500 NORTH AVENUE, LLC *v.* PLANNING COMMISSION OF THE TOWN OF STRATFORD (AC 42235)

Alvord, Prescott and Lavery, Js.

Syllabus

The plaintiff landowner appealed from the decision of the defendant planning commission, which had concluded that the plaintiff was required to file an application for subdivision approval in order to revise the lot lines of two abutting properties that it owned. The plaintiff submitted a map of the properties to the town's planning and zoning administrator, seeking a lot line adjustment that would reduce the acreage of one property and increase the acreage of the second property by ten acres. Following a hearing, the commission denied the plaintiff's request for a lot line revision, concluding that the plaintiff's map required subdivision approval because it created a drastic change in the existing lots. Thereafter, the plaintiff appealed to the Superior Court, which rendered judgment dismissing the appeal, from which the plaintiff, on the granting of certification, appealed to this court, claiming, inter alia, that the court improperly concluded that the plaintiff's proposed lot line revision constituted a subdivision under the applicable statute (§ 8-18). *Held*:

1. The Superior Court improperly concluded that there was substantial evidence in the record to support the commission's finding that the plaintiff's proposed lot line adjustment of two adjacent lots constituted a subdivision under § 8-18: because no new lot was created from the boundary adjustment that resulted in three or more parts or lots, the proposed lot line revision did not satisfy the definition of subdivision pursuant to § 8-18; although one of the properties had previously been subject to a first cut, the commission's decision that subdivision approval was required was contrary to the language of § 8-18 as the plaintiff's proposal did not divide that property a second time, resulting in three or more parts or lots.
2. The Superior Court improperly concluded that subdivision approval was required because the proposed lot line revision was more than a minor adjustment: there was nothing in the language of § 8-18 that addresses the degree of the lot line adjustment, rather, the only relevant inquiry

is whether the property was divided into three or more lots, and the mere changing of lot lines or adding additional land to lots, no matter how sizeable, does not constitute a subdivision.

3. The defendants could not prevail on their claim that because the proposed boundary line revision would create a third part, it required subdivision approval, which was based on their claim that the distinction in § 8-18 between "parts" and "lots" could indicate that the legislature meant the words to be read separately, and, therefore, the proposed lot line revision could still satisfy the definition of subdivision by dividing the first property into a third part: this court concluded that the legislature intended the word "parts" to refer to separate but whole, not fractional, members of a tract of land, thus, when the word "parts" is read in light of its commonly approved usage and together with the definition of "resubdivision" in § 8-18, its meaning is plain and unambiguous, and is to be read together with the word "lots" so as to clarify the latter's meaning.

Argued December 9, 2019—officially released July 21, 2020

Procedural History

Appeal from the decision of the defendant denying the plaintiff's application for certain property line revisions, brought to the Superior Court in the judicial district of Fairfield, where the court, *Radcliffe*, *J.*, granted the motion to intervene filed by the defendant Judith Kurmay et al.; thereafter, the matter was tried to the court, *Radcliffe*, *J.*; judgment dismissing the plaintiff's appeal, from which the plaintiff, on the granting of certification, appealed to this court; subsequently, this court granted the plaintiff's motion to substitute JRB Holding Co., LLC, as the plaintiff. *Reversed*; *judgment directed.*

Stephen R. Bellis, for the appellant (substitute plaintiff).

Alexander J. Florek, for the appellee (named defendant).

Joseph A. Kubic, for the appellees (defendant Judith Kurmay et al.).

Opinion

LAVERY, J. The plaintiff, 500 North Avenue, LLC, appeals from the judgment of the trial court dismissing its appeal from the decision of the defendant, the Plan-

ning Commission of the Town of Stratford (commission),[1] concluding that the plaintiff was required to file an application for subdivision approval in order to adjust the lot lines of two abutting properties that it owns by adding ten acres to one property and subtracting that acreage from the other. The plaintiff claims that the court improperly concluded that (1) its proposed boundary line revision of two adjacent lots constituted a subdivision under General Statutes § 8-18 and (2) a subdivision application was required because the proposed revision was more than a " 'minor' " adjustment. In response, the defendants argue that because the proposed boundary line revision would create a third part, it required subdivision approval. We agree with the plaintiff and, thus, reverse the judgment of the trial court.

The record and the court's memorandum of decision reveal the following facts and procedural history. The plaintiff is the owner of two adjacent properties in the town of Stratford (town). The first property is located at 795 James Farm Road and consists of fifteen acres of land. The second property is located at and known as Peters Lane and consists of ten acres of land. On or about March 24, 2017, the plaintiff submitted a Mylar map[2] of the two properties to the town's planning and zoning administrator, Jay Habansky, seeking a lot line adjustment. Specifically, the plaintiff sought to reduce the James Farm Road property from fifteen acres to 4.7 acres and to increase the Peters Lane property from

[1] On August 21, 2017, the court, *Radcliffe, J.*, granted a motion filed by Judith Kurmay and Cathleen Martinez to intervene as defendants. We refer in this opinion to Kurmay, Martinez, and the commission collectively as the defendants, and individually by name where necessary. After this appeal was filed, this court granted the plaintiff's motion to substitute JRB Holding Co., LLC, as the plaintiff. For ease of reference, we refer to 500 North Avenue, LLC, as the plaintiff in this opinion.

[2] "A Mylar map is a map prepared on a thin polyester film suitable for recording on the land records." *Torgerson* v. *Kenny*, 97 Conn. App. 609, 615 n.5, 905 A.2d 715 (2006), cert. denied, 281 Conn. 913, 916 A.2d 54 (2007).

ten acres to approximately twenty acres, thus, reconfiguring the properties.

On May 1, 2017, upon request from Habansky, Attorney John A. Florek[3] submitted a memorandum advising Habansky not to sign or approve the plaintiff's Mylar map. In the memorandum, Florek relied on language from *Goodridge* v. *Zoning Board of Appeals*, 58 Conn. App. 760, 765–66, 755 A.2d 329, cert. denied, 254 Conn. 930, 761 A.2d 753 (2000), in which this court stated: "A minor lot line adjustment between two existing lots, whereby no new lot is created, does not constitute a 'subdivision' as defined by § 8-18 and, thus, does not require municipal approval. . . . To accept every minor adjustment of property . . . as a 'subdivision' under § 8-18 would lead to a substantial increase in applications to municipal planning commissions and in land use appeals." On the basis of this language, Florek concluded that the plaintiff's proposal is a "much more drastic change" than the minor revision in *Goodridge* that did not require municipal approval and, therefore, recommended that Habansky refer the issue to the commission for its determination as to whether the boundary line adjustment constituted a mere lot line revision or a subdivision.

In response to Florek's memorandum, on May 4, 2017, the plaintiff's counsel sent a letter to Habansky explaining that because there was no division of 795 James Farm Road or the Peters Lane property into three or more lots pursuant to § 8-18, there was no subdivision. The letter cited to *McCrann* v. *Town Plan & Zoning Commission*, 161 Conn. 65, 70, 282 A.2d 900 (1971), in which our Supreme Court stated that because "[t]he site in question was created by combining two lots to make one parcel . . . [t]here was no division of a tract into three or more parts or lots and in the absence of the statutory requirement there was no subdivision."

[3] Florek is an assistant town attorney for the town.

Thereafter, Habansky referred the matter to the commission.

On May 16, 2017, the commission held an administrative hearing, in which it considered Florek's memorandum, the plaintiff's objection to Florek's memorandum, and a separate memorandum from Attorney Kurt M. Ahlberg that contained information regarding a prior cut[4] to 795 James Farm Road.[5] In Ahlberg's memorandum, he referenced the prior cut to 795 James Farm Road: "On August 29, 2003, Edward P. Colacurcio conveyed a 0.9197 acre parcel of this tract to Roger K. Colacurcio . . . . This property is now known as 875 James Farm Road. . . . [T]his is the only conveyance of any lot or part of the entire tract whatsoever from the contiguous [fifteen acre parcel known as 795 James Farm Road] since the adoption of the [s]ubdivision [r]egulations by the [t]own in 1956. By virtue of this 'first cut,' the entire [fifteen] acre tract was divided into two parts or lots," which became 795 James Farm Road and 875 James Farm Road. Relying on the recommendations from Florek and Ahlberg, the commission unanimously concluded that the Mylar map should be considered a subdivision "based on the facts that it creates a drastic change in the existing lots and [the lot line adjustment is] made for the purpose of development." The commission therefore concluded that an application for subdivision approval was necessary and denied

[4] "Where a parcel had been previously divided into two pieces and one of them was conveyed to another owner, that was considered a first or 'free cut' of the original parcel so that a subsequent division of the remainder of it into two lots was a subdivision as defined in . . . § 8-18." R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 10:9, p. 316. A "first cut" is also known as a prior cut.

[5] In 2016, the commission had requested that Ahlberg draft a memorandum and render an opinion "as to the title of certain real property known as 795 James Farm Road . . . as well as whether the proposed development of an approximately 3.7 acre parcel of this property which lies along James Farm Road constitutes a subdivision of this entire tract."

the plaintiff's request for a lot line revision. On May 23, 2017, notice of the commission's decision was published in the Connecticut Post. The plaintiff thereafter appealed to the Superior Court pursuant to General Statutes § 8-8 (b).

After considering the briefs and arguments of the parties, the trial court issued a memorandum of decision on June 22, 2018. The court held that there was substantial evidence in the record to support the commission's decision that the 2003 conveyance, as described in Ahlberg's memorandum, constituted a "first cut" of 795 James Farm Road. As such, the court stated that the plaintiff's "[M]ylar map . . . represent[ed] a second division of 795 James Farm Road . . . . Therefore, the reduction of the fifteen . . . acre parcel to 4.7 acres, is not subject to the 'first cut' exemption contained in [§] 8-18 . . . ." The court further held that the commission's decision that the Mylar map required subdivision approval was supported by substantial evidence in the record. Relying on the phrase "minor lot line adjustment" referenced in *Goodridge* v. *Zoning Board of Appeals*, supra, 58 Conn. App. 765–66, the court concluded: "The [M]ylar map filed by [the plaintiff] created no new lots, although it dramatically reconfigured existing parcels. Substantial evidence supports the conclusion that the map was filed, consistent with a desire to develop the 4.7 acre parcel. . . . The court is unable to find, as a matter of law, that a division of property which doubled the size of the Peters Lane parcel, while reducing 795 James Farm Road by ten . . . acres, represents a 'minor' revision."

On July 6, 2018, the plaintiff petitioned this court for certification to appeal, and the petition was granted on September 24, 2018. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The plaintiff first claims that the trial court improperly upheld the commission's decision by concluding that there was substantial evidence in the record to support the commission's finding that the plaintiff's proposed lot line adjustment of the 795 James Farm Road and Peters Lane properties constituted a subdivision for purposes of § 8-18. Specifically, the plaintiff argues that because no new lot was created from the boundary adjustment, subdivision approval was not necessary. We agree.

"Although we employ a deferential standard of review to the actions of zoning [commissions] . . . the issue raised here is one of statutory construction. Issues of statutory construction present questions of law, over which we exercise plenary review." (Citation omitted; internal quotation marks omitted.) *Benson* v. *Zoning Board of Appeals*, 89 Conn. App. 324, 329, 873 A.2d 1017 (2005); see *Clifford* v. *Planning & Zoning Commission*, 280 Conn. 434, 453, 908 A.2d 1049 (2006) (applying deferential standard of review to decision of zoning commission). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history

and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter." (Internal quotation marks omitted.) *Fedus* v. *Planning & Zoning Commission*, 278 Conn. 751, 756, 900 A.2d 1 (2006).

The issue before this court requires us to interpret the statutory definition of subdivision. Section 8-18 defines a subdivision as "the division of a tract or parcel of land into three or more parts or lots made subsequent to the adoption of subdivision regulations by the commission, for the purpose, whether immediate or future, of sale or building development expressly excluding development for municipal, conservation or agricultural purposes, and includes resubdivision . . . ."

"In interpreting the meaning of the term 'subdivision' in § 8-18, we do not write on a clean slate. In *McCrann* v. *Town Plan & Zoning Commission*, [supra, 161 Conn. 70], [our Supreme Court] examined the meaning of the term 'subdivision' in § 8-18. . . . The court concluded first that the language of § 8-18 is clear and unambiguous. . . . The court then explained that, in order to constitute a subdivision, the clear language of the statute has two requirements: '(1) [t]he division of a tract or parcel of land into three or more parts or lots, and (2) for the purpose, whether immediate or future, of sale or building development.' " (Citations omitted.) *Cady* v. *Zoning Board of Appeals*, 330 Conn. 502, 510, 196 A.3d 315 (2018).

