded that "the balance of interests does not favor the application of the exclusionary rule to a probation hearing in these circumstances." Id. The court further stated: "[W]e emphasize that in holding that the exclusionary rule does not apply to this case, we do not reach the question of whether the exclusionary rule would apply in probation revocation proceedings when the police officer who had conducted the search was aware or had reason to be aware of the suspect's probationary status. If illegally obtained evidence was admissible in such circumstances, the police officer might very well discount the fact that such evidence was inadmissible at a criminal trial, believing that incarceration of the probationer would instead be achieved through the revocation of his probation. Application of the exclusionary rule to the probation hearing might therefore contribute significantly to the deterrence of illegal searches." Id., 573.

In the ensuing cases, our Supreme Court recognized the general inapplicability of the exclusionary rule to probation revocation hearings. See *State* v. *Jacobs*, 229 Conn. 385, 392, 641 A.2d 1351 (1994) ("[w]e note initially that, unlike criminal trials, in which the exclusionary rule typically applies, in probation revocation hearings, the exclusionary rule typically does not apply"); see also *State* v. *Maietta*, 320 Conn. 678, 686, 134 A.3d 572 (2016); *State* v. *Foster*, 258 Conn. 501, 507, 782 A.2d 98 (2001). In each of those cases, however, the court was

not presented with facts inviting it to reach the question it had reserved in *Payne*: "whether the exclusionary rule would apply in probation revocation proceedings when the police officer who had conducted the search was aware or had reason to be aware of the suspect's probationary status." *Payne* v. *Robinson*, supra, 207 Conn. 573.[6]

In *State* v. *Jacobs*, supra, 229 Conn. 392, the court concluded that the case was not appropriate "for deciding whether the *Payne* dictum is correct" because "[t]he presence of a warrant [made the] case critically different . . . ." "Unlike a warrantless search, a search authorized by a warrant presupposes that the officer has persuaded a Superior Court judge that probable cause exists to believe that the defendant has committed a crime and that evidence of that crime exists at the place to be searched." Id., 392–93. As to whether the exclusionary rule would apply to a search performed with a patently defective warrant, the court declined to address that issue, stating that the "case [did] not present that factual scenario." Id., 394. In *State* v. *Foster*, supra, 509–10, the court stated that, "[a]s in *Jacobs*, the search in [this] case was made pursuant to a search warrant and [did] not present itself as one of egregious, shocking or harassing police misconduct. . . . Moreover, the defendant made no offer of proof that the state police who discovered the evidence and executed the search warrant knew that he was on pro-

[6] In *State* v. *Jacobs*, supra, 229 Conn. 389–90, the defendant claimed that "the fourth amendment exclusionary rule applies to a revocation of probation proceeding if the officers performing the search knew or should have known of the defendant's probationary status . . . ." Following the United States Supreme Court decision in *Pennsylvania Board of Probation & Parole* v. *Scott*, 524 U.S. 357, 357, 118 S. Ct. 2014, 141 L. Ed. 2d 344 (1998); see footnote 5 of this opinion; the defendant in *State* v. *Foster*, supra, 258 Conn. 502, claimed that the exclusionary rule applied in probation revocation proceedings under article first, § 7, of the Connecticut constitution. In *State* v. *Maietta*, supra, 320 Conn. 681, the defendant claimed that the exclusionary rule under the fourth and fourteenth amendments to the federal constitution should apply to his probation revocation hearing.

bation at the time." (Footnote omitted.) Lastly, in *State* v. *Maietta*, supra, 320 Conn. 687, the court determined that "nothing in the underlying record indicates that . . . [the] probation officers were conducting the searches at the behest of the police or for reasons other than to ensure that the defendant was in compliance with the terms of his probation" and that the "case contain[ed] no egregious, shocking or harassing police misconduct that would merit the application of the exclusionary rule." (Internal quotation marks omitted.)

In this appeal, Granatek and Nordstrom performed a warrantless search of the defendant's hotel room after they discovered that he was on probation. In this regard, we are provided with facts permitting us to reach the question reserved in dictum by our Supreme Court in *Payne* and noted by its progeny. Nevertheless, we do not reach that question in this case because we conclude that the search of the defendant's hotel room did not violate his right to be free from unreasonable searches under article first, § 7, of the Connecticut constitution. Accordingly, the exclusionary rule has no applicability in this case irrespective of whether the rule might apply in probation revocation proceedings when officers who conducted a warrantless search were previously aware of an individual's probationary status.

"In reviewing a trial court's decision on a motion to suppress, [a] finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [When] the legal conclusions of the court are challenged, [our review is plenary] . . . ." (Internal quotation marks omitted.) *State* v. *Maietta*, supra, 320 Conn. 686; see also *State* v. *Geisler*, 222 Conn. 672, 694 n.15, 610 A.2d 1225 (1992) ("legal issues, e.g., whether information sufficed to give officers reasonable suspicion or probable cause, reviewed de novo"). Article first, § 7, of the Connecticut

constitution provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any persons or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."[7] "[T]he exclusionary rule bars the government from introducing at trial evidence obtained *in violation of* the fourth amendment to the United States constitution. . . . The rule applies to evidence that is derived from unlawful government conduct, which is commonly referred to as the fruit of the poisonous tree . . . . In *State* v. *Dukes*, 209 Conn. 98, 115, 547 A.2d 10 (1988), [our Supreme Court] concluded that article first, § 7, of the Connecticut constitution similarly requires the exclusion of *unlawfully seized* evidence." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Brocuglio*, 264 Conn. 778, 786–87, 826 A.2d 145 (2003). Thus, if a search is lawful, the exclusionary rule will not apply.

The defendant argues that because the search of his hotel room was conducted without a warrant, probable cause and exigent circumstances, or consent, it was unconstitutional under article first, § 7, of the Connecticut constitution.[8] We are unpersuaded.[9]

[7] The fourth amendment to the United States constitution provides individuals with similar protections. See footnote 5 of this opinion.

[8] On appeal, the defendant does not claim that the search of the hotel room was unlawful under the fourth amendment to the United States constitution. In addition, the defendant does not claim that the stop of the van was unconstitutional under either the fourth amendment to the United States constitution or article first, § 7, of the Connecticut constitution. Accordingly, we do not consider those issues.

[9] On appeal, the state does not argue that the judgment should be affirmed because the search of the defendant's hotel room was constitutional. The defendant does, however, claim that the search of his hotel room was unconstitutional under article first, § 7, of the Connecticut constitution. Because we conclude that the search of the hotel room was lawful, and the lawfulness of that search is dispositive, we decide the defendant's appeal on this basis.

In *United States* v. *Knights*, 534 U.S. 112, 114, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001), the Supreme Court decided whether a search of a defendant pursuant to a search condition of his probation,[10] and supported by reasonable suspicion, satisfied the fourth amendment. The court noted that neither the terms of the defendant's probation search condition nor the fourth amendment limited permissible searches pursuant to that condition to those with probationary, rather than investigatory, purposes. Id., 116–18. The court further refrained from determining whether the defendant's "acceptance of the search condition constituted consent . . . of a complete waiver of his [f]ourth [a]mendment rights . . . because [it] conclude[d] that the search of [the defendant] was reasonable under [the] general [f]ourth [a]mendment approach of examining the totality of the circumstances . . . with the probation search condition being a salient circumstance." (Citation omitted; internal quotation mark omitted.) Id., 118. The court then considered the reasonableness of the search "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." (Internal quotation marks omitted.) Id., 118–19.

According to the court, the government's legitimate interests were the rehabilitation of the defendant and the protection of society from his commission of future criminal violations. Id., 119–20. With respect to the second interest, the court stated that "it must be remembered that the very assumption of the institution of probation is that the probationer is more likely than the

[10] The probation condition, agreed to by the defendant, provided that he would "[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." (Internal quotation marks omitted.) *United States* v. *Knights*, supra, 534 U.S. 114.

ordinary citizen to violate the law." (Internal quotation marks omitted.) Id., 120. Therefore, the search condition of probation advanced the government's interests, while diminishing the defendant's reasonable expectation of privacy. Id., 119–20. The court held "that the balance of these considerations require[d] no more than reasonable suspicion to conduct a search of [the defendant's] house." Id., 121. Moreover, the court concluded that the warrant requirement was unnecessary under the circumstances. Id. Thus, "[w]hen an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." Id.; see also *State* v. *Smith*, 207 Conn. 152, 174, 540 A.2d 679 (1988) ("Although the fourth amendment generally requires a warrant based on probable cause before a search occurs, exceptions exist to this requirement when a legitimate governmental purpose makes the intrusion into one's privacy reasonable. . . . This is consistent with the diminished expectation of privacy that a probationer, such as this defendant, is to expect in this governmental program to normalize his relations with society. The standard required to justify the search here by a probation officer . . . [is] reasonable suspicion . . . ." (Citations omitted; internal quotation marks omitted.)

In *State* v. *Moore*, 112 Conn. App. 569, 574–75, 963 A.2d 1019, cert. denied, 291 Conn. 905, 967 A.2d 1221 (2009), this court held that a warrantless search of the apartment of a defendant on probation did not violate the fourth amendment to the United States constitution. This court stated that "[t]he defendant's terms of probation required that he refrain from violating any criminal laws and that he '[s]ubmit to a search of [his] person, possessions, vehicle or residence when the [p]robation [o]fficer has a reasonable suspicion to do so.' " Id.,

574. Because the defendant's urine tested positive for cocaine and marijuana, and a colleague of the defendant's probation officer observed the defendant attempting to hide drug paraphernalia while the colleague was present in the apartment, this court determined that the defendant's probation officer "had ample basis for a reasonable suspicion that the defendant had violated the terms of his probation. The defendant was aware of and had signed and agreed to the standard term of his probation that provided that his probation officer could search his premises any time the officer had a reasonable suspicion to do so." Id., 575.

Although the defendant in the present case argues that the search of his hotel room violated his rights under the state constitution, he failed to provide an independent analysis of whether article first, §7, of the Connecticut constitution provides probationers with greater protection from warrantless searches than provided by the fourth amendment. See *State* v. *Geisler*, supra, 222 Conn. 684–85 (setting forth appropriate factors to address whether "the protections afforded to the citizens of this state by our own constitution go beyond those provided by the federal constitution, as that document has been interpreted by the United States Supreme Court" (internal quotation marks omitted)). As such, the holdings of *Knights* and *Moore* govern our analysis of whether the warrantless search of the defendant's hotel room was unreasonable and, thus, in violation of article first, §7, of the Connecticut constitution.

As in *Moore*, a standard condition of the defendant's probation was that he "[s]ubmit to a search of [his] person, possessions, vehicle or residence when the [p]robation [o]fficer has a reasonable suspicion to do so." See *State* v. *Moore*, supra, 112 Conn. App. 574. The defendant signed the conditions of his probation, thereby manifesting an understanding of and assent to those conditions. The defendant's probation search

condition diminished his reasonable expectation of privacy and furthered the state's dual interests in facilitating the defendant's rehabilitation and protecting society from any future criminal violations by him. See *United States* v. *Knights*, supra, 534 U.S. 119–20; *State* v. *Smith*, supra, 207 Conn. 174. Furthermore, there is no requirement in the defendant's probation search condition that a warrant be procured before a search is conducted of his "person, possessions, vehicle or residence . . . ." See also *United States* v. *Knights*, supra, 121 (dispensing with fourth amendment warrant requirement for searches of probationers who are subject to search condition and when there is reasonable suspicion). Accordingly, the defendant could reasonably be subjected to a search of his residence and possessions when a probation officer had reasonable suspicion that he was violating conditions of his probation. "The reasonable suspicion standard requires no more than that the authority acting . . . be able to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant a belief . . . that a condition of [probation] has been or is being violated." (Internal quotation marks omitted.) *State* v. *Moore*, supra, 112 Conn. App. 574. For the reasons that follow, we conclude that Granatek and Nordstorm possessed sufficient reasonable suspicion to conduct their search of the defendant's hotel room.

The defendant was observed by Nordstrom leaving the hotel parking lot, walking through a wooded area to the parking lot of the neighboring apartments, and approaching the driver of a van that had just pulled into the parking lot. The defendant reached his hand into the van's front driver side window, then entered the van through the front passenger side door. Nordstrom followed the van after it left the parking lot and drove approximately one-eighth to one-quarter of a mile down Bridge Street, until it entered the parking lot of the restaurant. The van stopped in the restaurant's parking

lot. Nordstrom and Belville approached the van to make identifications of those inside it.[11] The driver of the van, Rosario, was observed visibly shaking and beginning to cry. A needle and glassine baggies were discovered on Rosario's person. After being asked whether he purchased the glassine baggies from the defendant, Rosario replied "are you trying to get me killed?" Subsequently, Rosario admitted to purchasing $50 worth of heroin. The sum of $50 was found in one of the defendant's pockets, matching the amount of money Rosario admitted to paying for the heroin.

A room card key for the hotel was also found on the defendant, but he denied to Nordstrom that he was staying there. After Nordstrom learned that the defendant was on probation, she contacted Granatek because he was a local probation officer. When Granatek arrived on the scene, Nordstrom shared with him the reasons for her stop of the van, and that the defendant was on probation and reported living in Hartford. The defendant again denied staying at the hotel when he was asked by Granatek. Because the defendant had a hotel key card and had been observed by both Granatek and Nordstrom outside the hotel multiple times prior to March 17, 2017, Granatek reasonably suspected that the defendant was being deceitful when he denied staying at the hotel. The defendant was transported to the hotel, where Granatek and Nordstrom inquired of the front desk clerk whether the defendant was staying at the hotel. The clerk stated that the defendant had been staying at the hotel with Estrella.[12] Granatek went to

[11] On appeal, the defendant does not challenge the legality of the stop of the van and, therefore, we do not consider that issue. See footnote 8 of this opinion.