In *Cady*, our Supreme Court further interpreted the language of § 8-18. In that case, the defendant property owner proposed lot line revisions, seeking to reconfigure three lots on its property. Id., 506–507. The zoning enforcement officer concluded that "[t]he land comprising the current [three] lots was originally [four] lots . . . . [The three lots] were subject to a state taking

for road improvements . . . . Therefore, as of the time of the filing of the subject [l]ot [l]ine [r]evision map, it is my opinion there were three preexisting lots . . . and that no subdivision was required . . . .'' (Internal quotation marks omitted.) Id., 507–508. After appealing to the Zoning Board of Appeals of the Town of Burlington, which denied the appeal, the plaintiff filed an appeal with the Superior Court and alleged that the proposed lot line adjustments constituted a subdivision under § 8-18. Id., 508. The trial court agreed and reversed the decision of the board, holding that ''a new subdivision was created because three new lots were created.'' (Internal quotation marks omitted.) Id. Thereafter, our Supreme Court reversed the judgment of the trial court, holding that the ''appropriate inquiry under § 8-18 is whether *one lot* has been divided into *three or more lots*.'' (Emphasis added.) Id., 514.

Because the present case involves the application of § 8-18, we are bound by our Supreme Court's interpretation of the language of that statute in *Cady*. We, therefore, must determine whether the plaintiff's proposed lot line revision divides one lot into three or more lots. In particular, we must determine whether the plaintiff's proposed lot line revision divides 795 James Farm Road into three or more lots. We conclude that it does not.

The following additional facts are relevant to the resolution of the issue presented. Florek, guided by Ahlberg's memorandum, concluded that 795 James Farm Road was ''first cut'' in 2003, thus leaving three abutting parcels of land, 795 James Farm Road, Peters Lane, and 875 James Farm Road. He further concluded that because the plaintiff's proposal sought to ''severely change the character of the lots involved,'' subdivision approval was necessary. Specifically, Florek relied on language from *Goodridge*, concluding that the plaintiff's proposal was not ''minor'' and ''constitute[d] more than a simple lot line revision.'' Florek further relied on *Stones Trail, LLC*

v. *Zoning Board of Appeals*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-06-4010003-S (May 6, 2008), in which the court stated: "[W]here a boundary line adjustment is significant in size and made for the purpose of development, even where no additional lot is created, it does constitute a subdivision of property." (Internal quotation marks omitted.) Accordingly, Florek advised the commission to deny the plaintiff's proposal.[6]

At the administrative hearing, the commission was tasked with deciding whether "(1) an additional lot was or was not created; (2) if [the proposal] is simply a lot line revision; [and] (3) if [the proposal] is a subdivision that is created for the specific purpose of facilitating development." The commission relied on the case law cited in Florek's memorandum and concluded that the plaintiff's proposal should be considered a subdivision, and not a lot line adjustment. On appeal, the trial court upheld the commission's decision, concluding that, although the proposal created no new lot, it "dramatically reconfigured existing parcels," thus, amounting to more than a " 'minor' " revision.[7] The court held that "the [commission] was fully justified in concluding that the [M]ylar map constitutes a subdivision, within the meaning of [§] 8-18 . . . ."

The plaintiff claims that the trial court improperly interpreted the language of § 8-18 in upholding the commission's conclusion that subdivision approval was

[6] The following colloquy transpired at the hearing before the commission:

"[Chairman Silhavey]: Okay. So is there one lot that has now become three?

"[Attorney Florek]: Well . . . that's for you to decide. I can tell you that as it exists right now subsequent to the subdivision regulations there is one lot that has at least become two, that and the remainder, which is [fifteen] acres, okay? Again, the issue whether this is a major revision so that you now have lots—you now have lots that were different, severely different than existed before. That's up to you to decide."

[7] The trial court's memorandum of decision was published on June 22, 2018. Our Supreme Court published its decision in *Cady* on December 11, 2018. As such, the trial court did not have the benefit of the analysis in *Cady* when making its decision.

required for the plaintiff's proposed lot line revision. The principal issue, therefore, presents a question of law "turning upon the interpretation of statutes." (Internal quotation marks omitted.) *Smith* v. *Zoning Board of Appeals*, 227 Conn. 71, 80, 629 A.2d 1089 (1993), cert. denied, 510 U.S. 1164, 114 S. Ct. 1190, 127 L. Ed. 2d 540 (1994).

The trial court's conclusion that the plaintiff's proposed lot line revision met the definition of a subdivision set forth in § 8-18 was inconsistent with the language of the statute. *Cady* indicates that, in determining whether a lot line revision constitutes a subdivision, the question is whether one lot was divided into three or more lots. *Cady* v. *Zoning Board of Appeals*, supra, 330 Conn. 514. The defendants argue that because there was a "first cut" to 795 James Farm Road, the lot line revision would divide the property into a third part or lot. The defendants, however, are considering the proposed reconfiguration of the boundary lines of the property as constituting a division of 795 James Farm Road. No such division has occurred. In fact, the trial court, in its memorandum of decision, stated that "no new lots" were created; therefore, after the lot line revision, there remains the same number of lots, three, as existed before the revision, namely, 795 James Farm Road, Peters Lane, and 875 James Farm Road, which was created from the first cut of 795 James Farm Road. This first cut is the only division of 795 James Farm Road. We agree with the trial court that no new lots were created from the plaintiff's proposed lot line revision. Because there was not a second division of 795 James Farm Road that resulted in three or more parts or lots, however, the proposed lot line revision does not satisfy the definition of subdivision pursuant to § 8-18.

The commission asserts that *Cady* instructs this court that "[§] 8-18 . . . directs our attention to the original tract of land from which the initial division of the property was made." The commission argues that we must

look to the configuration of 795 James Farm Road when the town adopted its planning and zoning regulations on February 1, 1956. Because the first cut of 795 James Farm Road took place after the adoption of the town's planning regulations, the commission contends that "any further division of 795 [James Farm Road] would require subdivision approval." We are unpersuaded.

We acknowledge that 795 James Farm Road was subject to a first cut in 2003. We conclude, however, that because the plaintiff's proposal does not divide 795 James Farm Road a second time, resulting in three or more parts or lots, the commission's decision that subdivision approval was required is contrary to the language of § 8-18. As the court properly indicated, there simply was no additional lot created. Three lots existed before the proposal and three lots remain. Accordingly, the plaintiff's proposed lot line revision does not constitute a subdivision under § 8-18.

II

The plaintiff next claims that the trial court improperly relied on language from *Goodridge* in upholding the commission's decision and concluding that subdivision approval was required because the lot line revision was more than "minor." Specifically, the plaintiff cites to *Cady*, to argue that "[our Supreme Court] found that nothing in the plain language of . . . § 8-18 indicates that the determination of whether a particular proposal constitutes a subdivision depends on the degree of the lot line adjustment." Judith Kurmay and Cathleen Martinez, the intervening defendants, however, attempt to distinguish the present case from *Cady*, stating that "[t]he application of *Cady* to this case is like comparing an apple to a pineapple." The commission likewise contends that because *Cady* involved land that had not been previously subject to a " 'first cut,' " the court's holding should not apply to the present case. We are not persuaded by the defendants' arguments.

Cady implicitly overruled this court's decision in *Goodridge* in regard to the subject matter of the size of a proposed lot line revision. In particular, our Supreme Court explained that the use of the phrase " 'minor lot line adjustment' " is not supported by the language of the statute. *Cady* v. *Zoning Board of Appeals*, supra, 330 Conn. 515. The court stated: "Nothing in the plain language of § 8-18 indicates that the determination of whether a particular proposal constitutes a 'subdivision' depends on the degree of the lot line adjustment. Indeed, § 8-18 does not address a lot line adjustment or the size of an adjustment at all; instead, it addresses 'the division of a tract or parcel of land . . . .' Similarly, § 8-18 does not address the creation of a new lot, but only the division into 'three or more parts . . . .' To be sure, the phrase 'division of *a* tract or parcel of land into *three* or more parts or lots' demonstrates that the creation of *one* new lot does not constitute a subdivision." (Emphasis in original; footnote omitted.) Id., 516–17.

In the present case, the trial court's conclusion that subdivision approval was required because the proposed lot line revision of 795 James Farm Road was "more than minor," was based on its reliance on the language of *Goodridge*. In light of the holding in *Cady*, however, we conclude that the trial court's reasoning is flawed. As *Cady* indicated, there is nothing in the language of § 8-18 addressing the degree of the lot line adjustment. The only relevant inquiry is whether the property was divided into three or more lots. The mere changing of lot lines or adding additional land to lots, no matter how sizeable, does not constitute a subdivision. It is well established that "a court must construe a statute as written. . . . Courts may not by construction supply omissions . . . or add exceptions merely because it appears that good reasons exist for adding them. . . . The intent of the legislature, as this court has repeatedly observed, is to be found not in what the

legislature meant to say, but in the meaning of what it did say. . . . It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is the function of the legislature." (Internal quotation marks omitted.) *Tuxis Ohr's Fuel, Inc.* v. *Administrator, Unemployment Compensation Act*, 127 Conn. App. 739, 744, 16 A.3d 777 (2011), aff'd, 309 Conn. 412, 72 A.3d 13 (2013).

Even though the proposed lot line adjustment in the present case includes a nearly ten acre change in the size of the two properties, the degree of a lot line adjustment is not determinative of the need for subdivision approval. As such, the trial court's reliance on the term "minor" was improper. Because we have determined that 795 James Farm Road has not been divided into three or more lots and no new lots will be created from the proposed lot line adjustment, we conclude that subdivision approval of the plaintiff's proposed lot line adjustment was not necessary.

III

Kurmay and Martinez assert one final argument that we are compelled to address, namely, that the language of § 8-18 includes the terminology "parts or lots . . . ." They argue that, although "there may be the same number of [p]arcels before and after the proposed 'lot line adjustment' . . . 795 [James Farm Road] . . . would be divided into a third part. This third part . . . is . . . intended to be merged into the Peters Lane property. Neither 795 [James Farm Road] or Peters Lane [have] actually been subdivided into 'lots.' " At oral argument before this court, the defendant explained that, even if the property was not divided into three or more lots, the distinction in § 8-18 between "parts" and "lots" could indicate that the legislature meant the words to be read separately, and, therefore, the proposed lot line revision could still satisfy the definition of subdivision by dividing 795 James Farm Road into a third part. We disagree.

The determination of whether the word "parts" as used in § 8-18 indicates something different from a building lot requires the application of well established principles of statutory construction, which we previously set forth in part I of this opinion.

Although our Supreme Court in *McCrann* and *Cady* determined that the language of § 8-18 is clear and unambiguous, neither case analyzed the meaning of the phrase "parts or lots . . . ." We are therefore required to determine whether the plaintiff's proposed lot line revision creates multiple parts, as opposed to lots. With the principles of statutory construction in mind, we begin our analysis by examining the language of the statute.

Section 8-18 provides in relevant part that " 'subdivision' means the division of a tract or parcel of land into three or more parts or lots made subsequent to the adoption of subdivision regulations by the commission, for the purpose, whether immediate or future, of sale or building development expressly excluding development for municipal, conservation or agricultural purposes, and includes resubdivision; 'resubdivision' means a change in a map of an approved or recorded subdivision or resubdivision if such change (a) affects any street layout shown on a such map, (b) affects any area reserved thereon for public use or (c) diminishes the size of any lot shown thereon and creates an additional building lot, if any of the lots shown thereon have been conveyed after the approval or recording of such map . . . . "

Section 8-18 does not define the word "parts" or the word "lots." Moreover, after thorough research, we have uncovered no appellate case law that has interpreted the word "parts," as used in § 8-18, to have a meaning that is separate and distinct from the word "lots." Our Supreme Court has held that "in the absence of a statutory definition, we turn to General Statutes § 1-1 (a),

which provides in relevant part: 'In the construction of statutes, words and phrases shall be construed according to the commonly approved usage of the language. . . .' To ascertain the commonly approved usage of a word, 'we look to the dictionary definition of the term.' . . . *Chatterjee* v. *Commissioner of Revenue Services*, 277 Conn. 681, 690, 894 A.2d 919 (2006)." *Stone-Crete Construction, Inc.* v. *Eder*, 280 Conn. 672, 677–78, 911 A.2d 300 (2006). Taking into consideration that "[a] statute should be construed so that no word, phrase or clause will be rendered meaningless"; (internal quotation marks omitted) *Verrastro* v. *Sivertsen*, 188 Conn. 213, 221, 448 A.2d 1344 (1982); the use of the dictionary definition is appropriate where, as here, neither the word "parts" nor "lots" has been defined by the legislature.

Furthermore, "[t]he rule of [statutory] construction that the words in a statute must be construed according to their plain and ordinary meaning [is informed by] the doctrine of [in pari] materia, under which statutes [and statutory provisions] relating to the same subject matter may be looked to for guidance in reaching an understanding of the meaning of the statutory term." (Internal quotation marks omitted.) *State* v. *Pommer*, 110 Conn. App. 608, 616, 955 A.2d 637 (citing R. Williams, Jr., "Statutory Construction in Connecticut: An Overview and Analysis," 62 Conn. B.J. 313–14 (1988)), cert. denied, 289 Conn. 951, 961 A.2d 418 (2008). We are further guided by the principle that "the legislature is always presumed to have created a harmonious and consistent body of law . . . . [T]his tenet of statutory construction . . . requires [this court] to read statutes together when they relate to the same subject matter . . . . Accordingly, [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction. . . . [T]he General Assembly is always presumed to know all the existing

statutes and the effect that its action or [nonaction] will have upon any one of them." (Internal quotation marks omitted.) *Stone-Crete Construction, Inc.* v. *Eder*, supra, 280 Conn. 678.

Merriam-Webster's Collegiate Dictionary defines the word "part" as "one of the often indefinite or unequal subdivisions into which something is or is regarded as divided and which together constitute the whole . . . one of the several or many equal units of which something is composed or into which it is divisible . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003), pp. 902–903.

Applying this definition and the canons of construction outlined in the preceding paragraph, we conclude that the legislature intended the word "parts" to refer to separate but whole, not fractional, members of a tract of land. Specifically, the purpose of the inclusion of "parts" is to elucidate the meaning of the word "lots" by clarifying that the type of lot referred to in § 8-18 is a piece of property, which comprises "one of . . . several or more . . . units" that together can constitute a whole. This inherent divisibility demonstrates that a part or lot of a piece of property can be separated from the whole and can take on its own independent existence. In turn, this independent existence of a lot can only be accomplished if the "units" of the whole property are a constituent part of a tract of land that has been divided so as to become a subdivision.

Our conclusion is further supported by the fact that, when creating the statutory definition of subdivision, the legislature included the definition of resubdivision in its meaning. In the definition of resubdivision, the legislature used only the words "lot," "lots," and "building lots" to impart the type of land that is to be considered in a resubdivision. There is no use of the word "parts." As highlighted above, this court has previously explained that "[s]tatutes should be read as to harmonize with each other, and not to conflict with each

other." (Internal quotation marks omitted.) *Furhman* v. *Dept. of Transportation*, 33 Conn. App. 775, 778, 638 A.2d 1091 (1994). In light of the legislature's specific inclusion of the definition of resubdivision within the definition of subdivision and the fact that statutes should be read to harmonize with each other, we must presume that the legislature intended the two definitions to be read together and to be construed, wherever possible, to avoid conflict between them. Typically, " '[t]he use of the disjunctive 'or' between the two parts of the statute indicates a clear legislative intent of separability.' " *Bahre* v. *Hogbloom*, 162 Conn. 549, 557, 295 A.2d 547 (1972). Because Kurmay's and Martinez' interpretation of the definition of subdivision, which includes the division of land into "parts" as well as "lots" and that the "or" is to be used disjunctively, would create a conflict with the definition of resubdivision, we conclude that their interpretation is not workable. In other words, we conclude that "or" is not meant to be used as a disjunctive conjunction, and, instead, the term "parts or" is intended to clarify the meaning of the word "lots," and the two words are meant to be read together.

Moreover, Kurmay's and Martinez' interpretation of the definition of subdivision is inconsistent with prior judicial interpretations of the statute. In *Cady* v. *Zoning Board of Appeals*, supra, 330 Conn. 514, our Supreme Court concluded that the "appropriate inquiry under § 8-18 is whether one *lot* has been divided into three or more *lots*." (Emphasis added.) The absence of the word "parts" in *Cady* is consistent with our understanding that the word is not meant to have a meaning that is separate and distinct from that of "lots."

As such, we conclude that when the word "parts," as used in the definition of subdivision pursuant to § 8-18, is read in light of its commonly approved usage and together with the definition of resubdivision, its meaning is plain and unambiguous because it is susceptible

to only one reasonable interpretation. We conclude that the word "parts" is to be read together with the word "lots" so as to clarify the latter's meaning.

Lastly, the defendants argue that the proposed lot line revision was submitted solely for the purposes of development and, therefore, meets the definition of subdivision pursuant to § 8-18. The defendants, however, fail to recognize that, as stated in *McCrann*, to meet the statutory definition of a subdivision, we must first determine if there was a division of a tract or parcel of land into three or more parts or lots. *McCrann* v. *Town Plan & Zoning Commission*, supra, 161 Conn. 70. Next, we must determine whether this division was done for the purpose of development. Id. As we have concluded in parts I and II of this opinion, 795 James Farm Road has not been divided into three or more parts or lots. Because the first requirement of the statute was not met, an analysis as to whether the proposed lot line adjustment is being conducted for the purposes of development is not necessary. See id. (concluding that "[t]here was no division of a tract into three or more parts or lots and in the absence of this statutory requirement there was no subdivision").

The record reveals that the plaintiff's proposed lot line revision simply reconfigures two conforming lots into two differently shaped, yet conforming, lots. There is no division that results in the creation of three or more lots. Accordingly, we conclude that the trial court's judgment upholding the commission's decision requiring subdivision approval deviated from the plain language of § 8-18. We, therefore, reverse the judgment of the trial court dismissing the plaintiff's appeal.

The judgment is reversed and the case is remanded with direction to render judgment sustaining the plaintiff's appeal.

In this opinion the other judges concurred.

JESSICA BROWN *v.* BRETT BROWN
(AC 42576)

Lavine, Moll and Devlin, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the order of the trial court requiring her to reimburse the defendant a certain prorated portion of unallocated alimony and child support that she received in the year in which she remarried. The parties' separation agreement, which had been incorporated into the dissolution judgment, required the defendant to pay the plaintiff a specified percentage of his gross annual compensation in any calendar year, which payments were to terminate on, inter alia, the plaintiff's remarriage. In the year in which the plaintiff remarried, the defendant paid the plaintiff 40 percent of bonuses and severance payments he received from a former employer a few months before her remarriage. The court granted the defendant's postjudgment motion for order requesting reimbursement, in which he claimed that, when the plaintiff remarried in August of a year in which she was entitled to receive unallocated support, she was only to receive those benefits, specifically the bonus and severance payments, on a prorated basis. In the plaintiff's objection to the motion for reimbursement, she claimed that, because the separation agreement did not contain a provision for prorating unallocated support, she had no obligation to refund any part of the unallocated support she received that year. The parties, upon the plaintiff's remarriage, stipulated to the defendant's monthly child support obligation, which was entered as an order of the court. The defendant filed a cross appeal from the trial court's denial of his motion for modification of child support, in which he claimed that a reduction in his earned income constituted a substantial change in circumstances from the date when the court entered the parties' child support stipulation as an order of the court. On the plaintiff's appeal and the defendant's cross appeal to this court, *held*:

1. The trial court improperly granted the defendant's postjudgment motion for reimbursement of unallocated support and ordered the plaintiff to repay the defendant a portion of the unallocated support he paid her in the year of her remarriage: the relevant portion of the parties' separation agreement was clear and unambiguous, and the trial court improperly read a term into the separation agreement when it concluded that it was implicit that the defendant's gross annual compensation was to be prorated, the relevant language in the separation agreement did not contain the word prorated, and, to the contrary, additional language from the separation agreement provided that the defendant was to make all payments from his additional and/or incentive compensation to the plaintiff within fifteen days of receipt of such payment by the defendant,

and no paragraph of the agreement set forth conditions under which the plaintiff may have been required to return unallocated support at the time she was entitled to receive it; furthermore, the parties did not seek to unbundle alimony and child support in the defendant's unallocated payments at the time the parties stipulated to the defendant's child support obligation and arrearage, retroactive to the month of the plaintiff's remarriage, and the fact that there was no mention of an overpayment at that time did not support the defendant's position that the parties intended to prorate unallocated support that terminated before the end of a calendar year.

2. The defendant could not prevail on his claim in his cross appeal that the trial court improperly denied his motion for modification of child support by concluding that the reduction in his earned income did not constitute a substantial change in circumstances: any claim that the court failed to consider the defendant's argument regarding deviations from child support guidelines or that the court failed to consider child support guidelines failed, as at the time that the defendant filed his motion, he did not plead that the amount of child support he was paying pursuant to the parties' stipulation deviated from the child support guidelines but, instead, that he had experienced a substantial change in circumstances due to his loss of earned income, and the court was not required to consider the presumptive child support under the guidelines, as the evidence demonstrated the defendant's ability to maintain his lifestyle, spending habits, travel and assets, and, thus, he failed to carry his burden to demonstrate clearly and definitely that he experienced a substantial change in circumstances notwithstanding his diminution in salary and period of unemployment.

Argued March 2—officially released July 21, 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, *Schofield*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Tindill*, *J.*, entered the parties' stipulation regarding child support as an order of the court; subsequently, the court, *Heller*, *J.*, granted the defendant's motion for order requesting reimbursement of unallocated support and denied the defendant's motion to modify child support, and the plaintiff appealed and the defendant cross appealed to this court. *Reversed in part*; *further proceedings*.

Samuel V. Schoonmaker IV, with whom, on the brief, were *Wendy Dunne DiChristina* and *Peter M. Brynicz-ka*, for the appellant-cross appellee (plaintiff).

Leslie I. Jennings, for the appellee-cross appellant (defendant).

Opinion

LAVINE, J. This appeal concerns the judgment rendered by the trial court when it adjudicated two postdissolution motions filed by the defendant, Brett Brown. The plaintiff, Jessica Brown,[1] appeals from the decision of the court ordering her to reimburse the defendant certain unallocated alimony and child support (unallocated support), claiming that the court misinterpreted the parties' separation agreement. The defendant cross appeals from the court's denial of his motion for modification of child support. We agree with the plaintiff's claim but reject the defendant's claim. We, therefore, reverse that portion of the trial court's judgment with respect to its order to the plaintiff to reimburse the defendant unallocated support and affirm the trial court's judgment with respect to its denial of the defendant's motion to modify child support.

The following procedural history is relevant to our resolution of the parties' appeals. The parties were married in August, 2000, and together had three children, who were minors on February 26, 2013, when the court, *Schofield*, *J.*, rendered judgment dissolving their marriage.[2] The judgment of dissolution incorporated the parties' separation agreement (agreement) by reference. Paragraph 4.1 of the agreement obligated the defendant to pay the plaintiff unallocated support "during his lifetime, until her death or remarriage, or February 28, 2017, whichever event shall first occur . . . ." The plaintiff remarried on August 8, 2015, automatically terminating

[1] The plaintiff is now known as Jessica Drbul.

[2] The children still were minors at the time the trial court, *Heller*, *J.*, decided the motions at issue in this appeal.

the defendant's unallocated support obligation.[3] On October 19, 2015, the plaintiff filed a motion to "fix" child support in accordance with paragraph 5.1 of the agreement, following the termination of unallocated support.[4] On June 20, 2016, the parties stipulated to the defendant's monthly child support obligation, which the court, *Tindill*, *J.*, entered as an order of the court.[5] In July, 2016, Judge Tindill accepted the parties' stipulation as to the amount of the defendant's child support arrearage, which the defendant paid.[6] See footnote 4 of this opinion.

On October 24, 2016, the defendant filed a motion in which he sought to have the court order the plaintiff to reimburse him for what he claimed was his overpayment of unallocated support in 2015. On January 9, 2017, the defendant filed a motion to modify his child support obligation on the basis of a substantial change in circumstances due to the loss of his employment. The plaintiff opposed both of the defendant's motions. The parties appeared before the court, *Heller*, *J.*, to argue the defendant's motions on September 11, 2018.

[3] The plaintiff does not dispute that her right to alimony terminated at the time she remarried. See *Mihalyak* v. *Mihalyak*, 30 Conn. App. 516, 521, 620 A.2d 1327 (1993) (time certain alimony termination provision in dissolution judgment is self-executing).

[4] Article V of the separation agreement is titled "Child Support." Paragraph 5.1 provides: "Upon the termination of the unallocated alimony and child support pursuant to Article IV hereof, the parties shall determine the amount of child support to be paid by the [defendant] during his lifetime to the [plaintiff] for the support of each of the minor children and in the event they are unable to agree, the amount of such child support payments shall be determined by a court of competent jurisdiction. The amount of child support shall be paid retroactive to the date of the termination of the unallocated alimony and support payments."

[5] Nothing in the file indicates that the parties submitted child support guidelines at the June, 2016 hearing or that Judge Tindill made a finding as to the presumptive child support under the guidelines.

[6] At the time the parties stipulated to the defendant's child support arrearage in July, 2016, the defendant did not seek a credit against his child support arrearage on the basis of an overpayment of unallocated support that he paid in 2015.

On January 30, 2019, the court issued a memorandum of decision in which it granted the defendant's motion for reimbursement of unallocated support and ordered the plaintiff to pay the defendant $81,358.40. The court, however, denied the defendant's motion to modify child support. The present appeal and the present cross appeal followed.[7]

We begin with the standard of review applicable to postdissolution matters. An appellate court "will not disturb trial court orders unless the trial court abused its legal discretion or its findings have no reasonable basis in the facts. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal facts significant to a domestic relations case. . . . 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. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law." (Citations omitted; internal quotation marks omitted.) *Gabriel* v. *Gabriel*, 324 Conn. 324, 336, 152 A.3d 1230 (2016).