[12] The defendant's conditions of probation do not define "residence," as that term is used in the search condition. Nonetheless, because Nordstrom and Granatek had seen the defendant outside the hotel multiple times before March 17, and the hotel clerk had told Granatek that the defendant was staying at the hotel, it was reasonable for Granatek to infer that the hotel room was the defendant's residence. See *State* v. *Drupals*, 306 Conn. 149, 163, 49 A.3d 962 (2012) (interpreting "residence," as that term is used in

the defendant's room and performed a probation check of the hotel room, with some assistance from Nordstrom.

In light of the foregoing facts found by the court, it was reasonable for Granatek and Nordstrom to suspect that the defendant was engaged in a sale of narcotics and that his hotel room might contain further evidence of such criminality. Therefore, the warrantless search of the defendant's hotel room pursuant to the search condition of his probation was lawful.[13]

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* TREIZY LOPEZ (AC 42146)

DiPentima, C. J., and Lavine and Beach, Js.

Syllabus

Convicted, following a jury trial, of attempt to commit robbery in the first degree and conspiracy to commit robbery in the first degree, the defendant appealed to this court. *Held* that the defendant could not prevail on his claim that the trial court improperly admitted uncharged misconduct

General Statutes § 54-251 (a), to mean "the act or fact of living in a given place for some time, and . . . does not apply to temporary stays").

[13] The defendant argues that "[r]ather than seek a search warrant to search [his] hotel room after discovering that [he] was on probation, the police enlisted the assistance of . . . Granatek, who was assigned to New London county and was not involved in the supervision of [him] in any way." The defendant further argues that because Granatek was not his probation officer, he did not have access to his probation conditions to know of the search condition. To the extent that the defendant argues that only his probation officer may perform a search of his residence and possessions under the search condition, he has provided us with no authority to support that proposition. As a probation officer, Granatek was authorized to "supervise and enforce all conditions of probation ordered pursuant to section 53a-30." General Statutes § 54-108 (b). The defendant's search condition is a standard condition of probation. See *State* v. *Moore*, supra, 112 Conn. App. 575 (referring to "*standard term* of . . . probation that provided . . . probation officer could search . . . premises" (emphasis added)). We thus find these arguments unavailing.

evidence regarding a separate robbery as the defendant failed to meet his burden of establishing harmful error: the state presented evidence beyond the uncharged misconduct evidence that overwhelmingly identified the defendant, including surveillance video and eyewitness identification as well as physical evidence linking the defendant to the gun that was used in the attempted robbery and the defendant stated to the police that he and his accomplice had intended to commit robberies and were present in the store where the attempted robbery took place; moreover, the trial court instructed the jury several times that the uncharged misconduct evidence could be considered only for purposes of identification and a jury is presumed to follow limiting instructions in the absence of contrary evidence.

Argued November 21, 2019—officially released July 14, 2020

Procedural History

Amended information charging the defendant with felony murder, attempt to commit robbery in the first degree, and conspiracy to commit robbery in the first degree brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Kavanewsky, J.*; verdict and judgment of guilty of attempt to commit robbery in the first degree and conspiracy to commit robbery in the first degree, from which the defendant appealed to this court. *Affirmed.*

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

C. Robert Satti, Jr., supervisory assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Aaron Simkovitz*, certified legal intern, for the appellee (state).

Opinion

BEACH, J. The defendant, Treizy Lopez, appeals from the judgment of conviction, following a jury trial, of attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 and 53a-134 (a) (2), and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134

(a) (2).[1] On appeal, the defendant claims that the court improperly admitted uncharged misconduct evidence of a separate robbery. We conclude that the defendant has not met his burden of establishing harmful error. Accordingly, we affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On April 11, 2015, the defendant met with his friend, Leighton Vanderberg. They drove to Bridgeport in a light green Ford Focus owned by Vanderberg's wife to "hit a stain to get some money."[2] At approximately 3 p.m., the defendant and Vanderberg entered Sapiao's Grocery store in Bridgeport. The defendant went to the counter, where Maria Salgado (Maria) was located, and Vanderberg went to the back of the store where he confronted Jose Salgado (Jose).[3] Maria testified that the defendant, who was wearing a black mask, pointed a gun at her and told her not to talk or move. Meanwhile, Vanderberg, who also had a gun, approached Jose and demanded that he give him the $900 that Jose was holding. Speaking in Portuguese, Jose requested that Maria retrieve his gun located behind the counter. As she was reaching for the gun, Vanderberg shot Jose three times. Two bullets entered his body, one in the neck and the other in his right upper shoulder, which "went through the muscles of the upper arm and shoulder area and then continued into . . . the chest where

[1] The jury also found that the defendant used a firearm in the commission of the crime of attempt to commit robbery, and his sentence was enhanced by application of General Statutes § 53-202k.

[2] The defendant testified: "A stain means we're going to commit a robbery or just pretty much get in over on anybody. It doesn't necessarily have to be a robbery. It just could be something as easy as, all right, I told you I'm going to do something for you and I got you for your money. Like, you gave me money to do something and—I don't know—like, you [were] going to buy my car and you gave me the money for my car, but in return I didn't sell you the car. I filled out false paperwork. So, pretty much, basically, just scam somebody for money. That could be considered a stain as well. It's just anything—pretty much anything to get some money that—basically, that's it."

[3] The Salgados owned Sapiao's Grocery.

it went into the chest cavities and [injured] the right lung, as well as the pulmonary artery . . . and then it continued and it injured the left lung, as well." The bullet that injured the chest and torso was fatal.[4] Thereafter, the defendant and Vanderberg fled the store and drove to New Haven where they planned to commit a second robbery at the Smokin' Wings restaurant.[5]

Officers from the Bridgeport Police Department subsequently were called to the scene at Sapiao's Grocery. During their investigation, the police obtained video surveillance from surrounding stores. The videos revealed that the defendant had purchased items from a nearby market shortly before the robbery. The videos further showed the defendant and Vanderberg entering Sapiao's Grocery, fleeing, and driving away in a green Ford Focus, which had been parked nearby.[6]

The defendant also was identified by a witness who saw the two men flee the store. She testified that "[o]ne of [the men] was tall [with darker skin] and the other . . . was wearing some type of mask. . . . [The man wearing the mask] had light[er] skin. He wasn't too dark and he wasn't too fair." The witness further described the lighter skinned man as having longer black hair that went down to his neck.

Later that day, New Haven police officers found a gun in a trash can in New Haven. The gun was sent to the state's forensic laboratory for testing. The forensic

[4] The medical examiner testified: "I would say that the [bullet] that went through the torso . . . the trunk, and the lungs, that was, clearly, a fatal injury." He further testified: "The cause of death was the gunshot wound of the trunk."

[5] During the police interview, the defendant stated: "[W]e got back to New Haven . . . [a]nd [Vanderberg] was planning on robbing another store."

[6] The vehicle also was identified by Augusto Cesar Manazare, who testified that while he was waiting in his car to do laundry, he saw "[t]wo guys running and . . . going into a [light green] car that was parked in front of [his] . . . house." Although he could not describe the men in detail, he did identify the light green Ford Focus. Referring to the light green Ford Focus, Manazare testified: "That was the car that was parked in front of my house."

firearms examiner concluded that the bullets and bullet fragments recovered from Jose's body during an autopsy matched test samples fired from the gun that had been recovered by the New Haven police.[7] The forensic DNA examiner concluded that the defendant was a DNA contributor to samples found on multiple locations on the gun, including the gun's grip, trigger, and hammer.[8]

On April 27, 2015, Bridgeport police detectives arrested the defendant and conducted an interview, which was video recorded, and, ultimately, shown to the jury. During the interview, the defendant admitted to participating in the robbery.[9] The defendant further described the type of gun that he had used during the

[7] The forensic firearms examiner testified: "[A]fter a microscopic comparison of the two items to each other and then to test fires that the laboratory made with this actual firearm there was agreement between the bullets from the test fires, as well as the two evidence bullets. Enough for an examiner to say that, yes, these were fired in this gun."

[8] In regard to the hammer, the forensic DNA examiner testified: "[The defendant] is included as a potential contributor to the major DNA profile from item 3-3G1, which was the hammer. And the expected frequency of individuals who could be a contributor to this major mixture profile is less than one in seven billion in the African-American, Caucasian, and Hispanic population. That's actually our laboratory ceiling. We won't report out a statistic higher than that. We've capped it at one in seven billion because seven billion is approximately the population of the earth."

[9] The defendant stated: "So we were driving around Bridgeport and like, you know, we just going, we just going to get a store. I'm like, but how [are] we [going to] do it? We can't just go in there without having a plan. [Vanderberg's] like, just do it. We're just [going to] do it. You can't think. You think I'm [going to] be there like it's just, I don't even know how to explain it like, it's just . . . we got to the store, we got out. . . ."

He continued: "[Vanderberg] told me, just do it, just do it, this, that and a third. . . . So we go in the store, we both got guns. . . . He [goes] behind the counter, or whatever, I got the gun pointed at the lady. . . . I told her just, don't move, nobody is [going to] get hurt, we just want the money. So she's sitting there, she's not replying to nothing at all. She's just completely quiet and shocked. . . .

"So, next thing you know, the man come, he over here grabbing whatever he grabbing, gunshots go off. After that, we run out the store. . . . I'm like, I'm completely shocked, I don't know what the fuck [is] going on. I'm thinking he got [the] money, we [are about] to be good, everything, we just about to get away. . . .

"We got into the car and we just took off."

robbery[10] and what happened to the gun after the robbery.[11] He also admitted to changing his physical appearance after the day of the robbery.[12] The defendant was charged with felony murder in violation of General Statutes §§ 53a-54c, attempt to commit robbery in the first degree in violation of §§ 53a-49 and 53a-134 (a) (2), and conspiracy to commit robbery in the first degree in violation of §§ 53a-48 and 53a-134 (a) (2).

On May 2, 2018, the defendant filed a pretrial motion in limine seeking to preclude the state from presenting "any and all evidence regarding a robbery/shooting investigation of a commercial establishment called 'Smokin' Wings' in New Haven . . . on April 11, 2015 . . . ."[13] He argued that the evidence was irrelevant and unduly prejudicial. The state objected to this motion. On May 15, 2018, after conducting a hearing, the court, *Kavanewsky, J.*, denied the defendant's motion, subject to reargument, stating: "Okay, at this point, I'm going to deny the motion to preclude. . . . [Y]ou've got the

[10] The defendant stated: "I had a nine millimeter. . . . It was chrome. . . . [Vanderberg had] a .38 or something."

[11] When questioned about the location of the guns that were used in the robbery, he stated: "I gave it to [Vanderberg]. I really don't know what he did with them. But I'm pretty sure they're gone."

[12] The following colloquy occurred:

"[Detective Curet]: Your hair was different that day, right?

"[Lieutenant Lamaine]: It was like pretty long. And you had a decent looking beard, kind of scruffle thing going. When did you shave the head and the beard?

"[The Defendant]: The same day you talked to me.

"[Lieutenant Lamaine]: That Wednesday morning, that would be the Wednesday after the homicide."

[13] The motion did not seek to preclude the physical evidence regarding the gun recovered by the New Haven police. During the hearing on the motion, defense counsel stated: "I think my objection is really—it's not the recovery of the firearm or any subsequent testing . . . . I understand that the court is going to allow the firearm . . . but as far as [what occurred] inside the store, that would really be my specific objection because the person in the store cannot tell . . . who fired the firearm . . . . I'm asking the court to limit that testimony, more so than the actual physical recovery of the firearm . . . because the owner . . . of that store could not say who it was."

Bridgeport homicide, that's the one the defendant is charged with participating in. Very, very close in time, we have the Smokin' Wings [robbery], same day, within a matter of hours. The weapon that was used in the Bridgeport homicide was used in the Smokin' Wings [robbery] and was recovered by the police, identified to be the . . . Bridgeport homicide weapon. There's DNA of the defendant on this weapon.

"In the Smokin' Wings [robbery] there are three perpetrators supposed to be involved, an African-American and two either white or Hispanic.

"Now, the state does not have to prove beyond a reasonable doubt that the defendant participated in the Smokin' Wings [robbery], but yet, I think I have to keep my eye on the ball here, and the question is, is this New Haven Smokin' Wings incident and the [gun] and the . . . evidence concerning the [gun] relevant to establishing the defendant's guilt in the Bridgeport homicide. I think the answer is clearly it's relevant. It tends to prove a fact that's in issue. It doesn't have to be conclusive but it's relevant and I'll consider a limiting instruction concerning what you may object to being adduced about what happened within Smokin' Wings but I'm not going to just outright preclude that . . . I think all of this is relevant to the charge of the defendant's guilt of the felony murder in Bridgeport . . . . I think it's admissible evidence."

During trial, on May 23, 2018, the state proffered evidence of the Smokin' Wings robbery for the purposes of establishing identity, outside the presence of the jury. The defendant renewed his initial objection to the admission of the evidence. The court concluded that the evidence "should be . . . admitted for purposes of the jury's consideration that the defendant was a perpetrator in the charged offense here in Bridgeport." Evidence regarding the robbery at Smokin' Wings was then presented to the jury.

On May 31, 2018, the defendant was convicted of attempt to commit robbery in the first degree and conspiracy to commit robbery in the first degree.[14] The court sentenced the defendant to a total effective sentence of thirty years of incarceration, ten years of which were mandatory, followed by a period of special parole for five years. This appeal followed.