I

THE PLAINTIFF'S APPEAL

The plaintiff claims that the court erred by granting the defendant's motion for order, postjudgment, and ordering her to repay the defendant $81,358.40 of the unallocated support he paid her in 2015. The plaintiff

[7] We recognize that the parties have filed appeals from separate decisions of the trial court that were issued in one memorandum of decision. There is precedent for denominating the appeals as an appeal and a cross appeal. See *Commissioner of Public Health* v. *Freedom of Information Commission*, 311 Conn. 262, 267 n.3, 86 A.3d 1044 (2014).

claims that the court misinterpreted the agreement, failed to enforce its intended terms, and added terms to the agreement. We agree with the plaintiff and, therefore, reverse in part the judgment of the trial court.

The agreement was incorporated by reference into the February 26, 2013 judgment dissolving the parties' marriage. Article IV of the agreement, titled Unallocated Alimony and Support, required the defendant to pay the plaintiff unallocated support pursuant to certain terms. The relevant paragraphs of article IV follow:

"4.1. Commencing as of the first day of March, 2013, the [defendant] shall pay to the [plaintiff], during his lifetime, until her death or remarriage, or February 28, 2017, whichever event shall first occur, the following percentages of the '*gross annual compensation*' *as hereinafter defined* in any calendar year.[8] . . . [In a year in which the defendant earned up to $1 million, the plaintiff was entitled to 40 percent of gross annual compensation, not to exceed $400,000.][9]

"4.2. All payments made from the [defendant's] base salary shall be made in cash and in equal monthly installments on the first day of each calendar month, in advance. All payments from the [defendant's] additional and/or incentive compensation *shall be made by the* [*defendant*] *to the* [*plaintiff*] *within fifteen . . . days of receipt* of such payments by the [defendant].

"4.3. (a) '*Gross annual compensation in any year*' *shall be defined* to include any and all earnings of any nature whatsoever *actually received* by the [defendant] in the form of cash or cash equivalents, or which the

[8] The agreement contained a chart governing the amount of unallocated support the defendant was to pay the plaintiff in a particular year depending on the amount of gross annual compensation that he received. The chart contained five levels of increasing annual compensation and corresponding reductions in the percentage of that compensation to which the plaintiff was entitled as unallocated support. In other words, as the defendant's compensation increased, the plaintiff's entitled percentage of it decreased.

[9] There is no dispute that the defendant earned less than $1 million in 2015.

[defendant] is entitled to receive, from any and all sources including in relation to the services rendered by the [defendant] by way of his past, current or future employment, including but not limited to salary and bonus . . . .[10]

"(c) The [defendant] shall take no action for the purpose of defeating the [plaintiff's] *timely right to receive alimony* and, in particular, shall take no action to reduce, divert, delay or defer income for the purpose of reducing, limiting or delaying the [defendant's] alimony obligation to the [plaintiff].

"4.4. The alimony payments pursuant to paragraph 4.1 hereof shall be non-modifiable as to duration by the parties or a court of competent jurisdiction and any decree of any court incorporating all or a portion of this [a]greement shall preclude such modification. The alimony payments pursuant to paragraph 4.1 shall otherwise be modifiable pursuant to [General Statutes § 46b-86 (b)].

"4.5. For each year in which the [defendant] is obligated to pay unallocated alimony and support to the [plaintiff], the [defendant] shall provide the [plaintiff] with his year-end [pay stub], W-2s, K-1s and 1099s and a copy of his federal tax return when filed with the taxing authority. In addition, the [defendant] shall provide the [plaintiff] evidence, including pay stub or distribution sheet, *each time he receives* any change in salary or bonus *within seven . . . days of receipt* or filing. In addition, the [defendant] shall provide the [plaintiff] *within seven . . . days* of his receipt, with all statements evidencing the award of restricted share units and stock options and any other deferred or incentive compensation, including but not limited to documentation reflecting when and under what circumstances the restrictions lapse and/or the options may be exercised.

[10] Paragraph 4.3 (b) pertains to the defendant's self-employment, if any, and is not implicated in the present appeal.

"4.6. In the event the [defendant] changes employment and receives compensation incident thereto, in replacement of deferred or incentive compensation to which the [plaintiff] was entitled to share as income subject to the provisions of this Article IV, she shall be entitled to share in the replacement compensation to the extent she would have shared in the original deferred or incentive compensation.

"4.7. *The* [*defendant*] *shall take no action for the purpose of defeating the* [*plaintiff's*] *timely right to receive unallocated alimony and support* and, in particular, shall take no action to reduce, divert, delay or defer income for the purpose of reducing, limiting or delaying the [defendant's] unallocated alimony and support obligation to the [plaintiff] pursuant to this Article IV." (Emphasis added; footnotes added.)

In its memorandum of decision, the court found that the defendant had requested that it "order the plaintiff to reimburse him for the unallocated alimony and child support that he overpaid in 2015. According to the reconciliation prepared by [the defendant's] prior counsel in August, 2016, the defendant paid the plaintiff $288,309.51 in 2015, but he should have paid her $206,951.11.[11] The difference of $81,358.40 is largely due to the defendant's paying the plaintiff 40 percent of the bonuses and severance payments that he received in

[11] The defendant represented in his motion for order, postjudgment, that he had "paid the plaintiff $288,309.51 [unallocated support] in calendar year 2015, and claim[ed] that he [had] overpaid the [unallocated support] in the amount of $81,251.91. Pursuant to the following calculations, [he claimed that the] plaintiff should have received $207,057.60 as [unallocated support]:

"2015 Gross Annual Income 40 [percent] Multiplied by [0].5833

"$877,440.45 $354,967.18 $207,057.60"

In a footnote in its memorandum of decision, the court noted that "the defendant in his proposed orders ask[ed] that the plaintiff be ordered to reimburse him the sum of $81,251.91. In his memorandum of law re: portion of bonus income paid in 2015 includible in annual alimony calculation[s] . . . the defendant claims that the overpayment of [unallocated support] was $81,240.07."

March and April, 2015 from RBS and [Jefferies, LLC]. The defendant made these payments a few months before the plaintiff remarried." (Footnote added and footnote omitted.) The court continued that, at oral argument on September 11, 2018, the defendant contended that he had overpaid unallocated support in 2015 because the plaintiff was only entitled to receive 40 percent of his gross annual compensation on a prorated basis (i.e., for seven months, not for the entire year), in view of her remarriage in August, 2015. The plaintiff countered that the agreement did not contain a provision for prorating unallocated support and, therefore, she had no obligation to refund any part of the unallocated support she received in 2015.

The court determined that the defendant's obligation to pay the plaintiff unallocated support terminated when the plaintiff remarried and further determined that, pursuant to paragraph 4.1 of the agreement, "the plaintiff was entitled to receive 40 percent of the defendant's 'gross annual compensation in any year,' as defined in paragraph 4.3 of the [agreement], between $0 and [$1 million]. . . ." Although the court agreed with the plaintiff that nothing in the agreement "states explicitly that the defendant's annual unallocated . . . support obligation should be prorated if it terminated prior to the end of a calendar year," the court found that "[t]here is also nothing in the . . . agreement to suggest that the plaintiff would be entitled to a windfall if she remarried shortly after the defendant paid her 40 percent of his annual bonus, or that the defendant would be entitled to keep 100 percent of his annual bonus if he received it a few weeks after the plaintiff remarried."

As part of its analysis, the court set forth *a portion* of paragraph 4.5 of the agreement that requires the defendant in each year he is obligated to pay unallocated support to provide the plaintiff with his "year-end [pay stub], W-2s, K-1s and 1099s and a copy of his

federal tax return . . . .''[12] The court found that, beginning in 2013, and continuing for each year in which he had an unallocated support obligation, the defendant was to provide his year-end tax documents to the plaintiff, including 2015 when his unallocated support obligation terminated in August of that year. The court determined that the defendant would have had to provide the plaintiff with year-end tax documents in 2017, had his unallocated support obligation continued until February 28, 2017, when his obligation terminated under the terms of the agreement. The court concluded that the plaintiff had a right to review the defendant's tax documents to confirm that she had received the proper percentage of his ''gross annual compensation'' for that portion of the year, whether it was seven months or two months or twelve months.

The court also stated that ''[i]mplicit in paragraph 4.1 is that the defendant's [unallocated support] obligation, which was based on his gross annual compensation, was to be prorated when it terminated prior to December 31. Otherwise there would be no need to review the defendant's year-end tax documents for the year in which the [unallocated support] terminated; the only documents required would be evidence of income received to the date of termination.'' The court found that ''the parties intended that the defendant's [unallocated support] obligation would be prorated if it terminated prior to the end of the year.''[13] The court, there-

[12] The remainder of paragraph 4.5 provides: ''In addition, the [defendant] shall provide the [plaintiff] evidence, including pay stub or distribution sheet, each time he receives any change in salary or bonus *within seven . . . days of receipt or filing*. In addition, the [defendant] shall provide the [plaintiff] within seven . . . days of his receipt, with all statements evidencing the award of restricted share units and stock options and any other deferred or incentive compensation, including but not limited to documentation reflecting when and under what circumstances the restrictions lapse and/or the options may be exercised.'' (Emphasis added.)

[13] In support of its determination regarding the parties' intent, the court cited *King* v. *Colville-King*, Superior Court, judicial district of Waterbury, Docket No. FA-08-4018279-S (February 20, 2015), and *Upton* v. *Upton*, Supe-

fore, granted the defendant's motion and ordered the plaintiff to reimburse the defendant $81,358.40.

Our resolution of the plaintiff's claim turns on our construction of article IV of the agreement. We are guided by the principles of contract construction and the applicable standard of review. "It is well established that a separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts. . . . When construing a contract, we seek to determine the intent of the parties from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract. . . . Extrinsic evidence is always

rior Court, judicial district of Fairfield, Docket No. FA-06-4017460-S (May 11, 2007) (clarified in a subsequent memorandum of decision dated February 20, 2008), as situations in which the court prorated alimony payments. Those cases are distinguishable in that they do not concern the construction of a separation agreement but, rather, the manner in which the court resolved payment of alimony from bonuses when events beyond the control of the parties transpired.

In *King* v. *Colville-King*, supra, Superior Court, Docket No. FA-08-4018279-S, the alimony payer's bonuses initially were to be paid monthly as he received them. His employer, however, changed its bonus payment schedule from monthly to annually in the final year in which alimony was to be paid. The court ordered the final bonus payment to be prorated at the end of the year to maintain the integrity of the original judgment. In *Upton*, the trial court failed to include a schedule of alimony payments in its judgment of dissolution. It opened the judgment in February, 2008, to rectify the omission and issued an order regarding regular payments on the basis of the payer's base pay and a prorated schedule for bonus compensation. *Upton* v. *Upton*, Superior Court, judicial district of Fairfield, Docket No. FA-06-4017460-S (February 20, 2008).

admissible, however, to explain an ambiguity appearing in the instrument. . . . When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact. . . . When the language is clear and unambiguous, however, the contract must be given effect according to its terms, and the determination of the parties' intent is a question of law. . . .

"A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity when ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . .

"In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties." (Internal quotation marks omitted.) *Grogan* v. *Penza*, 194 Conn. App. 72, 78, 220 A.3d 147 (2019). "If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Internal quotation marks omitted.) Id., 79. "A word is ambiguous when it is capable of being interpreted by reasonably well-informed persons in either of two or more senses. . . . Ambiguous also means unclear or uncertain . . . [or] that which is susceptible of more than one interpretation or understood in more ways than one." (Citation omitted; internal quotation marks omitted.) *Bijur* v. *Bijur*, 79 Conn. App. 752, 760, 831 A.2d 824 (2003). Importantly, an agreement is not ambiguous because it does not contain a certain provision or is allegedly incomplete. See *Massey* v. *Branford*, 118 Conn. App. 491, 499, 985 A.2d 335 (2009), cert. denied, 295 Conn. 913, 990 A.2d 345 (2010).

"[T]he threshold determination in the construction of a separation agreement . . . is whether, examining

the relevant provisions in light of the context of the situation, the provision at issue is clear and unambiguous, which is a question of law over which our review is plenary." (Internal quotation marks omitted.) *Fazio* v. *Fazio*, 162 Conn. App. 236, 244, 131 A.3d 1162, cert. denied, 320 Conn. 922, 132 A.3d 1095 (2016). On the basis of our plenary review of article IV of the agreement, we conclude that it is clear and unambiguous.[14]

In his brief, the defendant argues that "to effectuate the intent of the parties that the plaintiff share in the defendant's 'gross annual compensation,' that entitlement must be read to mean that, in this instance, the plaintiff shall share in 40 [percent] of *all* 'gross annual compensation' received by the defendant in 2015, prorated for the seven out of twelve months of 2015 in which she was entitled to receive [unallocated support] . . . ." (Emphasis added.) We disagree, as paragraph 4.1 does not contain the word *all*. As the plaintiff points out in her reply brief, the term "gross annual compensation in any calendar year" does not include the term prorated.

"Gross annual compensation in any calendar year" is defined in paragraph 4.3 (a) of the agreement and provides, in part, " 'Gross annual compensation in any year' shall be defined to include any and all earnings of any nature *whatsoever actually received by the* [*defendant*] in the form of cash or cash equivalents, or which the [defendant] is entitled to receive, from any and all sources including in relation to the services rendered by the [defendant] by way of his past, current

[14] The relevant portion of paragraph 4.1 of the agreement provides: "Commencing as of the first day of March, 2013, the [defendant] shall pay to the [plaintiff] . . . until her . . . remarriage . . . the following percentage of the 'gross annual compensation' as hereinafter defined in any calendar year . . . ." The court misstated this portion of paragraph 4.1 in its memorandum of decision when it wrote that "the plaintiff was entitled to receive 40 percent of the defendant's 'gross annual compensation in any year,' as defined in paragraph 4.3 . . . between $0 and [$1 million] . . . ."

or future employment, including but not limited to salary and bonus . . . .'' The paragraph defines what types of payments constitute gross annual compensation. It does not provide that gross annual compensation is the sum total of the gross annual compensation that the defendant receives in a year.

Significantly, paragraph 4.3 (a) does not address when the defendant is to pay the plaintiff the relevant percentage of the gross annual compensation he receives. The time in which he is to make unallocated support payments to the plaintiff is set forth in paragraph 4.2, to wit: ''All payments made from the [defendant's] base salary shall be made . . . on the first day of each calendar month, in advance. All payments from the [defendant's] additional and/or incentive compensation shall be made by the [defendant] . . . *within fifteen . . . days of receipt of such payment* by the [defendant].'' (Emphasis added.)

A ''contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . .'' (Internal quotation marks omitted.) *Grogan* v. *Penza*, supra, 194 Conn. App. 79.

Pursuant to paragraphs 4.1, 4.2, and 4.3 (a) of the agreement, in the year 2015, the defendant was required to pay unallocated support to the plaintiff from the *gross annual compensation that he actually received* until August 8, 2015, when his unallocated support obligation terminated due to the plaintiff's remarriage. The defendant received bonuses and severance pay, which by definition is gross annual compensation, in March and April, at a time in which he was required to pay the plaintiff 40 percent thereof within *fifteen days*. None of those three paragraphs, or any other paragraph in the agreement, sets forth conditions under which the plaintiff may have been required to return unallocated

support that she received at a time she was entitled to receive it.[15]

The case of *Bijur* v. *Bijur*, supra, 79 Conn. App. 752, is instructive. In *Bijur*, the defendant filed a motion seeking reimbursement of alimony he claimed that he had overpaid the plaintiff. The issue in the case centered on the meaning of the word *retirement*. Id., 755. The defendant retired in the sense that he had stopped working on February 4, 2001. Id., 754–55. He paid the plaintiff alimony in February, 2001, but in no month thereafter. The plaintiff filed a motion for contempt in which she alleged that the defendant had failed to pay her alimony pursuant to the terms of the separation agreement, which required the defendant to pay alimony when he retired subject to the distribution of his pension. Id., 756. A subissue in the case was the meaning of pension distribution. The trial court denied the defendant's motion for reimbursement and ordered the defendant to pay the plaintiff retroactively to the date of his pension distribution, but did not find him to be in contempt. Id. The defendant appealed to this court, claiming that the trial court had misinterpreted the parties' separation agreement with respect to the duration of his alimony obligation. Id., 756–57. This court found that the meaning of *retirement* in the separation agreement was ambiguous and that the parties had offered reasonable but differing interpretations of *that portion of* the agreement. Id., 761. After resolving the distribution question, and therefore the date of the defendant's retirement (March 1); id., 764; this court reversed the trial court's judgment ordering the defendant to pay the plaintiff alimony retroactively to March, but affirmed the trial

[15] As stated previously, the plaintiff was entitled to receive unallocated support until she remarried. The only factor in the agreement limiting the plaintiff's receipt of unallocated support was a cap of $400,000 in a year in which the defendant received gross annual compensation of $1 million or less. The unallocated support that the defendant paid the plaintiff in 2015, $288,309.51, did not approach the $400,000 cap.

court's decision denying the defendant's motion for disgorgement from the plaintiff on a per day, prorated basis for the month of February, following the day he stopped working, for the following reasons. Id., 766.

"It is well settled that in a dissolution of marriage action, the distribution of assets rests within the sound discretion of the court . . . . To conclude that the court abused its discretion by refusing to order the plaintiff to refund the money, we must determine whether the court incorrectly applied the law or could not reasonably have concluded as it did. . . .

"Periodic alimony is a type of permanent alimony paid at scheduled intervals. The purpose of periodic alimony is primarily to continue the duty to support the recipient spouse. . . . [T]he right to enforce each periodic payment accrues on each payment as it matures. . . . The periodic alimony payment matures when it becomes due." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 766–67; see also 24A Am. Jur. 2d 121, Divorce and Separation § 666 (2008). The *Bijur* defendant was required to make alimony payments on the first day of the month in advance. Because he paid his February alimony obligation on the first of the month, he was not entitled to a per diem disgorgement for the remainder of the month. *Bijur* v. *Bijur*, supra, 767.

In the present case, paragraph 4.2 required the defendant to pay the plaintiff gross annual compensation in the form of bonuses and severance pay within fifteen days of its receipt. In March and April, 2015, the plaintiff was entitled to receive unallocated support. The defendant was obligated to pay the plaintiff unallocated support from the bonus and severance pay he received in March and April, 2015. His unallocated support payment matured and became due fifteen days after he received each payment. The defendant, therefore, was not entitled to reimbursement for that which he was obligated to pay the plaintiff at the time.

The plaintiff also claims that the court improperly added terms to the agreement when it stated, "[i]mplicit in paragraph 4.1 is that the defendant's unallocated [support] obligation, which was based on his gross annual compensation, was to be prorated when it terminated prior to December 31." The term *prorated* is not found anywhere in the agreement. "In interpreting a contract courts cannot add new or different terms." (Internal quotation marks omitted.) *Stratford* v. *Winterbottom*, 151 Conn. App. 60, 73, 95 A.3d 538, cert. denied, 314 Conn. 911, 100 A.3d 403 (2014). "The intention of the parties to a contract is to be determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. The question is not what intention existed in the minds of the parties but *what intention is expressed in the language used*." (Emphasis added.) *Ives* v. *Willimantic*, 121 Conn. 408, 411, 185 A. 427 (1936). The agreement contains no provision that the unallocated support was to be prorated if it terminated prior to the end of a calendar year.[16]

An agreement is not ambiguous because it does not contain a provision or is allegedly incomplete. In *Massey* v. *Branford*, supra, 118 Conn. App. 498–99, this court affirmed the judgment of the trial court, which rejected the plaintiffs' claim that the settlement agreement was incomplete because it did not include the name of a nonparty. See also *Kostak* v. *Board of Education*, Superior Court, judicial district of Litchfield,

[16] In concluding that prorating was called for, the court relied on the provisions of the agreement requiring the defendant to provide calendar year-end pay stubs and tax documents. The court minimized the significance of the defendant's obligation to provide the plaintiff with evidence of bonus and severance payments within seven days of receipt or a change in his base compensation. Those requirements indicate that the defendant was to apprise the plaintiff of his compensation as he received it. The plaintiff therefore was able to determine whether she was receiving timely payments. The plaintiff also has argued on appeal that the purpose of the defendant's providing year-end tax documents was for recalculation of child support under article V of the agreement. See part II of this opinion.

Docket No. CV-86-0043374-S (June 26, 2006) (rejecting plaintiff's claim that settlement agreement was incomplete because certain term was not included in it).

The evidence in the present case indicates that each of the parties has a high net worth and *is* accustomed to sophisticated financial matters. See part II of this opinion. At the time they were divorced, the parties were represented by experienced counsel who specialized in dissolution matters. Had the parties wanted to include a pro rata provision, or a true-up as it is sometimes called, in the agreement, they could have done so. Pro rata and true-up provisions commonly are incorporated in separation agreements. See, e.g., *Grogan* v. *Penza*, supra, 194 Conn. App. 75[17]; *Nadel* v. *Luttinger*, 168 Conn. App. 689, 693, 147 A.3d 1075 (2016).[18] The parties did not include language providing for the unallocated support that the defendant paid the plaintiff to be prorated if the support obligation terminated before December 31. "A court cannot ignore or disregard the language of the agreement because in hindsight an additional or more expansive term would have been better for one of the parties." *Grogan* v. *Penza*, supra, 80; see also *Crews* v. *Crews*, 295 Conn. 153, 169, 989 A.2d 1060 (2010). The court, therefore, improperly read a term into the agreement when it concluded that it was *implicit* that the defendant's gross annual compensation was to be prorated.

Child support and alimony are not delineated in an order of unallocated support. This court has stated, in

[17] "The alimony paid by the [plaintiff] to the [defendant] shall be paid in three components (monthly . . . and quarterly payments totaling $160,000 based on the first $550,000 of [the plaintiff's] income, and a year-end [true-up] alimony payment based on gross income of the [plaintiff] between $550,000 and $750,000)." (Internal quotation marks omitted.) *Grogan* v. *Penza*, supra, 194 Conn. App. 75.

[18] "Within [thirty] days after filing of the [defendant's] tax return in which the receipt of the restricted stock units are reflected, the parties shall true-up to share equitably the tax burden on the vesting of the [restricted stock units]." (Internal quotation marks omitted.) *Nadel* v. *Luttinger*, supra, 168 Conn. App. 693.

the context of a motion for modification of child support, that "[b]ecause an unallocated order incorporates alimony and child support without delineating specific amounts for each component, the unallocated order, along with other financial orders, necessarily includes a portion attributable to child support in an amount sufficient to satisfy the [child support] guidelines. . . . Thus, to decide a motion to modify in this situation, a trial court must determine what part of the original decree constituted modifiable child support and what part constituted nonmodifiable alimony." (Citation omitted; internal quotation marks omitted.) *Malpeso* v. *Malpeso*, 165 Conn. App. 151, 165–66, 138 A.3d 1069 (2016). In other words, before the court may rule on the motion to modify, it must unbundle the unallocated support. Id.

In the present case, the plaintiff's right to unallocated support terminated in August, 2015. In June, 2016, the parties stipulated that the defendant's child support obligation was $4250 per month with step-downs as each one of their children reached the age of majority. A few weeks later, the parties stipulated to the defendant's child support arrearage retroactive to August, 2015. As noted in part II of this opinion, no court determined the defendant's child support obligation at the time of dissolution in 2013, or in June, 2016, when Judge Tindill accepted the parties' child support stipulation. See footnote 20 of this opinion. The fact that the parties did not seek to unbundle alimony and child support in the defendant's unallocated payments at that time is telling. It does not appear that, at the time the parties negotiated the defendant's child support obligation and related arrearage, the defendant claimed an overpayment of unallocated support to offset the arrearage. If the parties had intended to prorate the unallocated support the plaintiff received for only seven months in 2015, any claimed overpayment would have been taken into account and placed on the record. The fact that

there was no mention of an overpayment in June or July, 2016, does not support the defendant's position that the parties intended to prorate unallocated support that terminated before the end of a calendar year.

For the foregoing reasons, the judgment of the trial court with respect to the granting of the defendant's motion for order, postjudgment, is reversed and the case is remanded with direction to deny the motion.

II

THE DEFENDANT'S CROSS APPEAL

In his cross appeal, the defendant claims that the court improperly denied his motion for modification of child support by concluding that the reduction in his earned income did not constitute a substantial change in circumstances. We disagree.

"[General Statutes §] 46b-86 governs the modification of [a] child support order after the date of a dissolution judgment. . . . Section 46b-86 (a)[19] permits the court to modify . . . child support orders in two alternative circumstances. Pursuant to this statute, a court may not modify [a] child support order unless there is first either (1) a showing of a substantial change in the circumstances of either party *or* (2) a showing that the final order for child support substantially deviates from the child support guidelines . . . ." (Emphasis added; footnote added and omitted; internal quotation marks

[19] General Statutes § 46b-86 (a) provides in relevant part: "Unless and to the extent that the decree precludes modification, any final order for the periodic payment of . . . support . . . may, at any time thereafter, be . . . modified by the court upon a showing of a substantial change in the circumstances of either party or upon a showing that the final order for child support substantially deviates from the child support guidelines established pursuant to section 46b-215a, unless there was a specific finding on the record that the application of the guidelines would be inequitable or inappropriate. There shall be a rebuttable presumption that any deviation of less than fifteen per cent from the child support guidelines is not substantial and any deviation of fifteen per cent or more from the guidelines is substantial. . . ."

omitted.) *De Almeida-Kennedy* v. *Kennedy*, 188 Conn. App. 670, 675–76, 205 A.3d 704 (quoting *Weinstein* v. *Weinstein*, 104 Conn. App. 482, 491–92, 934 A.2d 306 (2007), cert. denied, 285 Conn. 911, 943 A.2d 472 (2008)), cert. denied, 332 Conn. 909, 210 A.3d 566 (2019).