The defendant claims that the trial court improperly admitted evidence of the separate robbery at the Smokin' Wings restaurant in New Haven. He argues that (1) the evidence of the Smokin' Wings robbery was not relevant or material to any uncharged misconduct exception pursuant to § 4-5 (c) of the Connecticut Code of Evidence, (2) the prejudicial effect of evidence of the Smokin' Wings robbery outweighed its probative value, and (3) the admission of this evidence was harmful error.

We have no need to consider whether the admission of evidence of misconduct at the Smokin' Wings restaurant was improper, because the evidence was emphatically harmless. See *State* v. *Osimanti*, 299 Conn. 1, 18, 6. A.3d 790 (2010) (no abuse of discretion analysis conducted when concluding that trial court's evidentiary rulings were harmless). The evidence was proffered and admitted on the ground that it was relevant to identification, that is, that it tended to show that the defendant participated in the robbery at the Sapiao's Grocery. The court instructed the jurors several times that they could consider the evidence only for the purpose of identification.[15]

[14] The jury found the defendant not guilty of the felony murder charge.

[15] The court gave the following limiting instruction at the time the evidence was admitted: "You may not consider the Smokin' Wings evidence as establishing a predisposition on the part of the defendant to commit any crime charged or to demonstrate criminal propensity. You may consider such evidence if you believe it and further find it logically and rationally supports the issue for which its being offered by the state, but only as it may bear on the issue of the identity of the defendant in the Bridgeport homicide. So you can consider this evidence of the New Haven matter if you believe it and only for purposes of your consideration of identity of the defendant in the Bridgeport homicide."

Other evidence overwhelmingly established identification. The jury could have found that the defendant's DNA was on the gun that fired the fatal bullets. Surveillance video and eyewitness' descriptive testimony confirmed the identification. Furthermore, the defendant himself stated to the police and testified that he and Vanderberg had intended to commit robberies and that they were present in Sapiao's Grocery.[16]

The defendant claims evidential rather than constitutional error; he, thus, has the burden on appeal of showing harmful error. "[W]hen an improper evidentiary rul-

When charging the jury, the court also stated: "The state . . . offered [evidence of the Smokin' Wings robbery] . . . as an alleged act of misconduct of the defendant as it [may] bear upon your consideration of the identity of the defendant as a perpetrator of the crimes charged in this case. You may not consider such evidence as establishing a predisposition on the part of the defendant to commit any of the crimes charged or to demonstrate a criminal propensity. You may consider such evidence if you believe it and further to find that it logically and rationally supports the issue for which it is being offered by the state, but only as it may bear on the issue of identity of the defendant in the Bridgeport matters. On the other hand, if you do not believe such evidence, or even if you do, if you find that it does not logically and rationally support the issue for which it is being offered by the state—namely, the identity of the defendant—then you may not consider such [evidence] for any other purpose." We presume that the jury followed the instructions of the court.

[16] The following examination transpired between the prosecutor and the defendant at trial:

"Q. And the store that you're talking about, is that Sapiao's Grocery store?

"A. Yes. It is.

* * *

"Q. And what happens inside the store?

"A. I mean, I walk in the store, [Vanderberg] runs around the counter, and the next thing you know I just hear arguing. . . .

* * *

"Q. And what happens next?

"A. I just heard gunshots. Like, I heard the arguing. . . . But I didn't necessarily hear everything. . . . [T]he main things I remember was just give me the money or I'mma shoot you.

* * *

"Q. Okay. So, you hear a shot and what do you do?

"A. I froze up. I was completely in shock. . . . I didn't know what to do. Like, I didn't even know what was happening. I thought the lady got shot, but then I [saw] a man and the man was coming because I couldn't see. Like, I knew Vanderberg . . . was arguing with somebody, but I thought, like—I don't know. I just couldn't tell who he was arguing with. I didn't know what was going on until after the fact when the shots went off and there was a man in front of me. And he was, like, clutching his neck and his chest."

ing is not constitutional in nature, the defendant bears the burden ofdemonstrating that the error was harmful. . . . [W]e must examine the impact of the [improperly admitted] evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . That determination must be made in light of the entire record [including the strength of the state's case without the evidence admitted in error]." (Internal quotation marks omitted.) *State* v. *LeBlanc*, 148 Conn. App. 503, 508–509, 84 A.3d 1242, cert. denied, 311 Conn. 945, 90 A.3d 975 (2014).

The defendant argues that because the jury returned a split verdict, finding him not guilty of the felony murder charge but guilty of both robbery charges, the state's case against him was "close" and, therefore, the admission of evidence of the Smokin' Wings robbery "cannot be said to have *not* substantially affected the verdict." (Emphasis in original.) He argues that, "after carefully considering the evidence, the jury refused to find that all the elements of felony murder were proven beyond a reasonable doubt. . . . The fact that the jury split its verdicts after hearing [evidence of the Smokin' Wings robbery] and considering it to the point that it entered at least one acquittal further shows how close this case was." According to the defendant, the purported weakness in the state's case contributed to the harmfulness of the uncharged misconduct evidence. The defendant does not claim that there was insufficient evidence to support his conviction.

To support his assertion that the jury had doubts concerning the strength of the state's case, the defendant cites *State* v. *Angel T.*, 292 Conn. 262, 294–95,

973 A.2d 1207 (2009).[17] In *Angel T.*, our Supreme Court determined that where there was no physical evidence introduced concerning a sexual assault and the jury twice reported to the court that it was deadlocked in making its decision, "the state's case was not sufficiently strong so as to not be overshadowed by the [harmful error]." Id., 293. The court held: "[T]he lack of physical evidence of sexual assault . . . rendered it a credibility contest between the defendant and his accusers, and the jury's deadlock, followed by a split verdict, leads us to believe that the state's evidence did not overwhelm the jury, indicating that the jury may well have been unduly influenced by the [harmful error]." Id., 295.

In the present case, the jury reported to the court that it was deadlocked regarding the charge of felony murder. In a note to the court, the jury stated: "[T]he jury has—I think it's found—found consensus on charge two [(attempted robbery)] and [charge] three [(conspiracy to commit robbery)] and is divided on charge one [(felony murder)]. Jury members have indicated unwillingness to change." Shortly before the jury was released for the day, the foreperson indicated that "[he] just would prefer to have redacted the note." He clarified: "I sent it out too early and I don't really want the court to address [it], if that makes sense. . . . I sent the note out premature[ly] and I—I would wish to—to redact it, to take it back and not have the court address it." The next day, the court, acknowledging the note and the foreperson's request, instructed the jury to continue its

[17] The defendant also cites *State* v. *Sawyer*, 279 Conn. 331, 359–60, 904 A.2d 101 (2006), overruled in part on other grounds by *State* v. *DeJesus*, 288 Conn. 418, 953 A.2d 45 (2008), to support the proposition that the state's case was not particularly strong. In *Sawyer*, which involved a sexual assault, our Supreme Court held that when there is a lack of physical evidence of the sexual assault, the state does not have a strong case and the admission of uncharged misconduct is harmful. Id., 359. The present case is distinguishable from *Sawyer*. Here, there is an abundance of physical evidence linking the defendant to the robbery as well as the defendant's admissions. As such, *Sawyer* does not apply.

deliberations. The jury then informed the court that it had reached a consensus on all counts and delivered its verdict.

Although the record discloses that the jury briefly was deadlocked as to one count, there is no indication of deadlock as to the other two counts, or as to identity in any event. There was strong physical evidence linking the defendant to the gun that was used in the robbery, as well as witness identification and the defendant's own admissions. The court instructed the jury to consider the Smokin' Wings evidence, if at all, only on the issue of identification. We presume that the jury followed the instructions of the court. See *State* v. *Paul B.*, 315 Conn. 19, 32, 105 A.3d 130 (2014) (in absence of contrary evidence, appellate courts presume jury followed limiting instruction). A review of the evidence in this case, therefore, shows that the evidence of identification was so strong that any error regarding the admission of evidence concerning Smokin' Wings was inconsequential. The defendant has not met his burden of showing harmful error.

The judgment is affirmed.

In this opinion the other judges concurred.

BETHANY FLOOD *v.* ROBERT FLOOD (AC 42477)

Prescott, Devlin and Sheldon, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from judgment of the trial court, which granted the plaintiff's motion for a modification of the defendant's child support obligation. The parties' separation agreement, which had been incorporated into the dissolution judgment, required the defendant to pay the cost of the private elementary school education for the parties' minor child through the conclusion of the fifth grade. At the time the separation agreement became enforceable, the annual cost of the child's

private school tuition was $55,000. After the child completed the fifth grade and was enrolled in public school, the plaintiff sought a modification of the defendant's child support obligation on the grounds that there had been a substantial change in circumstances because, inter alia, the child was no longer attending private school. The defendant also filed a motion for modification of child support, in which he requested a decrease in his court-ordered obligation on the ground that the plaintiff's income had increased since the date of the last support order. The trial court determined that the parties had contemplated that the plaintiff accepted a lower weekly child support amount in return for the defendant's being responsible for paying 100 percent of the child's private school tuition. The court further determined that, because the child had stopped attending private school, the savings for the defendant in tuition represented a substantial change of circumstances that entitled the plaintiff to a modification in child support. The court awarded the plaintiff $1246 in weekly child support, which was the maximum presumptive amount prescribed by the child support guidelines. The court order was silent as to the defendant's motion for modification. On appeal, the defendant claimed, inter alia, that the trial court erred in finding that there had been a substantial change in circumstances and that the court had ordered an improper wealth transfer between the parties because it failed to consider or respond to the needs of the child. *Held*:

1. The trial court's finding that there had been a substantial change in the defendant's financial circumstances was not clearly erroneous: the expiration of the defendant's court-ordered obligation to pay for the child's private schooling removed an encumbrance on his assets that made an additional $55,000 per year available to him for all purposes, including the payment of child support, and, although the separation agreement did not expressly link the amount of the plaintiff's initial child support award to the defendant's agreement to pay for the child's private schooling or entitle the plaintiff to reconsideration of that order once the defendant's payment obligation ended, the court reasonably determined that the amount of that award should be reconsidered in light of the termination of the defendant's private school payment obligation.
2. The trial court did not abuse its discretion in determining that the amount of the child support award would be $1246 per week; the court did not determine the amount of the award until after it conducted an extensive evidentiary hearing and considered the arguments of counsel, the parties' motions, memoranda of law and testimony, and all relevant rules, statutory authority and case law, and the court was not required to cite additional reasons for its increase in the defendant's child support obligation, as its order was consistent with statutory (§ 46b-84 (d)) criteria and within the range between the minimum and maximum support amounts established by the child support guidelines.
3. The defendant could not prevail on his claim that the trial court erred by failing to consider and rule on his motion for modification of his

child support obligation; although the trial court never made a formal ruling on the defendant's motion, it expressly acknowledged that the motion was before it when it granted the plaintiff's motion for modification, which effectively and intentionally denied the defendant's motion, and, as the defendant conceded to this court that his motion was effectively denied, he could not be granted relief, as he failed to raise a substantive challenge to the ruling.

Argued February 6—officially released July 14, 2020

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Shay, J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Truglia, J.*, granted the plaintiff's motion for modification of child support and rendered judgment thereon, and the defendant appealed to this court. *Affirmed.*

Gary I. Cohen, for the appellant (defendant).

Eric R. Posmantier, with whom was *Kimberly A. Stokes*, for the appellee (plaintiff).

Opinion

SHELDON, J. The defendant, Robert Flood, appeals from the judgment of the trial court in favor of the plaintiff, Bethany Flood, on her postjudgment motion for modification of child support. The defendant claims that the trial court erred in granting the plaintiff's motion (1) by predicating its ruling on a finding that there had been a substantial change in circumstances since the date of the last court order requiring him to pay child support, as agreed to by the parties and entered by the court as part of the judgment dissolving their marriage, (2) by failing to consider or respond to the needs of the child when fashioning its modified child support order, and thus merely ordering an improper wealth transfer between the parties, and (3) by entering its modified order without ruling on the defendant's conflicting, simultaneously argued motion for modification of child support. We reject the defendant's claims and, thus, affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. The parties were married on June 5, 2004. On November 7, 2014, the trial court, *Shay, J.*, rendered judgment dissolving the parties' marriage. The judgment of dissolution incorporated by reference the terms of a written separation agreement between the parties, wherein they agreed, inter alia, to the division of their marital property, to the alimony and child support obligations between them, and to all arrangements for the parenting and schooling of their minor daughter (child). Section 4.1 of the separation agreement provides, more particularly, that the defendant would provide for the financial support of the child in three ways: (1) by making a weekly payment to the plaintiff of $464 in child support; (2) by continuing to provide health insurance for the child, and paying 80 percent of any unreimbursed medical expense that might be incurred for her benefit; and (3) by paying all expenses for the child's enrollment in private elementary school through the conclusion of fifth grade at Pear Tree Point School or another school mutually agreed to by the parties.[1]

At the time the separation agreement became enforceable under the judgment of dissolution, the child was enrolled in the fourth grade at Pear Tree Point School in Darien, where the cost of her attendance was approximately $55,000 per year. The child completed the fifth grade at Pear Tree Point School in June, 2016. Thereafter, in September, 2016, the child was enrolled in a public middle school in Greenwich.

On December 18, 2017, the plaintiff filed a motion for modification of child support. The plaintiff alleged in her motion for modification that there had been a

[1] Section 4.1 is the first subsection of article IV of the agreement, entitled "CHILD SUPPORT/POST MAJORITY EDUCATIONAL SUPPORT/PROPERTY SETTLEMENT/ALIMONY/RETIREMENT PLAN." It sets forth all of the parties' agreements concerning the provision of financial support for the child.

substantial change in circumstances since the date of the last child support order because (1) "the defendant's total compensation from employment has increased in one or more of the years following the entry of the last order," and (2) "the minor child is no longer attending private school."

On October 1, 2018, the defendant filed his own motion for modification of child support, in which he requested a decrease in his court-ordered obligation to pay child support to the plaintiff. In support of his motion for modification, the defendant alleged that there had been a substantial change in the plaintiff's financial circumstances since the date of the court's last child support order because the plaintiff's income had increased in that period by 188 percent. The defendant claimed, more specifically, that whereas the plaintiff's gross base pay as a part-time nurse, on the date of the judgment of dissolution, had been $186.65 per week, or $9705.80 per year, her gross base pay on the date of his motion for modification, in her then current position as a full-time nurse, was $537 per week, or $27,924 per year. The defendant further alleged that whereas, when the judgment of dissolution was rendered, the plaintiff's total expenses for the child had been $882.90 per week, or $45,910.80 per year, her expenses for the child had since fallen by 43 percent, to a total of $504 per week, or $26,208 per year.

In her memorandum of law in support of her motion for modification, the plaintiff not only reiterated her claims that there had been a substantial change in circumstances since the date of the judgment of dissolution due to the defendant's intervening increase in income and loss of responsibility to pay for the child's private schooling, but argued that the defendant had conceded that there had been a substantial change in circumstances in that interval by filing his own motion for modification of child support. The plaintiff concluded her memorandum by arguing that, under *Dowling* v. *Szymczak*, 309 Conn. 390, 407, 72 A.3d 1 (2013),

an increase in child support was warranted because the initial child support order was not accomplishing the goal of "Connecticut's [i]ncome [s]hares [m]odel for child support, [under which a] child [of separated parents] should receive the same proportion of parental income [after her parents' separation] as [she] would have received if [her] parents [still] lived together." (Internal quotation marks omitted.)

The defendant filed a memorandum of law in opposition to the plaintiff's motion for modification, in which he argued that the plaintiff could not meet her burden of demonstrating that a substantial change in circumstances had occurred since the date of the last court order. Specifically, the defendant argued that there had been no substantial change in his financial circumstances since that date because there had not been a substantial change in his net income in that time frame. Child support, he argued, must be calculated on the basis of the parties' net income, not their disposable income. Therefore, he argued, the child's enrollment in public school meant only that she had one less need for financial support at the time of the plaintiff's motion than she had when the judgment of dissolution was rendered, thus providing good reason for him to pay less, not more, money in child support than he was required to pay under the last court order. The plaintiff, he therefore concluded, was improperly using her motion for modification to make a "cash grab in the form of child support . . . ."

On December 17, 2018, the court, *Truglia, J.*, conducted a full day hearing on the parties' conflicting motions for modification. At that hearing, the plaintiff argued once again that there had been a substantial change in the defendant's financial circumstances since the date of the last child support order because (1) his income had increased in the interim and (2) the child was no longer attending private elementary school, and thus the defendant was no longer obligated to pay for

her private schooling. The plaintiff contended that because the parties' combined net weekly income exceeded $4000, a proper award of child support under the child support guidelines could be not less than $443 per week nor more than $1246 per week, as determined by our Supreme Court in *Dowling* v. *Szymczak*, supra, 309 Conn. 390, and *Maturo* v. *Maturo*, 296 Conn. 80, 995 A.2d 1 (2010). Accordingly, the plaintiff requested the court to order an increase in the defendant's child support obligation to $1246 per week, the maximum amount awardable without deviating from the guidelines. In support of her position, the plaintiff argued that, although the child was entitled to receive up to a certain percentage of her father's income so that she might enjoy the same luxuries after her parents separated as she would have enjoyed if they had remained together, the current child support award did not give her that opportunity because it only enabled her to enjoy such luxuries when she was with the defendant.

In response to the plaintiff's arguments, the defendant contended that the alleged increase in his income since the date of the last court order and the intervening termination of his obligation to pay for the child's private schooling did not support a finding of a substantial change in circumstances. As for his income, he testified that, in the period from 2014, when the separation agreement became enforceable under the judgment of dissolution, until 2018, when the plaintiff filed her motion for modification, his income had increased by only 3 percent. As for the termination of his obligation to pay for the child's private schooling, he argued that even though he was no longer required to pay approximately $55,000 per year for such schooling, the termination of that payment obligation could not be considered a substantial change in circumstances because it did not result in any change in his net income. Child support, he argued, must be based on the parties' net income,

not on the manner in which they used that net income after they received it. Therefore, he argued, just because he had "more cash in [his] wallet" or "[m]ore disposable income" after his obligation to pay for the child's private schooling came to an end, his access to such increased funds did not constitute a substantial change in circumstances of the sort required to support a modification of his child support obligation.

In support of his own motion for modification, the defendant reargued his pleaded claim that the amount of his child support obligation should be decreased because, since the time of the divorce, the plaintiff's income had increased by 188 percent while her expenses for the child had decreased by 43 percent.

On January 2, 2019, the court granted the plaintiff's motion for modification by issuing a written order requiring the defendant to pay the plaintiff $1246 per week in child support, as she had requested, retroactive to January 8, 2018—the date on which the defendant had been served with the plaintiff's motion. In its order, the court explained the basis for its ruling as follows: "The court has carefully considered all of the evidence presented by both parties in this case, including the testimony of both parties and the financial records presented in support of and in opposition to the plaintiff's motion to modify child support.

"The court finds that the plaintiff has carried her burden of proof by a preponderance of the evidence that there has been a substantial change in circumstances since the initial child support order was entered in November, 2014. The court finds that the parties contemplated that the plaintiff accepted a lower weekly child support amount in return for the defendant being responsible for paying 100 percent of the private school tuition and other school costs for the parties' daughter. At the time of judgment, the daughter attended the Pear Tree Point School. The child stopped attending the Pear

Tree Point School in June, 2016, and began attending a public school . . . in the fall of 2016. The savings in annual private school tuition represents a substantial change of circumstances entitling the plaintiff to a modification in child support. . . .

"[T]aking into consideration the respective gross and after-tax incomes of the parties and the parties' respective assets, the court finds that the proper weekly child support order is the maximum presumptive amount as prescribed by the guidelines." Although the trial court's order was silent as to the defendant's motion for modification, the defendant never sought judicial relief to clarify the nature or scope of the ruling set forth in that order. This appeal followed.

I

On appeal, the defendant first claims that the trial court erred in granting the plaintiff's motion for modification by finding that there had been a substantial change in circumstances since the date of the judgment of dissolution, under which the last court order requiring him to pay child support to the plaintiff went into effect. The defendant claims, more particularly, that the court erred in finding that there had been a substantial change in his financial circumstances when his obligation to pay for the child's private schooling came to an end based on a finding that the parties intended to link the plaintiff's initial acceptance of the lowest presumptive amount of child support awardable under the guidelines to the defendant's agreement to pay all expenses for the child's private schooling through the fifth grade. The defendant claims that the trial court erred in making such a finding as to the parties' intent because there is no language in the agreement expressing such an intent, there is no other evidence in the record to support such a finding, and the parties did not base their arguments

for or against the plaintiff's motion for modification on the presence or absence of any such intent.

The plaintiff does not dispute the defendant's claim that she did not base her motion for modification on allegations or proof that the parties intended to base the initial amount of her child support award on the defendant's willingness to pay for the child's private schooling through the fifth grade. She contends, however, that although the court undeniably made such a finding, that finding was not central to its ultimate determination that there had been a substantial change in the defendant's financial circumstances since the date of the judgment of dissolution. Instead, she argues, the court's finding of a substantial change in circumstances was based principally on the proven fact that the termination of the defendant's private school payment obligation for the child had made a considerable sum of previously committed money—specifically, $55,000 per year in after-tax dollars—available for his discretionary use since the child completed the fifth grade, thereby substantially increasing his usable assets and materially improving his financial condition since that time. For the following reasons, we agree with the plaintiff that the trial court's finding of a substantial change in circumstances must be upheld.

We begin by setting forth the applicable standard of review. "The scope of our review of a trial court's exercise of its broad discretion in domestic relations cases is limited to the questions of whether the [trial] court correctly applied the law and could reasonably have concluded as it did. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Nevertheless, we may reverse a trial court's ruling on a modification motion if the trial court applied the wrong standard of law." (Internal quotation marks omitted.) *Fox* v. *Fox*, 152 Conn. App. 611, 619, 99 A.3d 1206, cert. denied, 314 Conn. 945, 103 A.3d 977 (2014).

General Statutes § 46b-86 governs the modification of an alimony or child support order after the date of a dissolution judgment. Section 46b-86 (a) provides that a final order for alimony or child support may be modified by the trial court upon a showing of a substantial change in the circumstances of either party. "Under that statutory provision, the party seeking the modification bears the burden of demonstrating that such a change has occurred. . . . To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it. Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order. . . .

"Once a trial court determines that there has been a substantial change in the financial circumstances of one of the parties, the same criteria that determine an initial award of alimony and support are relevant to the question of modification. . . . More specifically, these criteria, as outlined in General Statutes § [46b-84], require the court to consider the needs and financial resources of each of the parties and their children . . . . The power of the trial court to modify the existing order does not, however, include the power to retry issues already decided . . . or to allow the parties to use a motion to modify as an appeal. . . . Rather, the trial court's discretion includes only the power to adapt the order to some distinct and definite change in the circumstances or conditions of the parties. . . .

"Thus, [w]hen presented with a motion for modification, a court must first determine whether there has been a substantial change in the financial circumstances of one or both of the parties. . . . Second, if the court finds a substantial change in circumstances, it may

properly consider the motion and, on the basis of the § [46b-84] criteria, make an order for modification. . . . The court has the authority to issue a modification only if it conforms the order to the distinct and definite changes in the circumstances of the parties." (Footnote omitted; internal quotation marks omitted.) *Fox* v. *Fox*, supra, 152 Conn. App. 620–21 (postjudgment motion to modify child support).

"A finding of a substantial change in circumstances is subject to the clearly erroneous standard of review." (Internal quotation marks omitted.) *Thomasi* v. *Thomasi*, 181 Conn. App. 822, 842, 188 A.3d 743 (2018). A factual finding is not clearly erroneous when there is evidence in the record to support it, unless "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.) *Kirwan* v. *Kirwan*, 185 Conn. App. 713, 726, 197 A.3d 1000 (2018).

Following the evidentiary hearing, the court found that "the plaintiff has carried her burden of proof by a preponderance of the evidence that there has been a substantial change in circumstances since the initial child support order was entered in November, 2014. The court finds that the parties contemplated that the plaintiff accepted a lower weekly child support amount in return for the defendant being responsible for paying 100 percent of the private school tuition and other school costs for the parties' [child]. At the time of judgment, the [child] attended the Pear Tree Point School. The child stopped attending the Pear Tree Point School in June, 2016, and began attending a public school . . . in Greenwich in the fall of 2016. *The savings in annual private school tuition represents a substantial change of circumstances entitling the plaintiff to a modification in child support*." (Emphasis added.)

By the foregoing language in its order granting the plaintiff's motion for modification, the trial court made it clear that the principal basis for its finding that there had been a substantial change in circumstances since the date of the last court order was not the mere termination of the defendant's obligation to pay for the child's private schooling, which had no automatic consequences under the parties' separation agreement or the judgment of dissolution, but the material improvement in the defendant's financial situation that resulted from the defendant's subsequent "savings in annual private school tuition . . . ." As the realization of such substantial savings is indisputable, the basic issue presented to this court is whether such a change in a party's financial circumstances, substantially increasing his usable assets without a corresponding increase in his net income by relieving him of a preexisting obligation to use those assets to satisfy a binding court order, can be found to constitute a substantial change in circumstances within the meaning of § 46b-86 (a). Under our long-standing case law interpreting and applying § 46b-86 (a), we conclude that that question must be answered in the affirmative.

We find, more particularly, that *Bartlett* v. *Bartlett*, 220 Conn. 372, 382–83, 599 A.2d 14 (1991), and *Fabiano* v. *Fabiano*, 10 Conn. App. 466, 469–70, 523 A.2d 937 (1987), are instructive on this issue. In *Bartlett*, the plaintiff alleged that it was improper for the trial court to refuse to consider evidence of the vesting of the defendant's inheritance since the date of the last court order as a basis for determining, on the plaintiff's motion to modify alimony, if there had been a substantial change in circumstances since the date of that order within the meaning of § 46b-86 (a). The plaintiff argued that that the court's ruling was erroneous because the defendant's "financial circumstances had changed sub-

stantially due to his [newly vested] inheritance . . . ." *Bartlett* v. *Bartlett*, supra, 220 Conn. 382. Our Supreme Court agreed with the plaintiff, ruling that "the defendant's financial circumstances changed substantially upon the vesting of [the defendant's] inheritance, warranting the plaintiff's motion . . . to increase the award of periodic alimony." Id., 381. Significantly, moreover, the Supreme Court concluded its analysis by observing, more generally, that, "[w]hether the defendant inherited 'property' or cash is of no consequence; *a substantial increase in wealth of any sort may form an appropriate ground for a motion to modify alimony*." (Emphasis added.) Id., 383.