The following additional facts are relevant to our resolution of the defendant's cross appeal. As noted previously in part I of this opinion, the parties stipulated in June, 2016, that from the time his unallocated support obligation terminated in August, 2015, the defendant's child support obligation was $4250 a month, subject to a one-third reduction when each one of the parties' children reached the age of majority. On January 9, 2017, the defendant filed a motion to modify his child support obligation because "he ha[d] been terminated from his employment and no longer ha[d] any earned income." He moved "for an order modifying his child support obligation to an amount that is consistent with the current . . . child support guidelines." The defendant did not plead that the amount of child support that he was paying pursuant to the parties' stipulation deviated from the child support guidelines.

The parties appeared before the court to argue the defendant's motion for modification of child support in September, 2018. The defendant testified at length on both direct and cross-examination regarding his income, employment, and expenses. When ruling on the motion, the court recited the procedural history regarding the defendant's child support obligation, specifically, that paragraph 4.1 of the agreement required the defendant to pay unallocated support to the plaintiff until her remarriage. When the plaintiff remarried on August 8, 2015, the defendant stopped paying her unallocated support. In June, 2016, the parties stipulated to the defendant's child support obligation; the defendant agreed to pay the plaintiff child support in the amount of $4250

per month retroactive to August, 2015.[20] See footnote 21 of this opinion.

In addition, the court found that at the time of the June, 2016 child support stipulation, the defendant was a bond trader employed by Jefferies, LLC, where his annual base salary was $400,000. According to his May 20, 2016 financial affidavit, the defendant's gross base monthly income from employment was $33,333 and his net monthly income from employment was $19,580. His total monthly income, however, was $28,345, which included his net base monthly employment, interest, dividend, and bonus income. He reported monthly expenses of $38,180. His assets were valued at $10,166,496 and his liabilities at $3600.[21]

[20] Paragraph 4 of the June, 2016 stipulation provided that the "defendant's obligation to pay the plaintiff $4250 per month shall be reduced by one-third . . . as each child attains age eighteen, or if a child is still attending high school when he attains age eighteen . . . until a child completes his high school education or attains age nineteen . . . whichever event shall first occur." Paragraph 4 also provided that it "shall be without prejudice to either party's right to file a motion to modify the child support and/or the amount of the automatic reduction." Under paragraph 5 of the stipulation, the defendant acknowledged his obligation under the separation agreement to pay for the children's education, medical insurance, and unreimbursed medical expenses.

[21] In a footnote, Judge Heller stated that there were no child support guidelines worksheets in the file for the June, 2016 hearing. The court further stated that "[c]hild support guidelines worksheets that were prepared by counsel in connection with the June, 2016 stipulation were admitted into evidence as [p]laintiff's [e]xhibits 10 and 11 [at the September 11, 2018 hearing]. Counsel for the defendant also prepared a child support guidelines worksheet for the September 11, 2018 hearing based on the parties' May, 2016 financial affidavits, which was admitted into evidence as [d]efendant's exhibit S. The defendant's presumptive weekly child support obligation range[d] from $690 to $2115 on these child support guidelines worksheets. *Nothing in the court file reflects the court's findings in June, 2016, as to the presumptive weekly child support obligation and any deviation from the guidelines. The parties offered no evidence in that regard during the September 11, 2018 hearing.*" (Emphasis added.)

We have reviewed the record and found no evidence that Judge Tindill unbundled the unallocated support and determined what portion of the unallocated support was designated for child support. See *Malpeso* v. *Malpeso*, supra, 165 Conn. App. 165 (unallocated support orders incorporate

The court found that the defendant's employment with Jefferies, LLC, ended in January, 2017, and he was given one month's salary as severance. The defendant was unemployed from that time until August 22, 2017, when he joined Stifel, Nicolaus & Co., Inc. (Stifel), as a bond trader with an annual base salary of $250,000. The defendant's September 11, 2018 financial affidavit indicated a gross monthly salary of $20,833 and a net monthly salary of $12,485. His net average monthly commissions were $151. The defendant estimated his monthly income from interest and dividends to be $5590. His total monthly expenses were $40,420, his assets were valued at $11,044,794, and his liabilities were valued at $4909. Stifel lent the defendant $150,000, a loan forgivable over three years.

With respect to the plaintiff, the court found that she had not worked outside her home since she became pregnant with the parties' eldest child. Her May 18, 2016 financial affidavit reflected an average monthly income of $1648 from interest and dividends. Her monthly expenses were $41,027. She had assets valued at $6,309,279 and no liabilities. The plaintiff's September 6, 2018 financial affidavit reflected a net monthly income from investments of $6296 and monthly rental income of $1458. She reported monthly expenses of $37,697, which included private school tuition for the parties' children that was paid for by the defendant and household expenses that were paid for by her husband.[22]

alimony and child support without delineating amounts for each; unallocated order necessarily includes portion attributable to child support); see also *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 558, 46 A.3d 112 (2012).

Judge Heller's decision indicates that she did not consider the child support guideline worksheets submitted by the parties when she determined that the defendant had not met his burden to demonstrate that there had been a substantial change in circumstances. Her decision was predicated on the defendant's financial affidavits.

[22] The court noted the plaintiff's testimony that her net monthly rental income may not be accurate on her current financial affidavit and that she may have made an error in her tax calculations.

The court acknowledged the principles of law governing the modification of child support. Section 46-86 (a) governs the modification of a child support order after the date of dissolution and provides in relevant part: "Unless and to the extent that the decree precludes modification . . . any final order for the periodic payment of . . . support . . . may, at any time thereafter, be . . . set aside, altered or modified . . . upon a showing of a substantial change in the circumstances of either party . . . ." See also *Weinstein* v. *Weinstein*, supra, 104 Conn. App. 482. "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 part to it." *Borkowski* v. *Borkowski*, 228 Conn. 729, 737–38, 638 A.2d 1060 (1994).

The court recognized that under the substantial change in circumstances provision of § 46b-86 (a), "[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 . . . make an order for modification. . . . A party moving for a modification of [a support] order must clearly and definitely establish the occurrence of a substantial change in the circumstances of either party that makes the continuation of the prior order unfair and improper. . . . The party seeking modification bears the burden of showing the existence of a substantial change in the circumstances." (Emphasis added; internal quotation marks omitted.) *Light* v. *Grimes*, 156 Conn. App. 53, 65, 111 A.3d 551 (2015); *Fox* v. *Fox*, 152 Conn. App. 611, 621, 99 A.3d 1206, cert. denied, 314 Conn. 945, 103 A.3d 977 (2014) (same). In determining whether there has been a substantial change of circumstances of one or both of the parties, "the trial court is limited to considering

events arising after the dissolution decree or the most recent modification thereof." *Olson* v. *Mohammadu*, 310 Conn. 665, 675, 81 A.3d 215 (2013).

"In the context of a trial court's consideration of a motion to modify, *the guidelines become relevant only after a change in circumstances has been shown, if that is the ground urged in support of modification* . . . or in determining whether the existing child support order substantially deviates from the guidelines, if that is the ground urged in support of modification." (Citation omitted; emphasis added.) *Mullin* v. *Mullin*, 28 Conn. App. 632, 635–36, 612 A.2d 796 (1992).

"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 exiting order." *Borkowski* v. *Borkowski*, supra, 228 Conn. 738. A court's findings on the basis of financial affidavits alone are inadequate to support a modification without any record that the court had evaluated the circumstances surrounding the payer's claimed inability to pay. See *Olson* v. *Mohammadu*, supra, 310 Conn. 676; *Sanchione* v. *Sanchione*, 173 Conn. 397, 407, 378 A.2d 522 (1977).

In the present case, the court determined that June, 2016, was the starting point for its determination as to whether there had been a substantial change in the parties' circumstances when Judge Tindill entered the parties' child support stipulation as an order of the court.[23]

[23] Both parties submitted child support guideline worksheets at the September, 2018 hearing, but Judge Heller did not indicate which, if either, set of worksheets she relied on in determining that there had been no substantial change in circumstances. In a footnote, the court stated that "[c]hild support guidelines worksheets that were prepared by counsel in connection with the June, 2016 stipulation were admitted into evidence as [p]laintiff's [e]xhibits . . . . Counsel for the defendant also prepared a child support guidelines worksheet for the September 11, 2018 hearing based on the parties' May, 2016 financial affidavits, which was admitted into evidence as [d]efendant's [e]xhibit . . . . The defendant's presumptive weekly child support obligation ranges from $690 to $2115 on these child support guidelines worksheets.

Judge Heller examined the evidence presented at the September 11, 2018 hearing to determine whether the defendant clearly and definitely had established that there was a substantial change in circumstances. The court found that in September, 2018, the defendant's financial circumstances had not changed substantially since June, 2016.[24] Significantly, the court found that the defendant was able to maintain his lifestyle even though he had not been employed from January until August, 2017. Although his net monthly base salary had declined by 36 percent, his assets at the time of the 2018 hearing exceeded $11,000,000 and his monthly expenses and liabilities were essentially unchanged from June, 2016. The court considered the defendant's total financial picture on the basis of the evidence presented and found that he had "failed to establish the threshold requirement of . . . § 46b-86 (a)—he has not shown that a substantial change in his financial circumstances has occurred since the parties entered into the June, 2016 stipulation." The court therefore denied the defendant's motion to modify his child support obligation.

Nothing in the court file reflects the court's findings in June, 2016, as to the presumptive weekly child support obligation and any deviation from the guidelines. The parties offered no evidence in that regard during the September 11, 2018 hearing." Judge Heller also made no finding regarding the presumptive child support under the guidelines.

[24] The court did not specifically find the amount of the defendant's total net income in 2017 or earnings to the date of the 2018 hearing. In its memorandum of decision, the court refers to the figures on the defendant's financial affidavits. The court made no finding as to whether it considered the defendant's deferred compensation to be income. The defendant retained his RBS deferred compensation pursuant to the property distribution in the agreement. Neither party filed a motion for articulation seeking clarification of the court's finding.

General Statutes § 46b-82 does not define income. In such instances, we look to the ordinary meaning of the word. See General Statutes § 1-1 (a); see also *Gay* v. *Gay*, 70 Conn. App. 772, 800 A.2d 1231 (2002), aff'd, 266 Conn. 641, 835 A.2d 1 (2003). Income is defined as "a gain or recurrent benefit that is [usually] measured in money and for a given period of time, derived from capital, labor, or a combination of both, includes gains from transactions in capital assets, but excludes unrealized advances in value . . . ." (Internal quotation marks omitted.) *Gay* v. *Gay*, supra, 778.

The court found the amounts listed on his financial affidavit, but did not find his total net income for either 2017 or 2018.[25] Neither party requested an articulation for that purpose. See Practice Book § 66-5. The court concluded that the defendant had failed to establish the threshold requirement of § 46b-86 (a) that there had been a substantial change in his financial circumstances since the parties entered into the 2016 child support stipulation and denied the defendant's motion for modification of child support obligation.

On appeal, the defendant claims that the court improperly concluded that his reduction in income did not constitute a substantial change in circumstances because the court improperly (1) considered his assets and expenses when it determined that his significant reduction in income did not constitute a substantial change in circumstances, (2) failed to consider that the decrease in the defendant's income decreased the presumptive child support order by more than 15 percent, (3) considered his income only as of the date of the hearing, rather than at both the time he filed the motion for modification of child support and the date of the hearing on that motion,[26] (4) included other income for purposes of his support obligation, (5) con-

[25] The court found pursuant to the defendant's September 11, 2018 financial affidavit that he had a gross monthly salary of $20,833 and a net monthly salary of $12,485. He reported gross monthly average commissions of $403, but he testified that his gross monthly average commissions were actually $803. His estimated monthly interest and dividend income is $5590. His total net monthly income is $18,226 according to his current financial affidavit. He reported total monthly expenses of $40,420. His assets are valued at $11,044,794. His liabilities total $4909. He also had a contingent debt to Stifel of $150,000.

[26] A trial court has discretion to modify retroactively child support to different amounts especially during long periods of time while a motion is pending. See *Zahringer* v. *Zahringer*, 124 Conn. App. 672, 689, 6 A.3d 141 (2010). The defendant filed one motion for modification of child support in January, 2017. He did not amend the motion or file another motion for modification of child support when he found new employment in August, 2017. The defendant does not claim that he argued for two modified child support orders during the September, 2018 hearing. He, however, did file

sidered as income the return on his capital contribution in an investment, (6) considered the exercise of stock units awarded to him as part of the property division of the parties' assets at the time of dissolution, and (7) imputed a rate of return on his investments that he did not realize.[27] He also claims that with his income at the time he filed the motion for modification of child support and at the time the motion was heard, the decrease in presumptive child support was greater than 15 percent from the most recent order, thereby providing a presumptive substantial change in circumstances.[28]

proposed orders in which he proposed that the court determine his presumptive support obligation pursuant to the guidelines for the period of time that he was unemployed, find that he overpaid the plaintiff, and order her to reimburse him for the overpayment. He also proposed that the court determine his presumptive child support obligation pursuant to the guidelines for the time he found new employment to the date of the September, 2018 hearing, find that he overpaid the plaintiff, and order the plaintiff to reimburse him for the overpayment.