Similarly, in *Fabiano*, "[t]he principal issue [on] appeal [was] whether the trial court erred by declining to modify the defendant's child support obligation to the plaintiff [under § 46b-86], where the defendant's assets had increased substantially as a result of a personal injury award." *Fabiano* v. *Fabiano*, supra, 10 Conn. App. 466. Upon a review of the record, this court found that the "continuation of the prior order would be unfair and improper"; id., 469; because the increase in assets was "a significant betterment in the financial condition of [the defendant] . . . and constituted an unforeseen change of circumstances justifying a reconsideration by the trial court of the prior . . . support orders." (Citation omitted; internal quotation marks omitted.) Id., 470.[2]

[2] When *Fabiano* was decided, a claimant seeking to modify an alimony or child support order under § 46b-86 was required to show that an *uncontemplated* substantial change in circumstances had occurred since the date of the last court order. *Fabiano* v. *Fabiano*, supra, 10 Conn. App. 469. An uncontemplated change, however, is no longer required by statute. Number 87-104 of the 1987 Public Acts eliminated the requirement in § 46b-86 that modifications of alimony or child support be based on uncontemplated changes of circumstances. See General Statutes § 46b-86 (a) ("[a]fter the date of judgment, modification of any child support order issued before, on or after July 1, 1990, may be made upon a showing of such substantial change of circumstances, whether or not such change of circumstances was contemplated at the time of dissolution").

The circumstances in the present case are similar to those at issue in *Bartlett* and *Fabiano* because here, as in those cases, the defendant gained access to and the right to make immediate use of substantial additional assets between the date of the last court order and the date of the plaintiff's motion for modification. Those newly available assets, more particularly, were savings the defendant had realized by no longer having to pay for the child's private schooling, which he had agreed to do under the parties' separation agreement until the child completed the fifth grade, and the dissolution court had ordered him to do by making the separation agreement enforceable as part of the judgment of dissolution.

Importantly, this increase in the defendant's available assets did not result from mere changes in his discretionary spending habits or other voluntary choices as to how to use or invest his assets. No such change would constitute a substantial change in circumstances because the defendant could always reverse it in the continuing exercise of total control over all of his assets. Such a change would therefore not affect the defendant's total assets, which would always remain fully available to him, at all times and for all purposes, including consideration by the trial court as possible sources of wealth for the payment of child support.

The change in available assets in this case, by contrast, resulted from the termination of the defendant's obligation, under a binding court order, to make substantial payments of after-tax dollars for the child's private schooling. When the initial court order of child support was entered as part of the parties' judgment of dissolution, that binding court order encumbered the defendant's assets to the extent of his private school payment obligation, and continued to do so for as long as the order remained in effect. The existence of the order thus made the encumbered assets unavailable

to the defendant for any other purpose, including the payment of child support. When the order expired, however, the resulting encumbrance upon the defendant's assets was removed, making an additional $55,000 per year in after-tax dollars available to the defendant for all purposes, including the payment of child support. By gaining access to those previously encumbered assets, the defendant realized a substantial increase in his disposable wealth and a significant betterment of his financial condition just as surely as if he had received assets of the same value by the vesting of an inheritance, as in *Bartlett*, or the awarding of civil damages, as in *Fabiano*.

For the defendant, as the trial court properly recognized, the savings realized by the termination of his private school payment obligation were new assets in his pocket that could and should be considered in determining the amount of his child support obligation to the plaintiff going forward. Therefore, although the separation agreement did not expressly link the amount of the plaintiff's initial child support award to the defendant's agreement to pay for the child's private schooling through the fifth grade, or contain a look-back provision automatically entitling the plaintiff to reconsideration of that order once the defendant's payment obligation came to an end, the court reasonably determined that the amount of that award should be reconsidered in light of the termination of the defendant's private school payment obligation because a larger amount of money had thereby become available to the defendant for that purpose.[3]

[3] It might further be noted that the two paragraphs of the separation agreement that established the amount of the initial court order of child support and the defendant's obligation to pay all expenses for the child's private schooling through the fifth grade were set forth in the same section of the separation agreement, § 4.1, along with a third paragraph requiring the defendant to pay for the child's health insurance. This recitation of those obligations to the child in a single paragraph of the parties' separation agreement supports the inference that the parties agreed to them as comple-

On the basis of that evidence, we conclude that the court's finding that there had been a substantial change in the defendant's financial circumstances since the date of the last court order requiring him to pay child support to the plaintiff was not clearly erroneous.

II

The defendant next claims that the trial court erred because the granting of the plaintiff's motion for modification amounted to an impermissible postdissolution transfer of wealth between the parties rather than a need-based increase in the amount of his child support obligation. Specifically, the defendant contends that the trial court failed to consider the child's needs in establishing the amount of its modified child support award, thus rendering that award an improper wealth transfer to the plaintiff. We disagree.

A challenge to a trial court's application of a statute in modifying a child support order raises a question of law, over which this court exercises plenary review. See *Mason* v. *Ford*, 176 Conn. App. 658, 662, 168 A.3d 525 (2017). Our Supreme Court in *Dowling* provided clear guidance for determining child support obligations in high income situations: "In a trilogy of recent cases, [our Supreme] [C]ourt has already discussed the guidelines and accompanying schedule in detail. See

mentary parts of a unified matrix of financial support for the child, to meet her changing needs as she grew older until she reached the age of majority. The amount of child support that the defendant agreed to pay directly to the plaintiff was thus only one component of the total financial support the parties agreed to provide for her. Therefore, when one essential need of the child changed with the passage of time, the deployment of her parents' assets to provide for her continuing support could change as well, providing different amounts of money for different purposes as her activities changed and her needs evolved. This factor as well supports the court's determination that the practical increase in the defendant's usable wealth that resulted from the termination of his private school payment obligation made it appropriate for the court to consider such increased wealth as a basis for modifying its initial child support award.

Maturo v. *Maturo*, supra, 296 Conn. 80; *Misthopoulos* v. *Misthopoulos*, [297 Conn. 358, 999 A.2d 721 (2010)]; *Tuckman* v. *Tuckman*, 308 Conn. 194, 61 A.3d 449 (2013). Accordingly, we will not till this legal landscape any more than is necessary for the resolution of the present case. . . . [T]he schedule sets forth a presumptive percentage and resultant amount corresponding to specific levels of combined net weekly income; the schedule begins at $50 and continues in progressively higher $10 increments, terminating at $4000. . . . This court has recognized that the guidelines nonetheless apply to combined net weekly income in excess of that maximum amount. . . . Indeed, the regulations direct that, [w]hen the parents' combined net weekly income exceeds [$4000], child support awards shall be determined on a case-by-case basis, and the current support prescribed at the [$4000] net weekly income level shall be the minimum presumptive amount. . . .

"While the regulations clearly demarcate the presumptive minimum amount of the award in high income cases, they do not address the maximum permissible amount that may be assigned under a proper exercise of the court's discretion. . . . [T]his court has remained mindful that the guidelines . . . indicate that such awards should follow the principle expressly acknowledged in the preamble [to the guidelines] and reflected in the schedule that the child support obligation as a percentage of the combined net weekly income should decline as the income level rises. . . . We therefore have determined that child support payments . . . should presumptively not exceed the [maximum] percent [set forth in the schedule] when the combined net weekly income of the family exceeds $4000, and, in most cases, should reflect less than that amount. . . .

"Either the presumptive ceiling of income percentage or presumptive floor of dollar amount on any given child support obligation, however, may be rebutted by application of the deviation criteria enumerated in the

guidelines and by the statutory factors set forth in § 46b-84 (d). . . . In order to justify deviation from this range, the court must first make a finding on the record as to why the guidelines were inequitable or inappropriate . . . . Thus, this court unambiguously has stated that, when a family's combined net weekly income exceeds $4000, the court should treat the percentage set forth in the schedule at the highest income level as the presumptive ceiling on the child support obligation, subject to rebuttal by application of the deviation criteria enumerated in the guidelines, as well as the statutory factors described in § 46b-84 (d). . . . In other words, as long as the child support award is derived from a total support obligation within this range—between the presumptive minimum dollar amount and the presumptive maximum percentage of net income—a finding in support of a deviation is not necessary." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Dowling* v. *Szymczak*, supra, 309 Conn. 400–402.

In adjudicating child support cases, courts in our jurisdiction have been reminded to avoid wealth transfers when awarding child support. In *Maturo*, for example, our Supreme Court expressly warned as follows against wealth transfers or disguised alimony: "The effect of unrestrained child support awards in high income cases is a potential windfall that transfers *wealth* from one spouse to another or from one spouse to the children under the guise of child support. In the present case, the award of 20 percent of the defendant's indeterminate annual bonus without any justification relating to the characteristics or needs of the children closely resembles the 'disguise[d] alimony' this court disapproved of in *Brown* v. *Brown*, 190 Conn. 345, 349, 460 A.2d 1287 (1983)." (Emphasis in original.) *Maturo* v. *Maturo*, supra, 296 Conn. 105. Moreover, the preamble to the child support guidelines expressly acknowledges that a child support obligation, as a percentage of the combined net weekly income, should decline as

the income level rises. Child Support and Arrearage Guidelines (2015), preamble, § (d), p. v.

In this case, the defendant focuses on the "warnings" to courts about making wealth transfers or providing increased alimony in the guise of increased child support awards in high income situations, as described in *Maturo*. The defendant's reliance on *Maturo*, however, is misplaced because *Maturo* involved a "child support order [that was found to be] improper because it was inconsistent with the statutory criteria and with the principles expressed in the guidelines." *Maturo* v. *Maturo*, supra, 296 Conn. 89. As a result, the warning in *Maturo* was made in the context of a court's award of child support that exceeded the highest amount established for families at the upper limit of the schedule. Id., 87, 104–105. Therefore, the court in *Maturo* held that the trial court "misapplied *the deviation criteria* and failed to expressly consider the factors set forth in § 46b-84 (d), thus providing no acceptable rationale for its decision." (Emphasis added.) Id., 89. In the present case, however, the trial court's modified child support award did not fall outside the range prescribed by the guidelines but, rather, increased the child support to the highest amount authorized by those guidelines. Consistent with this analysis, our Supreme Court, in its opinion in *Dowling*, which was issued three years after *Maturo*, explained that "as long as the child support award is derived from a total support obligation within this range—between the presumptive minimum dollar amount and the presumptive maximum percent of income—a finding in support of a deviation is not necessary." *Dowling* v. *Szymczak*, supra, 309 Conn. 402. This means that, although the trial court is required to consider the statutory criteria set forth in § 46b-84 (d) in setting the amount of a modified child support order, the statute does not "mandate that a court articulate why it is ordering an amount consistent with the criteria." (Internal quotation marks omitted.) *Kirwan* v. *Kirwan*, supra, 185 Conn. App. 746.

In light of this important distinction, we cannot say that the trial court erred in determining the amount of its modified award under the guidelines. In making its order and findings of fact, the court conducted an extensive evidentiary hearing on the motions before it and reviewed the parties' memoranda in support of and in opposition to those motions, the testimony they presented, all relevant rules, statutory authority and case law, and the arguments of counsel. In its order, the court expressly noted that the "statutory criteria of § 46b-84 [d]" had been considered. It also noted that it had considered "the respective gross and after-tax incomes of the parties and the parties' respective assets . . . ." It was not until after those considerations had been made that the court determined that the child support award would be $1246 per week. Although the court did not cite any additional reasons for its increase in the defendant's child support obligation, it was not required to do so because the child support order was consistent with statutory criteria and within the range between the minimum and maximum support amounts established by the guidelines. See *Kirwan* v. *Kirwan*, supra, 185 Conn. 746–47. Indulging every reasonable presumption in favor of upholding the court's ruling, we cannot say that the trial court abused its discretion in so ordering or that it applied the wrong standard of law.

III

Lastly, the defendant claims that the trial court erred because it failed properly to consider and rule on his motion for modification, and, thus, that this court should remand this case for further proceedings on that motion. Although the trial court never made a formal ruling on the defendant's motion, it expressly acknowledged that the defendant's motion was before it when it issued its ruling granting the plaintiff's conflicting motion. If parties file conflicting motions, and one such motion is granted, it can reasonably be presumed that

the other motion was thereby denied. See *Lambert* v. *Donahue*, 78 Conn. App. 493, 511–12, 827 A.2d 729 (2003); id., 512 ("although not specifically mentioned in the decision, the court did, in essence, rule on [the plaintiff's] motion . . . [by] finding in favor of [the defendant]"). The defendant concedes that under this rule of law, the court did in fact effectively deny his motion. In consideration of this applicable precedent, and of the defendant's failure to seek further judicial relief to clarify the nature or scope of the trial court's ruling, we conclude that by granting the plaintiff's motion for modification, the trial court effectively and, thus, intentionally, with full consideration of the defendant's counterarguments, denied the defendant's conflicting motion. In light of the defendant's concession that his motion was effectively denied, we cannot grant him relief with respect to that ruling because he has failed to raise a substantive challenge to the ruling.

The judgment is affirmed.

In this opinion the other judges concurred.

DAVID GODBOUT *v.* TONY ATTANASIO ET AL. (AC 42683)

Alvord, Prescott and Bright, Js.

Syllabus

The plaintiff sought to recover monetary relief pursuant to statute (§ 12-170) for the alleged misconduct of the defendants, members of the town board of assessment appeals related to his motor vehicle tax assessment appeal. The defendants filed a motion to dismiss the plaintiff's action on the grounds that the trial court lacked subject matter jurisdiction because the plaintiff failed to exhaust his administrative remedies and had failed to allege that the defendants had engaged in some unlawful act or the omission of a necessary act, allegations that were required to support an action pursuant to § 12-170. The court granted the motion to dismiss on both grounds, from which the plaintiff appealed to this court. *Held*:

1. The trial court improperly held that it lacked subject matter jurisdiction over the plaintiff's action because the plaintiff failed to exhaust his administrative remedies before the Freedom of Information Commission (FOIC): there was nothing in the record before this court from which to conclude that the legislature intended that a plaintiff seeking to recover under § 12-170 must first exhaust any and all administrative remedies; § 12-170 does not contain an exhaustion requirement and nothing in the Freedom of Information Act (FOIA) statutory scheme mandates that any and all issues involving the FOIA must always be raised to and resolved by the FOIC before an action is brought in the Superior Court; moreover, there is no statute that confers any authority on the FOIC to impose monetary penalties on board members and, thus, it would have been futile for the plaintiff to have filed an administrative appeal because the FOIC lacked the ability to provide the plaintiff with the relief requested.
2. This court declined to consider the plaintiff's claim that a motion to dismiss was not the proper procedural vehicle to challenge the legal sufficiency of his complaint, the plaintiff having waived any objection to the defendants' use of a motion to dismiss by failing to raise that issue before the trial court.
3. The trial court properly determined that the plaintiff's complaint was insufficiently pleaded, the complaint having failed to allege any act or omission by an individual defendant that, if true, could satisfy the plaintiff's burden of demonstrating an unlawful act or omission necessary to prevail under § 12-170.

Argued January 16—officially released July 14, 2020

Procedural History

Action to recover damages for alleged official misconduct, brought to the Superior Court in the judicial district of New London where the court, *Calmar, J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Improper form of judgment*; *reversed*; *judgment directed.*

David Godbout, self-represented, the appellant (plaintiff).

Mark S. Zamarka, with whom, on the brief, was *Edward B. O'Connell*, for the appellees (defendants).

Opinion

PRESCOTT, J. In this statutory civil action brought pursuant to General Statutes § 12-170,[1] the plaintiff, David Godbout, appeals from the judgment of the trial court dismissing the action against the defendants, all of whom are individual members of the East Lyme Board of Assessment Appeals (board).[2] In his action, the plaintiff sought to recover monetary relief pursuant to § 12-170 on the basis of alleged misconduct by the defendants related to his motor vehicle tax assessment appeal. The plaintiff claims that the court improperly concluded that it lacked subject matter jurisdiction to adjudicate the merits of his action because he (1) failed to exhaust his administrative remedies with the Freedom of Information Commission (FOIC) before filing his action in Superior Court and (2) failed to allege sufficient facts in his complaint demonstrating that each of the defendants had engaged in some unlawful act, or had failed to perform a necessary act, related to the tax assessment appeal. Although we agree with the plaintiff with respect to his first claim, we disagree with the second. We also conclude that the form of the judgment is incorrect in that, rather than granting the motion to dismiss on jurisdictional grounds, the court should have rendered judgment in favor of the defendants.[3]

The following facts, which either are undisputed or are taken from the underlying complaint and viewed in the light most favorable to the plaintiff, are relevant

[1] General Statutes § 12-170 provides in relevant part: "Each . . . member of the board of assessment appeals . . . who does any unlawful act or omits to do any necessary act connected with the levy, assessment or collection of any tax, shall forfeit fifty dollars to the person aggrieved thereby, to be collected by such person in an action on this statute . . . ."

[2] The defendants are Tony Attanasio, Michael Foley, Patrick Hughes, and William W. Mather III.

[3] As we discuss in part II of this opinion, the plaintiff waived any claim that a motion to dismiss was not the proper vehicle for challenging the legal sufficiency of his complaint.

to our consideration of the plaintiff's claims on appeal. The plaintiff is a resident of East Lyme (town). The plaintiff has a history of disputes with the town and the board.[4] In 2012, he filed a complaint with the FOIC against the board and the town alleging that they had violated the state's Freedom of Information Act (FOIA), General Statutes § 1-200 et seq., "by not permitting [the plaintiff] or others with assessment appeals to view, listen, observe and attend the hearings of other persons appealing their motor vehicle tax assessments." *Godbout* v. *Board of Assessment Appeals*, Freedom of Information Commission, Docket No. FIC 2012–504 (August 28, 2013). The FOIC, after a hearing, concluded that the board had violated General Statutes § 1-225 (a)—FOIA's open meeting provision—as alleged by the plaintiff, and the FOIC ordered the town and board to comply strictly with § 1-225 in the future in conducting hearings and meetings concerning tax assessment appeals.

Following this decision by the FOIC, the plaintiff moved the board to disqualify the defendant Michael Foley from participating in any subsequent tax assessment appeal brought by the plaintiff because Foley allegedly had displayed bias against him, including calling him by vulgar names. Thereafter, Foley elected to recuse himself in matters involving the plaintiff. As of May, 2017, the defendant Patrick Hughes also elected not to participate in property assessment appeals brought by the plaintiff due to Hughes' own negative interactions with the plaintiff.

On September 8, 2018, the plaintiff appeared before the board to challenge the taxes assessed by the town on his motor vehicles pursuant to General Statutes § 12-

[4] In their brief, the defendants label the plaintiff a "serial abuser" of the Freedom of Information Act (FOIA), General Statutes § 1-200 et seq., and describe in some detail the plaintiff's past interactions with town officials related to what the defendants characterize as "the plaintiff's FOIA obsession." The defendants attached documents in support of these assertions as exhibits to their motion to dismiss that are part of the record on appeal.

71 (f).[5] The board consisted of five elected members. Present at the hearing were the four defendants and a town clerk, Brooke Stevens, who acted as the recording secretary.[6] When it was time for the plaintiff to present his appeal to the board, the defendants Foley, Hughes, and William W. Mather III "indicated that they were disqualif[ying] themselves . . . by getting up and leaving the room." Although Hughes and Foley provided no explanation for their decisions on the record, Mather indicated that he worked for the law firm that represents the town in many legal matters.[7]

The plaintiff indicated to the defendant Tony Attanasio, the sole remaining board member present at the hearing, that the board appeared no longer to have a quorum present, and he assumed that, without a quorum, the proceedings automatically would be adjourned. The plaintiff also indicated to Attanasio that he was prepared to proceed with his argument but warned that any further proceedings might be void and also might violate the FOIC's prior orders directing the board to comply strictly with the FOIA requirements. Attanasio adjourned the proceedings, and the plaintiff indicated to Attanasio that he would await further instructions regarding a hearing on his appeal.[8] Shortly thereafter, on or about September 11, 2018, the board mailed the plaintiff a copy of the minutes of the Septem-

[5] The plaintiff successfully has challenged previous assessments on the same vehicles. The gravamen of the plaintiff's argument is that the values attributed to his vehicles, which are provided to the town assessor's office by the state, are based on data that does not properly take into account the actual condition of his vehicles, resulting in a purported overvaluation and, correspondingly, an unfair tax assessment.

[6] According to the meeting minutes, the board's fifth member, Susan Graham, was absent.

[7] The meeting minutes indicate that Foley's and Hughes' recusals were precipitated by the plaintiff having filed a motion asking that they have nothing to do with his appeal.

[8] The minutes of the hearing indicate that the plaintiff also suggested that Foley, Hughes, and Mather resign from the board and that new members be appointed.

ber 8, 2018 hearing and a copy of his appeal application, both of which indicated that the board had taken no action on the plaintiff's appeal.

On October 1, 2018, the plaintiff, in response to the board's September 11, 2018 mailings, commenced the underlying action as a self-represented party. Although the plaintiff initiated his action as a small claims matter, the court, on motion by the defendants, subsequently transferred it to the regular civil docket of the Superior Court. See Practice Book § 24-21. The plaintiff filed the operative amended complaint on October 3, 2018. In that complaint, the plaintiff alleged that the defendants had engaged in official misconduct in violation of § 12-170 because they failed to comply with certain provisions of the FOIA.

The defendants filed a motion to dismiss the plaintiff's action on October 25, 2018, claiming that the court lacked subject matter jurisdiction over it. In their memorandum in support of the motion to dismiss, the defendants argued that because the plaintiff's complaint was premised on alleged noncompliance with the FOIA, he was required, pursuant to General Statutes § 1-206 (b) (1),[9] to seek relief by way of an appeal to the FOIC, and that his failure to exhaust this administrative remedy deprived the trial court of subject matter jurisdiction over this statutory action. According to the defendants, the plaintiff did not file an appeal with the FOIC because he knew that the FOIC would not schedule a hearing "due to his abusive history." The defendants also argued that the plaintiff sought to avoid the administrative appeal requirement by framing his action as one seeking relief pursuant to § 12-170, but that such an action

[9] General Statutes § 1-206 (b) (1) provides in relevant part: "Any person . . . wrongfully denied the right to attend any meeting of a public agency or denied any other right conferred by the Freedom of Information Act may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission. . . ."

required allegations that the individual board members had engaged in some unlawful act or the omission of a necessary act, and, even construing the allegations in the complaint in the light most favorable to the plaintiff, the complaint failed to contain any such allegations.

The plaintiff filed a memorandum in opposition to the motion to dismiss. In it, he argued that a civil action commenced in Superior Court, and not an administrative appeal to the FOIC, was the proper vehicle to obtain the monetary relief provided by § 12-170, and that he was not seeking an adjudication of whether a FOIA violation had occurred but instead was asserting that the board members' actions amounted to a criminal violation of an existing FOIC order, a remedy for which was beyond the authority of the FOIC.

The court, *Calmar, J.*, heard argument on the motion to dismiss on December 17, 2018. The court rendered a judgment of dismissal on February 4, 2019, agreeing with the arguments of the defendants. The court reasoned as follows: "In paragraph 46 of the plaintiff's amended complaint, the plaintiff pleaded that his motor vehicle property assessment appeal was not heard by the [board] due to a lack of quorum, and [that] the [board] did not produce accurate minutes of the failed hearing. The plaintiff, however, did not appeal to the FOIC to reschedule a hearing. . . . [G]rievances against quorum and accurate minutes should be heard before the FOIC. Because the plaintiff did not have a hearing and did not receive a final decision from the FOIC, he has not exhausted all of his administrative remedies with the FOIC, and therefore, cannot appeal a decision through the Superior Court because the court lacks jurisdiction.

"In paragraph 62 of the plaintiff's amended complaint, the plaintiff pleaded that the defendants have committed 'criminal acts' and 'multiple violations' of General Statutes § 1-240. In paragraph 63 of the plaintiff's

amended complaint, the plaintiff pleaded that the defendants have created a cause of action due to 'official misconduct' under § 12-170. . . . Here, an order has not been given by the FOIC, therefore, no member of the [board] has failed to comply with the FOIC and cannot be found guilty of criminal acts or multiple violations under § 1-240. . . . [With respect to the alleged violation of § 12-170], the plaintiff has alleged the defendants 'demonstrated official misconduct'; however, the plaintiff fails to allege any specific incidents of misconduct. Even viewing the amended complaint in the light most favorable to the plaintiff, the plaintiff has failed to show that the [board] or any individual member of the [board] has committed an unlawful act or omission of a necessary act."

The court concluded: "Because the plaintiff has not exhausted all of his administrative remedies with the FOIC, and because no criminal or unlawful act, or omission of a necessary act performed by the [board] has been alleged in the amended complaint, this court lacks subject matter jurisdiction and the motion to dismiss is granted." This appeal followed.

We begin our discussion by setting forth the well settled standard of review that governs an appeal from a judgment granting a motion to dismiss on the ground of a lack of subject matter jurisdiction. "A motion to dismiss properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A court deciding a motion to dismiss must determine *not the merits of the claim or even its legal sufficiency*, but rather, whether the claim is one that the court has jurisdiction to hear and decide. . . . [B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Bailey* v.

Medical Examining Board for State Employee Disability Retirement, 75 Conn. App. 215, 219, 815 A.2d 281 (2003).

"Trial courts addressing motions to dismiss for lack of subject matter jurisdiction pursuant to [Practice Book § 10–30] may encounter different situations, depending on the status of the record in the case. . . . [If] a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . .

"In contrast, if the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . other types of undisputed evidence . . . and/or public records of which judicial notice may be taken . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein. . . .

"Finally, where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . In that situation, [a]n evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Cuozzo* v. *Orange*, 315 Conn. 606, 615–17, 109 A.3d 903 (2015).

In the present case, the parties supplemented the factual allegations as set forth in the complaint by attaching affidavits and public records to the motion to dismiss and to the opposition. Because no jurisdictional facts were disputed, however, no evidentiary hearing was required.

I

The plaintiff first claims that the court improperly concluded that it lacked subject matter jurisdiction to adjudicate the merits of his action because he had failed to exhaust his administrative remedies with the FOIC. We agree.

"Because the exhaustion [of administrative remedies] doctrine implicates subject matter jurisdiction, [the court] must decide as a threshold matter whether that doctrine requires dismissal of the [plaintiff's] claim. . . . [B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . .

"Under our exhaustion of administrative remedies doctrine, a trial court lacks subject matter jurisdiction over an action *that seeks a remedy that could be provided through an administrative proceeding*, unless and until that remedy has been sought in the administrative forum. . . . In the absence of exhaustion of that

remedy, the action must be dismissed." (Citation omitted; emphasis added; internal quotation marks omitted.) *Levine* v. *Sterling*, 300 Conn. 521, 528, 16 A.3d 664 (2011). "[If] a statutory requirement of exhaustion is not explicit, courts are guided by [legislative] intent in determining whether application of the doctrine would be consistent with the statutory scheme. . . . Consequently, [t]he requirement of exhaustion may arise from explicit statutory language or from an administrative scheme providing for agency relief. . . .