The court did not address the defendant's proposed orders in its memorandum of decision. The defendant did not file a motion for articulation, asking the court to articulate whether it had considered his proposal for separate orders for the respective periods of time. It is the appellant's burden to provide an adequate record for review. See *State* v. *Feliciano*, 74 Conn. App. 391, 402, 812 A.2d 141 (2002), cert. denied, 262 Conn. 952, 817 A.2d 110 (2003). "In a situation in which the court has not set forth the factual and legal basis for a discretionary ruling, and the appellant has failed to seek an articulation in accordance with Practice Book § 66-5, we must presume that the court acted correctly and can only conclude that there has been an abuse of discretion if such abuse is apparent on the fact of the record before us." *Bank of New York Mellon* v. *Horsey*, 182 Conn. App. 417, 430, 190 A.3d 105, cert. denied, 330 Conn. 928, 194 A.3d 1195 (2018). Inasmuch as the defendant sought two modification of child support orders on the basis of the child support guidelines in a case in which the court did not find a substantial change in circumstances, we cannot conclude that the court abused its discretion.

[27] In its memorandum of decision, the court did not discuss the defendant's rate of return on his investments. We decline to address the claim further.

[28] The defendant did not allege that the order that entered in June, 2016, deviated from the child support guidelines. The defendant's motion for modification of child support alleged the "[d]efendant represents that he has been terminated from his employment and no longer has any earned income." He requested that the court enter a child support order consistent with the current child support guidelines. At the hearing on September 11,

The plaintiff responded in her brief that the trial court properly found that there had been no substantial change in the defendant's financial circumstances by comparing his September, 2018 financial affidavit with his May, 2016 financial affidavit. The plaintiff acknowledges, as did the trial court, that the defendant had sustained a decline in earned income but contends that the defendant's overall financial situation had not changed substantially. Although the defendant's base salary was $400,000 in 2016 and had decreased to $250,000 in 2018, in 2016, his assets were valued at $10,166,496 and his liabilities totaled $3600. In 2018, his assets were valued at $11,044,794 and his liabilities at $4909. Even though the defendant had been unemployed from January to August in 2017, his net worth increased by $878,298. In early 2017, he received a deferred cash payment of $1.3 million from RBS, his former employer, and a second deferred payment in 2018. The plaintiff also argued that the court found no evidence that the defendant's lifestyle had changed between June, 2016 and September, 2018. In addition to his earned income, in 2017, he received approximately $66,000 in dividends and interest from his investment portfolio. The plaintiff noted that, according to the defendant's financial affidavits, his expenses were greater than his earned income, indicating that he supported his lifestyle, in part, with returns from his investments.

On the basis of our review of the record, particularly the evidence regarding the defendant's ability to maintain his lifestyle, spending habits, travel, and assets[29];

2018, counsel for the defendant argued that the court should enter a child support order consistent with the income shared model. The defendant did not argue that the rebuttable presumption that a 15 percent difference in the presumptive child support amount applied.

[29] At the hearing on September 11, 2018, the defendant testified as follows in response to questions from the plaintiff's counsel:

"Q.: [W]hen you lost your job in December of 2016, did you do anything to try to reduce your expenses?

"A.: Do anything?

the briefs of the parties; and their oral arguments, we conclude that the court did not abuse its discretion by denying the defendant's motion for modification because the defendant failed to carry his burden to demonstrate clearly and definitely that there has been a substantial change in circumstances notwithstanding his diminution in salary and period of unemployment.

We acknowledge that the decrease in the defendant's earned income may have created a rebuttable presumption of a greater than 15 percent deviation from the child support guidelines, but neither Judge Tindill nor Judge Heller ever made a finding as to the presumptive child support under the guidelines. In 2016, the defendant agreed to pay child support of $4250 per month without a finding as to the presumptive amount under the guidelines. It is apparent to us from the memorandum of decision that Judge Heller determined that the defendant's overall financial circumstances, which had improved between 2016 and 2018, did not represent a substantial change of circumstances and, therefore, the presumption was rebutted.

"Q.: Make any changes.

"A.: I mean I—with regard to my boys, I kind of try to keep a lot of the stuff status quo, especially like keeping the [nannies] that were around. I generally thought I was a frugal person by nature. I mean. . . .

"Q.: Okay. So, is it your testimony that there's nothing specific that you can recall you did to try to spend less money even during a period when you weren't working?

"A.: I probably didn't do anything to spend less money.

"Q.: On your financial affidavit, your current one . . . . The September 1 . . . 2018. Looking at page 3, letter K, entertain, travel, and visitation. You see that, sir?

"A.: Yup.

"Q.: Trips and vacations. You list 1750 a month, which is about $21,000 a year. Where did you derive that figure or how did you arrive at that figure?

"A.: For this year or for in general?

"Q.: For inclusion on that affidavit, sir.

"A.: *I try to keep a lot of the vacations and stuff I do from year to year consistent. So I'm sure it's similar to.*

"Q.: When you say vacations from year to year, does that include travel with your sons as well as not with your sons?

"A.: Yes." (Emphasis added.)

First, as a matter of law, we conclude that any claim that the court failed to consider the defendant's argument regarding deviations from the child support guidelines or that the court failed to consider the child support guidelines fails. The basis of the defendant's motion for modification was a substantial change in circumstances due to his loss of earned income, not a deviation from the child support guidelines. The court carefully examined the evidence, including the defendant's testimony regarding his income and spending habits, and the defendant's financial affidavit and determined that there had not been a substantial change in his financial circumstances. Unless the defendant had demonstrated a substantial change in circumstances, which he did not, there was no need for the court to consider the child support guidelines.[30]

The defendant's claims that the court improperly considered his assets and expenses and included "other income" as requested by the plaintiff when it found that there had been no substantial change in circumstances are without merit. The court did not address the defendant's "other income," whatever it may be. The court found that there was no substantial change in circum-

[30] As noted, § 46b-86 (a) permits a trial court to modify child support orders in two alternative cases, to wit: upon a showing of a substantial change in circumstances *or* upon a showing that the final order for child support deviates from the guidelines. In the present case, the defendant grounded his motion for modification of child support on a substantial change in circumstances, not a deviation from the child support guidelines. See footnote 21 of this opinion. At the hearing on the defendant's motion for modification, however, the defendant argued for a modification of his child support obligation because "our child support guidelines are income share models." He did not argue that the 15 percent substantial change provision of § 46b-86 (a) was a factor for the court to consider.

To repeat, the guidelines are relevant only if the movant demonstrates a substantial change in circumstances *or* that the existing child support order substantially deviates from the guidelines, depending on the ground urged in support of modification. See *Mullin* v. *Mullin*, supra, 28 Conn. App. 635–36. In the present case, the defendant grounded his motion for modification of child support on a substantial change in circumstances and failed to demonstrate such a change.

stances on the basis of the defendant's lifestyle between 2016 and 2018, which had not changed despite a nearly 40 percent reduction in his base salary and months of unemployment. As to the court's consideration of the source of the defendant's income, the child support guidelines "include bonus and deferred compensation in the definition of gross income. Regs., Conn. State Agencies § 46b-215a-1 (11) (A). A court must consider earned and unearned income from *all sources* in calculating gross income to fashion child support obligations. . . . Id., § 46b-215a-1 (11)." (Emphasis in original; internal quotation marks omitted.) *Hendricks* v. *Haydu*, 160 Conn. App. 103, 117, 124 A.3d 554 (2015). Moreover, questions involving modification of child support depend on conditions as they exist at the time of the hearing. See *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 558, 46 A.3d 112 (2012). "[T]he determination of a parent's child support obligation must account for all of the income that would have been available to support the children had the family remained together." *Jenkins* v. *Jenkins*, 243 Conn. 584, 594, 704 A.2d 231 (1998). Our Supreme Court has stated that it "broadly interprets the definition of gross income contained in the guidelines to include items that, in effect, increase the amount of a parent's income that is available for child support purposes." (Emphasis omitted; internal quotation marks omitted.) *Hendricks* v. *Haydu*, supra, 113; see also *Unkelbach* v. *McNary*, 244 Conn. 350, 360, 710 A.2d 717 (1998). For the foregoing reasons, we conclude that the court did not abuse its discretion when it denied the defendant's motion for modification of child support.

The judgment is reversed with respect to the granting of the defendant's motion for order, postjudgment, for reimbursement of unallocated support and the case is remanded with direction to deny the defendant's motion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ALFRED P. MAYO (AC 41562)

Lavine, Prescott and Bishop, Js.

Syllabus

Convicted of the crime of breach of the peace in the second degree in connection with an encounter with S, the mayor of New Britain, the defendant appealed to this court, claiming that the evidence was insufficient to support his conviction. S had been hosting an event for children in a public park when the defendant arrived on a bicycle that had a political campaign sign affixed to it and began passing out business cards to children. When an aide to S asked the defendant to leave because his presence was inappropriate and a safety issue for the children, the defendant screamed profanities. Thereafter, when S approached the defendant and asked him to stop yelling profanities, he grabbed her wrist, threw her arm down abruptly and shouted profanities at her. *Held* that the evidence was sufficient to support the defendant's conviction of breach of the peace in the second degree in violation of statute (§ 53a-181 (a) (1)), as his conduct and use of profanities occurred in a public place and constituted fighting, or violent, tumultuous or threatening behavior; the evidence was sufficient for the jury to determine that the defendant acted with the requisite intent required by § 53a-181 (a) (1), and the jury was free to consider that the defendant intended the harm to S as a natural result of his physical actions toward her.

Argued March 16—officially released July 21, 2020

Procedural History

Substitute information charging the defendant with the crimes of assault in the third degree and breach of the peace in the second degree, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, and tried to the jury before *Graham*, *J.*; verdict and judgment of guilty of breach of the peace in the second degree, from which the defendant appealed to this court. *Affirmed.*

Peter G. Billings, assigned counsel, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, was *Brian Preleski*, state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Alfred P. Mayo, appeals from the judgment of conviction, rendered after a jury trial, of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (1). On appeal, the defendant claims that there was insufficient evidence adduced at trial to support his conviction. We affirm the judgment of conviction.

The jury reasonably could have found the following facts. On July 30, 2015, the mayor of New Britain, Erin Stewart, hosted the annual Pencil Hunt (event) at Walnut Hill Park, a public park in New Britain. Counselors from Camp TotalRec[1] hid candy and pencils for the participating children in a section of the park reserved for the event. As the host, Stewart was in attendance.

Shortly before the event was to begin, the defendant arrived at the park with a political campaign sign affixed to the back of his bicycle. The defendant then climbed off his bicycle and passed out business cards to the children at the event. This made several adults at the event uncomfortable, including Stewart; Matthew Schofield, the recreation services coordinator for the New Britain Parks and Recreation Department; and Justin Dorsey, Stewart's deputy chief of staff. Dorsey approached the defendant and asked him to leave because his presence was "inappropriate" and a "safety issue" for the children. In response, the defendant screamed profanities at Dorsey, yelling, "[i]t's a fucking park . . . ."

Thereafter, Stewart approached the defendant and advised him that the children were listening and that it was inappropriate to be yelling such profanities. She requested that he "please stop" and leave before she called the police. The defendant then grabbed Stewart's

[1] Camp TotalRec is a summer day camp for students in elementary and middle school.

wrist and threw her arm down, leaving a red mark on her wrist and causing her pain. Stewart backed away from the defendant and informed him that the police would be called. The defendant continued to shout profanities, calling Stewart a "[fucking] racist" and yelling that she "[didn't] know what the [fuck she was] talking about."

As a result of the defendant's physical contact, Stewart went to see Elaine Jeffrey, the public health nurse for the city. Stewart told Jeffrey that "she was grabbed by a political opponent and that as soon as she was grabbed she felt the pain." Jeffrey examined Stewart and advised her that, if the pain worsened, she should consult her doctor or visit an emergency department.

The defendant subsequently was charged with assault in the third degree in violation of General Statutes § 53a-61 (a) (1) and breach of the peace in the second degree in violation of § 53a-181 (a) (1). Following a trial, the jury found the defendant guilty of breach of the peace in the second degree and not guilty of assault. The court rendered judgment in accordance with the jury's verdict and sentenced the defendant to six months of incarceration. This appeal followed. Additional facts will be set forth as necessary.