"A primary purpose of the [exhaustion of administrative remedies] doctrine is to foster an orderly process of administrative adjudication and judicial review, offering a reviewing court the benefit of the agency's findings and conclusions. It relieves courts of the burden of prematurely deciding questions that, entrusted to an agency, may receive a satisfactory administrative disposition and avoid the need for judicial review. . . . Moreover, the exhaustion doctrine recognizes the notion, grounded in deference to [the legislature's] delegation of authority to coordinate branches of [g]overnment, that agencies, not the courts, ought to have primary responsibility for the programs that [the legislature] has charged them to administer. . . . Therefore, exhaustion of remedies serves dual functions: it protects the courts from becoming unnecessarily burdened with administrative appeals and it ensures the integrity of the agency's role in administering its statutory responsibilities." (Citations omitted; internal quotation marks omitted.) *Stepney, LLC* v. *Fairfield*, 263 Conn. 558, 564–65, 821 A.2d 725 (2003).

"Despite the important public policy considerations underlying the exhaustion requirement"; *Hunt* v. *Prior*, 236 Conn. 421, 432, 673 A.2d 514 (1996); appellate courts in this state have recognized several exceptions to the requirement, albeit "infrequently and only for narrowly defined purposes. . . . One of the limited exceptions to the exhaustion rule arises when recourse to the

administrative remedy would be demonstrably futile or inadequate." (Citations omitted; internal quotation marks omitted.) Id. "[A]n administrative remedy is futile or inadequate if the agency is without authority to grant the requested relief. . . . It is futile to seek a remedy [if] such action *could not* result in a favorable decision and *invariably* would result in further judicial proceedings." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Neiman* v. *Yale University*, 270 Conn. 244, 259, 851 A.2d 1165 (2004).[10]Thus, a party

[10] Many of the policy considerations underlying the exhaustion of administrative remedies doctrine are equally applicable to a related abstention doctrine—namely, the doctrine of primary jurisdiction or prior resort. See *Sharkey* v. *Stamford*, 196 Conn. 253, 255–56, 492 A.2d 171 (1985) (discussing difference between doctrines of exhaustion of administrative remedies and primary jurisdiction). It is helpful to our discussion to briefly set forth the interplay between these two doctrines. "The doctrine of exhaustion of administrative remedies contemplates a situation where some administrative action has begun, but has not yet been completed; where there is no administrative proceeding under way, the exhaustion doctrine has no application. In contrast, primary jurisdiction situations arise in cases where a plaintiff, in the absence of pending administrative proceedings, invokes the original jurisdiction of a court to decide the merits of a controversy." Id.

"The doctrine of primary jurisdiction, like exhaustion, is grounded in a policy of fostering an orderly process of administrative adjudication and judicial review in which a reviewing court will have the benefit of the agency's findings and conclusions. . . . Ordinarily, a court should not act upon subject matter that is peculiarly within the agency's specialized field without giving the agency an opportunity to apply its expertise, for otherwise parties who are subject to the agency's continuous regulation may become the victims of uncoordinated and conflicting requirements. . . . Primary jurisdiction is applied in order to ensure that an orderly procedure will be followed, whereby the court will ultimately have access to all the pertinent data, including the opinion of the agency. . . . [If] an action raises a question concerning the validity of an agency practice, the doctrine is particularly applicable. . . . The aim is to prevent disjointed, uncoordinated, and premature decisions affecting policy. . . .

"There are instances, however, in which the application of the doctrine [of primary jurisdiction] will not serve these interests. The controversy may turn on a question of pure law which has not been committed to agency discretion. . . . Further, resort to agency proceedings may be futile and might also work severe harm on the party seeking relief." (Citations omitted; internal quotation marks omitted.) Id., 256–57. Importantly, unlike the doctrine of exhaustion of administrative remedies, which, as indicated, impli-

is not required to exhaust administrative remedies if it is seeking a particular form of relief that the agency is unable or lacks authority to provide. See, e.g., *Fairchild Heights Residents Assn., Inc.* v. *Fairchild Heights, Inc.*, 310 Conn. 797, 816–17, 82 A.3d 602 (2014) (holding mobile home residents were not required to exhaust administrative remedies before Department of Consumer Protection before asserting Connecticut Unfair Trade Practices Act (CUTPA) claim against mobile home park owner-operator because CUTPA contained no express or implicit exhaustion requirement and department lacked ability to provided injunctive and other relief available under CUTPA); see also *Stepney, LLC* v. *Fairfield*, supra, 263 Conn. 570 (noting that, although mere allegation of constitutional violation premised on action of board or agency was insufficient to excuse party's failure to exhaust available administrative remedies, exhaustion doctrine is inapplicable if party challenges constitutionality of statute or regulation under which agency operates because administrative agency lacks authority to grant adequate relief in such instances).

Turning to the present case, the plaintiff commenced the underlying civil action pursuant to § 12-170, seeking monetary relief against individual members of the board. Section 12-170, titled "Penalty for Official Misconduct," provides in relevant part: "Each . . . member of the board of assessment appeals . . . who does any unlawful act or omits to do any necessary act con-

cates the subject matter jurisdiction of the court; see *Stepney, LLC* v. Fairfield, supra, 263 Conn. 563; "[t]he doctrine of primary jurisdiction is a rule of judicial administration created by court decision . . . ." *Waterbury* v. *Washington*, 260 Conn. 506, 574, 800 A.2d 1102 (2002); see also *State ex rel. Golembeske* v. *White*, 168 Conn. 278, 281, 362 A.2d 1354 (1975) ("doctrine of primary jurisdiction is invoked only to determine who will initially decide an issue . . . it cannot operate to divest a court of its ultimate jurisdiction" (citation omitted)). Thus, if applicable, the court ordinarily retains jurisdiction and "the judicial process is suspended pending referral of such issues to the administrative body for its views." (Internal quotation marks omitted.) *Waterbury* v. *Washington*, supra, 574. Whether to remand to an agency in a particular case is a discretionary matter for the trial court. Id., 575.

nected with the levy, assessment or collection of any tax, shall forfeit fifty dollars to the person aggrieved thereby, to be collected by such person in an action on this statute . . . ." The plaintiff's complaint does not invoke General Statutes § 4-183 (a), which governs the filing of administrative appeals,[11] nor does he ask by way of relief for the Superior Court to adjudicate whether the board should have sustained his tax assessment appeal. "[In] 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." (Internal quotation marks omitted.) *Rivers* v. *New Britain*, 288 Conn. 1, 10–11, 950 A.2d 1247 (2008). Accordingly, in determining whether the plaintiff was required to exhaust any administrative remedy prior to pursuing his civil action, we begin with the text of § 12-170.

Section 12-170, which was first enacted in 1887,[12] contains no explicit requirement of exhaustion. There is

[11] General Statutes § 4-183 (a) provides in relevant part: "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may *appeal* to the Superior Court as provided in this section. . . ." (Emphasis added.)

[12] See General Statutes (1887 Rev.) § 3895, which provides in relevant part: "Any assessor, member of the board of relief, selectman, committee, or collector, who shall do any unlawful act, or omit to do any necessary act connected with the levy, assessment, or collection of any tax, shall forfeit five dollars to the person aggrieved thereby, and any collector who shall charge or receive any illegal fees shall, in addition to said sum of five dollars, also forfeit double the amount of such illegal fees to the person aggrieved."

no language in the statute mandating that an aggrieved person first seek any form of administrative review or other agency action. Rather, the statute expressly authorizes a party aggrieved by an individual board member's undefined unlawful act or omission to bring "an action on [the] statute . . . ." The fact that the statute contains no express exhaustion language, although significant, does not, however, end the inquiry. We must look for any other indication that application of the doctrine would be consistent with legislative intent as reflected in the overall statutory scheme. See *Stepney, LLC* v. *Fairfield*, supra, 263 Conn. 564–65.

No court in this state has had the opportunity to discuss the legislative history of § 12-170, or how the statutory remedy provided therein fits within the extensive statutory framework governing personal property tax assessments. We need not do so in the present case to resolve whether the statute provides an independent basis for commencing an action in Superior Court that does not require a plaintiff first to seek review by the FOIC or other administrative remedy.

By its plain language, the statute does not limit a board member's liability to violations of FOIA or other administrative law statutes. Rather, it broadly provides for recovery on the basis of any unlawful act or omission. The legislature's use of such broad language counsels against a construction that would only permit a party seeking to recover under the statute if it first obtained agency input because not every instance of an unlawful act or omission necessarily would involve an administrative body. For example, if a board member were found criminally liable for taking a bribe to affect the outcome of a tax appeal, an aggrieved plaintiff arguably would have no conceivable administrative impediment to bringing an action under § 12-170.

The lack of any exhaustion requirement also is apparent from the fact that the statutory remedy provided

for in § 12-170 long predates both the Uniform Administrative Procedures Act, General Statutes § 4-183 et seq., which was enacted in Connecticut in 1972, and the FOIA, which was enacted in 1975. In other words, at the time § 12-170 was enacted, the legislature could not have contemplated a need to protect the integrity of the FOIC or any other agency's role in administering its statutory responsibilities. See *Stepney, LLC* v. *Fairfield*, supra, 263 Conn. 565.

Nothing in the FOIA's statutory scheme mandates that any and all issues involving the FOIA always must be raised to and resolved by the FOIC before any type of action may be brought in Superior Court. In fact, General Statutes § 1-242 suggests that the opposite is true. Section 1-242 (a) provides in relevant part: "In any action involving the assertion that a provision of the [FOIA] has been violated or constitutes a defense, the court to which such action is brought shall make an order requiring the party asserting such violation or defense, as applicable, to provide the [FOIC] with notice of the action and a copy of the complaint and all pleadings in the action . . . ." Upon such notice, the FOIC is authorized to seek to intervene in the action. In other words, the legislature contemplated that actions might be brought in court involving issues related to the applicability and compliance with provisions of the FOIA, and rather than imposing any blanket exhaustion requirement, provided a means for the FOIC to intervene in such action to protect its interests.[13]

Furthermore, we are not aware of any statute that would confer any authority on the FOIC to impose monetary penalties on board members, and the defendants have cited to no such authority. In fact, they conceded at oral argument before this court that the FOIC could not grant the plaintiff the relief provided

[13] There is nothing in the record indicating that § 1-242 was brought to the attention of the trial court.

for under the statute. Accordingly, even if it is within the FOIC's administrative expertise to determine whether the board or any member had complied with particular FOIA requirements, it would have been futile for the plaintiff to have filed an administrative appeal in this matter because the FOIC lacked the ability to provide the plaintiff with the relief he requested, namely, the imposition of the relief provided for in § 12-170. See *Cummings* v. *Tripp*, 204 Conn. 67, 80, 527 A.2d 230 (1987) (noting "administrative relief cannot encompass a monetary award" and, if "administrative relief is inadequate, we do not require a party to exhaust administrative remedies"). In order to obtain the statutory relief he sought, a civil action in Superior Court was inevitable. Although the plaintiff ultimately might be unable to prove the existence of the type of unlawful act or omission contemplated to sustain a cause of action under § 12-170, such consideration is immaterial to the question of whether the court lacked jurisdiction to consider the plaintiff's action because of the doctrine of exhaustion of administrative remedies.

There is nothing in the record before us from which to conclude that the legislature intended that a plaintiff seeking to recover under § 12-170 first must exhaust any and all administrative remedies. If the legislature believed that the remedy it had provided in § 12-170 required reformation in light of its adoption of administrative law procedures, it could have amended the statute. For example, it could have defined or limited the types of unlawful acts or omissions that the statute was intended to remedy, or included language that would require a plaintiff to exhaust any available administrative remedies if the allegations of unlawfulness concerned violations of agency rules or regulations. We do not need to resolve whether § 12-170 is outmoded or anachronistic, or whether the legislature's failure to amend or repeal it reflects an oversight or a conscious

intention to retain an existing, independent cause of action.[14] It suffices that there is nothing in § 12-170's unambiguous language or its relationship to the administrative scheme that suggests any intent on the part of the legislature to incorporate an exhaustion requirement.

We observe that the present case does not fall neatly into the category of cases in which the exhaustion doctrine commonly arises. This case is not one in which a litigant has merely skipped over a step in the ordinary administrative appeal process by, for example, appealing directly to the Superior Court from the decision of an agency or hearing officer without first engaging the agency's own appellate body. See *State ex rel. Golembeske* v. *White*, 168 Conn. 278, 282, 362 A.2d 1354 (1975). Here, the plaintiff followed the administrative path set forth by the legislature for appealing his tax assessment to the board. Further, review of the board's decision ordinarily would have been by appeal to the Superior Court. See General Statutes § 12-117a. The board, however, took no final action on the plaintiff's tax appeal prior to his filing this civil action. Instead, the scenario at issue in the present case is much more akin to cases in which the Superior Court has jurisdiction over a matter but that matter involves issues implicating the expertise and decision-making authority of an administrative agency—in this case, the FOIC. Any abstention by the court in resolving the present matter thus falls closer to the doctrine of primary jurisdiction than implicating the exhaustion doctrine. See footnote 10 of this opinion. In other words, if the trial court believed that the FOIC should be asked to resolve in the first instance whether board members had violated substantive provisions of the FOIA, the court could have stayed the

[14] We note that the $50 statutory penalty has not been increased in more than fifty years; see *Kraus* v. *Klee*, 5 Conn. Cir. 193, 194 n.1, 248 A.2d 515 (1968); effectively limiting any intended deterrent effect of the statute.

matter and referred the case to the FOIC for consideration, rather than dismissing the action for lack of subject matter jurisdiction.

Having determined that no express or implied legislative intent existed to impose an exhaustion requirement, we examine the trial court's rationale for reaching a contrary conclusion. In granting the defendant's motion to dismiss, the trial court appears to have focused too narrowly on the plaintiff's allegations of FOIA violations. A complaint, like any pleading, properly must be viewed in its entirety and with an eye toward finding jurisdiction over the claims asserted, not the opposite. See *Parsons* v. *United Technologies Corp.*, 243 Conn. 66, 83, 700 A.2d 655 (1997) (noting Connecticut follows modern trend of construing pleadings broadly and that any complaint "must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded" (internal quotation marks omitted)); see also *Conboy* v. *State*, 292 Conn. 642, 650, 974 A.2d 669 (2009) (noting "well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged" (internal quotation marks omitted)).

Here, the court construed the complaint principally as one seeking administrative review of the underlying property assessment appeal procedures and determined that the plaintiff first was required to file an administrative action with the FOIC. The court refers to § 4-183 despite the fact that the complaint contains no specific claim of error directed at any particular administrative ruling. The court further failed properly to account for express allegations in the complaint that directly contradict the court's construction.

In determining the cause of action alleged in the complaint and whether the plaintiff was required to exhaust any available administrative remedies, the

court should have focused on the *relief* that the plaintiff sought. In the section of the complaint captioned "Relief Sought," the plaintiff expressly states: "This complaint is not about an assessment appeal; it's squarely focused on official misconduct." Although such a statement is not binding on the court's interpretation of the pleading as a whole, when viewed in the light most favorable to the plaintiff and to upholding the court's jurisdiction, it nonetheless supports a conclusion that the plaintiff's intent was not to file an administrative appeal but a civil action seeking statutory civil penalties for official misconduct as authorized by our legislature.

Moreover, in analyzing whether the plaintiff failed to exhaust administrative remedies, the court appears to have failed to consider whether the FOIC had any authority to provide the plaintiff with adequate relief. Although we have concluded that § 12-170 does not require the exhaustion of administrative remedies prior to filing an action with Superior Court, even if we concluded to the contrary that the exhaustion doctrine applied to § 12-170, an exception would exist because, as we already have concluded, the FOIC lacked any authority to grant the specific relief contemplated under the statute, and, therefore, any administrative appeal would have been futile and not a jurisdictional prerequisite to filing an action in Superior Court.

We conclude that the court improperly granted the motion to dismiss on the ground that it lacked subject matter jurisdiction because the plaintiff failed to exhaust administrative remedies. That conclusion, however, is not fully dispositive of the present appeal because the court also concluded as an independent basis for granting the defendants' motion that, even if the plaintiff could bring a statutory cause of action pursuant to § 12-170 directly to Superior Court, the factual allegations in his complaint were legally insufficient to maintain such an action. We now turn to that issue.

II

Having concluded that the plaintiff did not fail to exhaust his administrative remedies, we turn to the plaintiff's claim that the court also improperly granted the motion to dismiss on the ground that he failed to include sufficient factual allegations in the complaint demonstrating that each individual defendant had engaged in some unlawful act, or had failed to perform some mandatory act, connected to his tax assessment. We conclude that the plaintiff's complaint failed, as a matter of law, to sufficiently allege a cause of action pursuant to § 12-170.

Before addressing the merits of this claim, we first turn to the plaintiff's argument, raised for the first time on appeal, that the motion to dismiss was not the proper procedural means for the defendants to challenge the legal sufficiency of the complaint. Because we conclude that the plaintiff waived any procedural irregularity by failing to raise that issue to the trial court, it cannot provide a sound basis for reversing the substance of the court's ruling on the motion to dismiss.

A

In addition to concluding that the plaintiff had failed to exhaust his administrative remedies, the court also granted the motion to dismiss on the basis of the legal insufficiency of the complaint's factual allegations. Ordinarily, a motion to strike, and not a motion to dismiss, is the proper means "to contest . . . the legal sufficiency of the allegations of any complaint . . . ." Practice Book § 10-39.

In *Egri* v. *Foisie*, 83 Conn. App. 243, 247–50, 848 A.2d 1266, cert. denied, 271 Conn. 931, 859 A.2d 930 (2004), this court reversed the trial court's judgment granting a motion to dismiss that had challenged the legal sufficiency of the plaintiff's complaint, concluding that the trial court should have denied the defendant's motion

because it was improperly utilized to achieve the goal of a motion to strike. This court considered the distinct functions of the motion to dismiss and the motion to strike, noting that "[t]here is a significant difference between asserting that a plaintiff *cannot* state a cause of action and asserting that a plaintiff *has not* stated a cause of action, and therein lies the distinction between the motion to dismiss and the motion to strike." (Emphasis in original) Id., 247. "A motion to dismiss does not test the sufficiency of a cause of action and should not be granted on other than jurisdictional grounds." (Internal quotation marks omitted.) Id., 248.

It is axiomatic that a complaint that fails to allege enough facts to state a legally sufficient cause of action remains "within the trial court's subject matter jurisdiction, albeit subject to a motion to strike for failure to state a legally sufficient claim . . . ." (Internal quotation marks omitted.) Id., 249, citing *Gurliacci* v. *Mayer*, 218 Conn. 531, 545, 590 A.2d 914 (1991). Permitting a motion to dismiss to challenge the legal sufficiency of pleadings would be especially unfair to the plaintiff given that "the rule of court . . . granting a right to plead over after [the motion to strike] would not apply to [a] motion to dismiss." (Internal quotation marks omitted.) *Egri* v. *Foisie*, supra, 83 Conn. App. 248. Thus, the distinction between the motion to dismiss and the motion to strike is not merely semantic. Whereas the granting of a motion to dismiss terminates an action save for the right to appeal the dismissal, the granting of a motion to strike affords a party the right to amend any deficiency by repleading. See Practice Book § 10-44.

In *Larobina* v. *McDonald*, 274 Conn. 394, 399–403, 876 A.2d 522 (2005), the Supreme Court considered an analogous issue, namely, whether a motion for summary judgment, rather than a motion to strike, properly could be used to challenge the legal sufficiency of a

complaint. As is the case with a judgment granting a motion to dismiss, a plaintiff is not entitled to replead following the granting of a motion for summary judgment. See id., 401 ("use of a motion for summary judgment instead of a motion to strike may be unfair to the nonmoving party because [t]he granting of a defendant's motion for summary judgment puts the plaintiff out of court . . . [while the] granting of a motion to strike allows the plaintiff to replead his or her case" (internal quotation marks omitted)). The Supreme Court nonetheless held that "we will not reverse the trial court's ruling on a motion for summary judgment that was used to challenge the legal sufficiency of the complaint when it is clear that the motion was being used for that purpose and the nonmoving party, by failing to object to the procedure before the trial court, cannot demonstrate prejudice. A plaintiff should not be allowed to argue to the trial court that his complaint is legally sufficient and then argue on appeal that the trial court should have allowed him to amend his pleading to render it legally sufficient. Our rules of procedure do not allow a [party] to pursue one course of action at trial and later, on appeal, argue that a path he rejected should now be open to him. . . . To rule otherwise would permit trial by ambuscade." (Internal quotation marks omitted.) Id., 402.

Accordingly, as this court recently explained, "[t]o avoid waiving a right to replead, a nonmoving party must, before the trial court decides the summary judgment motion, either object to the trial court's deciding the case through summary judgment and argue that it should instead decide the motion as a motion to strike to afford it the opportunity to replead a legally sufficient cause of action or, in the alternative, the nonmoving party may maintain that its pleading is legally sufficient, *but it must offer to amend the pleading if the court concludes otherwise*. See *American Progressive Life &*

Health Ins. Co. of New York v. *Better Benefits, LLC*, 292 Conn. 111, 124, 971 A.2d 17 (2009) ('a party does not waive its right to replead by arguing that the pleading is legally sufficient, but offering, if the court were to conclude otherwise, to amend the pleading')." (Emphasis added.) *Streifel* v. *Bulkley*, 195 Conn. App. 294, 302, 224 A.3d 539, cert. denied, 335 Conn. 911, 224 A.3d 539 (2020). We can discern no reason not to employ this same analysis to claims that the trial court improperly considered the legal sufficiency of a complaint in adjudicating a motion to dismiss.

On appeal, the plaintiff argues that a motion to dismiss was not the proper procedural vehicle to address alleged insufficient factual allegations in his complaint. The plaintiff admitted at oral argument before this court, however, that he never made this procedural argument to the trial court in opposition to the motion to dismiss. On appeal, although the plaintiff now argues that the defendants should have filed a motion to strike rather than a motion to dismiss, he does not explain how he was prejudiced by this procedural irregularity, i.e., he does not claim that he asked for an opportunity to replead or that, if the court had provided him with such an opportunity, he would have alleged additional factual allegations in support of his action. Because the plaintiff waived any objection to the use of the motion to dismiss to challenge the legal sufficiency of the complaint, and he does not complain that he was prejudiced, we decline to consider this claim on appeal. We therefore turn to the merits of the trial court's determination that the complaint was legally insufficient, which presents a legal question over which we exercise plenary review. *Larobina* v. *McDonald*, supra, 274 Conn. 403.

B

"Connecticut is a fact pleading jurisdiction . . . ." *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 626, 99 A.3d 1079 (2014). Therefore, a pleading must

"contain a plain and concise statement of the material facts on which the pleader relies, but not of the evidence by which they are to be proved . . . ." Practice Book § 10-1. "The purpose of fact pleading is to put the defendant and the court on notice of the important and relevant facts claimed and the issues to be tried." *A.C. Consulting, LLC* v. *Alexion Pharmaceuticals, Inc.*, 194 Conn. App. 316, 330, 220 A.3d 890 (2019). In considering the legal sufficiency of a complaint, a court "take[s] the facts to be those alleged in the [pleading] . . . and [it] construe[s] the [pleading] in the manner most favorable to sustaining its legal sufficiency." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). In considering whether sufficient facts have been alleged that, if provable, would support a cause of action, however, a court will not consider mere legal conclusions or the truth or accuracy of opinions stated in the pleadings. See *Faulkner* v. *United Technologies Corp.*, 240 Conn. 576, 588, 693 A.2d 293 (1997).

As indicated in part I of this opinion, we construe the plaintiff's complaint as seeking relief for the defendants' alleged violation of § 12-170. To state a cause of action against an official pursuant to § 12-170, a plaintiff must allege facts that, if proven, would establish that the official engaged in some official misconduct by committing an unlawful act or failing to perform a necessary act pertaining to a tax assessment. Even construing the allegations set forth in the complaint in a light most favorable to the plaintiff, we agree with the assessment of the trial court that the plaintiff's complaint failed to allege sufficient facts to state a cause of action under § 12-170.

Although the plaintiff alleges in his complaint that "the defendants have created a cause of action under § 12-170" and "have committed criminal acts, multiple violations of § 1-240 in their individual capacities," those allegations are mere legal conclusions. He fails to

allege the material facts on which he relied in reaching those legal conclusions. The plaintiff does not allege that the defendants ever were criminally charged or prosecuted for a misdemeanor violation of a prior FOIC order pursuant to § 1-240.[15] Indeed, he merely states his opinion that such a violation occurred. Although the plaintiff alleges that there was a lack of a quorum to hear his appeal, the only factual inference to draw from the allegations in the complaint was that the lack of quorum was due to the plaintiff's own request that a majority of the board members recuse themselves, which they did. The sole remaining board member present, Attanasio, adjourned the hearing without taking any action on the plaintiff's appeal, which was, as alleged in the complaint, precisely what the plaintiff had requested.

There are no allegations in the complaint that the individual members acted outside their duties as board members, for example, by conspiring to deprive the plaintiff of a fair hearing or acting out of corruption or undue influence. The only factual allegation in the complaint of individual acts or omissions by the defendants Foley, Hughes, and Mather directly related to the plaintiff's tax assessment was that they recused themselves in the face of the plaintiff's request for recusal. An allegation that an individual board member recused himself or herself from deliberations when requested by a party to do so cannot, without some additional factual allegations, which are absent in this complaint, amount to an illegal act or omission of a necessary act constituting official misconduct. The only factual allegations regarding Attanasio's action are that he adjourned the hearing after the plaintiff raised that the board no longer had a quorum present to hear his appeal and that he signed the notice and hearing

[15] General Statutes § 1-240 (b) provides: "Any member of any public agency who fails to comply with an order of the [FOIC] shall be guilty of a class B misdemeanor and each occurrence of failure to comply with such order shall constitute a separate offense."

minutes sent to the plaintiff indicating that the board had taken no action on the appeal. Again, those allegations, even if true, would not in and of themselves support the plaintiff's legal conclusion that Attanasio engaged in official misconduct. Although the plaintiff alleged that he construed the statement "take no action," as set forth in the hearing minutes and notice, as being a denial of his appeal, that is an opinion or legal conclusion that is not binding on this court in considering whether the complaint was legally sufficient regarding its assertion of official misconduct. See *Faulkner* v. *United Technologies Corp.*, supra, 240 Conn. 588.

This court asked the plaintiff at oral argument to identify those specific allegations in the complaint that, if true, would support his assertion that the individual defendants, and not the board generally, engaged in misconduct. He was unable to direct us to any such specific factual allegations. His brief contains a chart that he claims demonstrates that his complaint was "riddled with such allegations that would support a finding of a violation of [§] 12-170," but that chart, which makes reference to nearly every paragraph of the complaint, is not accompanied by any analysis of a particular allegation or its relevance to the issue of legal sufficiency.

Contrary to the plaintiff's argument on appeal, and consistent with the ruling of the trial court, we conclude that the complaint fails to allege any act or omission by an individual defendant, that, if established as true, could satisfy the plaintiff's burden of demonstrating an unlawful act or omission necessary to prevail under § 12-170. Accordingly, the trial court properly determined that the complaint was insufficiently pleaded, and, because the plaintiff never raised his inability to replead as an issue before the trial court, the court's granting of the motion to dismiss was not reversible error.

The form of the judgment is improper; the judgment dismissing the complaint is reversed, and the case is remanded with direction to render judgment for the defendants.

In this opinion the other judges concurred.