The defendant claims that there was insufficient evidence to support his conviction of breach of the peace in the second degree. Specifically, the defendant claims that the state failed to prove beyond a reasonable doubt that his conduct rose "to the level of physical fighting, or physically violent, threatening or tumultuous behavior."[2] The state counters that the evidence that the defen-

[2] In his brief, the defendant also claims that the alleged profanities and verbal language cannot serve as the basis of the alleged crime, as it would violate the first amendment to the United States constitution. He claims further that the court failed to instruct the jury on fighting words. The defendant's claims are unpersuasive because his speech was part of his conduct. See *State* v. *Szymkiewicz*, 237 Conn. 613, 620, 678 A.2d 473 (1996) ("speech can be proscribed not only when accompanied by actual physical

dant grabbed Stewart's wrist and threw it down with such force that it left a mark and caused her pain constituted sufficient evidence for the jury to conclude that the defendant engaged in fighting, violent, threatening or tumultuous behavior. We agree.

We first set forth our well established standard of review. "In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

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

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of

conduct, but also when it can be identified as fighting words"); see also *State* v. *Andriulaitis*, 169 Conn. App. 286, 299, 150 A.3d 720 (2016) (this court concluded that "we need not decide whether the defendant's language portended physical violence or amounted to fighting words because the defendant's conduct consisted of more than mere speech"). Therefore, because the defendant's speech in the present case was accompanied by physical contact, we do not consider the defendant's claim that his verbal language cannot serve as the basis of the alleged crime because it violates the first amendment to the federal constitution.

evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonabledoubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Bagnaschi*, 180 Conn. App. 835, 840–42, 184 A.3d 1234, cert. denied, 329 Conn. 912, 186 A.3d 1170 (2018).

To convict the defendant of breach of the peace in the second degree in violation of § 53a-181 (a) (1), the state must prove beyond a reasonable doubt that "(1) the defendant engaged in fighting or in violent, tumultuous or threatening behavior, (2) that this conduct occurred in a public place and (3) that the defendant acted with the intent to cause inconvenience, annoyance or alarm, or that he recklessly created a risk thereof." *State* v. *Simmons*, 86 Conn. App. 381, 386–87, 861 A.2d 537 (2004), cert. denied, 273 Conn. 923, 871 A.2d 1033, cert. denied, 546 U.S. 822, 126 S. Ct. 356, 163 L. Ed. 2d 64 (2005). "[T]he predominant intent [in a breach of the peace charge] is to cause what a reason-

able person operating under contemporary community standards would consider a disturbance to or impediment of a lawful activity, a deep feeling of vexation or provocation, or a feeling of anxiety prompted by threatened danger or harm." *State* v. *Wolff*, 237 Conn. 633, 670, 678 A.2d 1369 (1996).

In the present case, the evidence was sufficient for the jury to conclude that the defendant's conduct occurred in a public place and that it constituted fighting, violent, tumultuous or threatening behavior. The evidence was sufficient, as well, for the jury to determine that the defendant acted with the requisite intent required by § 53a-181 (a) (1). During trial, the state presented evidence that the defendant engaged in physical conduct, which was accompanied by the use of profanities. Specifically, the state presented the testimony of Stewart, who stated that she was present in a public park when accosted by the defendant and that after she had asked the defendant to leave the event, he grabbed her wrist and threw her arm down "abruptly." The defendant's physical actions caused a red mark on Stewart's arm and enough pain that she sought medical attention. The jury was free to consider that the defendant intended this harm as a natural result of his conduct. See *State* v. *Dijmarescu*, 182 Conn. App. 135, 154, 189 A.3d 111, cert. denied, 329 Conn. 912, 186 A.3d 707 (2018).

In sum, there was overwhelming evidence that the defendant's behavior was sufficient for the jury reasonably to have found that the defendant engaged in violent, tumultuous or threatening behavior in a public place. Therefore, we conclude that the state satisfied its burden of proving beyond a reasonable doubt that the defendant committed breach of the peace in the second degree.

The judgment is affirmed.

STATE OF CONNECTICUT *v.* DHATI COLEMAN (AC 42157)

Keller, Elgo and Devlin, Js.

Syllabus

Convicted, on a conditional plea of nolo contendere, of the crimes of assault in the first degree, robbery in the first degree and criminal possession of a firearm, the defendant appealed to this court, claiming, inter alia, that the trial court improperly denied his motions to dismiss the charges against him because he was not brought to trial within a reasonable period of time in violation of his right to a speedy trial under the sixth amendment and his right under the Interstate Agreement on Detainers (§ 54-186 et seq.) to a final disposition of his case within 180 days from the date on which he requested a speedy disposition. The defendant had been arrested in 2017 in connection with a shooting he was alleged to have committed in 2014. DNA was recovered from a cap that was left at the scene of the shooting. Shortly after the shooting, the police received information that the defendant had fled to Maine and obtained a warrant authorizing the taking of a DNA sample from him that was to be compared with the DNA sample from the cap. The DNA samples were not sent to the state's forensics laboratory until 2016, when the laboratory matched the defendant's DNA with that on the cap. In July, 2016, the police submitted to the state's attorney's office a draft arrest warrant application for the defendant, which was not signed by the affiant until February, 2017, and by the court until March, 2017, when the defendant was in federal custody in New Hampshire. The defendant was not returned to Connecticut and arrested until August, 2017. After the defendant entered his plea but prior to sentencing, he filed a second motion to dismiss, claiming that the state had failed to comply with the 180 day requirement for a final disposition of his case pursuant to § 54-186 et seq. The trial court denied the defendant's motion to dismiss, reasoning that there had been no objection to the course of the proceedings under § 54-186 et seq., and rendered judgment in accordance with the defendant's plea. *Held*:

1. The defendant could not prevail on his claim that his right to due process was violated because the state's three year delay in filing charges against him caused him actual substantial prejudice and was unreasonable and unjustifiable:

   a. The trial court properly concluded that the defendant failed to prove that actual substantial prejudice resulted from the preaccusation delay; the defendant's claim that he was prevented from gathering documentary, exculpatory evidence or that there was any witness who could have provided exculpatory testimony was speculative, and his assertion that he was unable to secure video surveillance from the area of the crime scene was unsupported by evidence that such surveillance video existed or that it would have been exculpatory.

b. The defendant's claim that the trial court improperly rejected his assertion that the state deliberately delayed his arrest to gain a tactical advantage over him was unavailing; it was not the role of this court to reexamine the evidence considered by the trial court or to construe it differently and in the light favorable to the defendant.

2. The defendant's express waiver of any claim stemming from the postarrest delay in bringing him to trial was fatal to his assertion of a violation of his rights to a speedy disposition of his case under the sixth amendment and § 54-186 et seq.

Submitted on briefs April 6—officially released July 21, 2020

Procedural History

Substitute information charging the defendant with two counts each of the crimes of assault in the first degree and robbery in the first degree, and with one count each of the crimes of larceny in the second degree, carrying a pistol without a permit, criminal possession of a pistol or revolver, criminal possession of a firearm and criminal possession of ammunition, brought to the Superior Court in the judicial district of New Haven, where the court, *Blue*, *J.*, denied the defendant's motion to dismiss; thereafter, the defendant was presented to the court, *Clifford*, *J.*, on a conditional plea of nolo contendere to one count each of assault in the first degree, robbery in the first degree and criminal possession of a firearm; subsequently, the court, *Clifford*, *J.*, denied the defendant's motion to dismiss and rendered judgment in accordance with the plea, from which the defendant appealed to this court. *Affirmed.*

Tamar R. Birckhead, assigned counsel, filed a brief for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, *Patrick J. Griffin*, state's attorney, and *Michael Pepper*, supervisory assistant state's attorney, filed a brief for the appellee (state).

Opinion

DEVLIN, J. The defendant, Dhati Coleman, appeals from the judgment of conviction, rendered after a condi-

tional[1] plea of nolo contendere, of assault in the first degree in violation of General Statutes § 53a-59 (a) (1), robbery in the first degree in violation of General Statutes § 53a-134 (a) (2) and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). On appeal, the defendant claims that the trial court should have dismissed the charges against him because (1) the three year delay between the date of the commission of the crimes in this case and his arrest (preaccusation delay) violated his right to due process under the fourteenth amendment to the United States constitution, and (2) once he was arrested, the state failed to bring him to trial within a reasonable period of time in violation of his right to a speedy trial under the sixth amendment to the United States constitution[2] and his right under the Interstate Agreement on Detainers (IAD), General Statutes § 54-186 et seq., to a final disposition of his case within 180 days from the date on which he requested a speedy disposition. We disagree and, accordingly, affirm the judgment of the trial court.

The defendant filed two motions to dismiss the charges against him. In denying his first motion to dismiss, the trial court, *Blue*, *J.*, set forth the following relevant factual

[1] General Statutes § 54-94a provides: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law provided a trial court has determined that a ruling on such motion to suppress or motion to dismiss would be dispositive of the case. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

[2] The defendant also claims that his right to be brought to trial in a reasonable amount of time was violated under article first, § 8, of the Connecticut constitution. Because he did not, however, brief that claim, we do not address it. See, e.g., *Riddick* v. *Commissioner of Correction*, 113 Conn. App. 456, 468, 966 A.2d 762 (2009), appeal dismissed, 301 Conn. 51, 19 A.3d 174 (2011).

and procedural history. "[The defendant] was arrested for the crimes alleged in this case on August 30, 2017. The state subsequently filed a long form information charging [him] with two counts of assault in the first degree, two counts of robbery in the first degree, larceny in the second degree, carrying a pistol without a permit, criminal possession of a pistol or revolver, criminal possession of a firearm, and criminal possession of ammunition. The charges arise from the alleged shooting of one Martin Carpentino in New Haven on August 7, 2014. . . .

"Carpentino was shot in a residential area of New Haven on August 7, 2014. He drove to a gasoline station several blocks away and called 911. According to the arrest warrant application, 'Carpentino described the shooter as a black male, five foot, ten inches, tall, short curly hair, thin but not skinny, wearing a puffy green vest, and last seen fleeing in an unknown direction on foot.' A police canvass of the area of the shooting failed to turn up any witness to the shooting. Other clues were subsequently developed.

"DNA was recovered from a baseball cap left at the scene of the shooting and sent to the state forensic laboratory. On September 17, 2014, a DNA profile from the cap was entered into state and national databases. . . . [The defendant] also left a cell phone in a motor vehicle connected to the crime.

"On August 14, 2014, the police received information from an informant that [the defendant] was the shooter and had fled to Maine. As a result, on September 9, 2014, the court . . . signed a search and seizure warrant authorizing a DNA sample to be taken from [the defendant] and compared with the DNA sample taken from the cap. . . .

"[The defendant] was arrested on an unrelated drug charge in New Haven on September 9, 2014. The police obtained a DNA sample from him on that day. On December 23, 2014, [the defendant] entered a plea of

guilty to the drug charge and was sentenced by the court . . . to seven years, execution suspended after two years, followed by three years of conditional discharge, to be served concurrently with his 'present sentence.' . . .

"On September 22, 2014, the police showed Carpentino an array of photographs, including a photograph of [the defendant]. Carpentino said that he was '90 percent sure' that the man depicted in [the defendant's] photograph was his assailant.

"The investigation then stopped for over a year. In December, 2015, Brian Diange, the New Haven [police] detective in charge of the shooting case, realized that the DNA sample taken from [the defendant] on September 9, 2014, had never been sent to the state forensic laboratory for comparison with the DNA taken from the baseball cap. A formal request for analysis was submitted on February 9, 2016. . . . On March 18, 2016, the laboratory matched [the defendant's] DNA with that on the cap.

"On July 14, 2016, the New Haven police submitted a draft arrest warrant to the office of the New Haven State's Attorney. The personnel in that office were not satisfied with the original draft [of the warrant], and discussions between the police and the state's attorney continued for several months. On February 28, 2017, a final draft of the arrest warrant application was signed by the affiant. On March 3, 2017, the court . . . signed the warrant.

"By this time, [the defendant] was in federal custody in New Hampshire. On May 31, 2017, the state's attorney received a letter from [the defendant] requesting a speedy trial under the [IAD]. On August 30, 2017, [the defendant] was returned to Connecticut and arrested for the crimes now in question.

"[The defendant] was arraigned in the Superior Court on August 31, 2017. On September 24, 2017, he agreed

to toll his rights to a speedy trial under the constitution and the [IAD]. A series of such waivers has continued, with minor interruptions, to the present time." (Citations omitted.)

On January 19, 2018, the defendant filed a memorandum of law in support of a motion to dismiss that he subsequently filed on January 24, 2018 pursuant to General Statutes § 54-193 (b). The defendant argued that his right to due process under the fourteenth amendment to the United States constitution was violated because the preaccusation delay of three years was deliberate and unreasonable and caused him to suffer substantial prejudice by denying him "the opportunity for a global resolution of [all of] the claims against him as well as the opportunity to properly develop a defense to the claims [at issue in this case]."

On January 24, 2018, the day that the defendant filed his motion to dismiss, the court commenced an evidentiary hearing on it, which continued on March 20 and 29, 2018. On April 27, 2018, the defendant filed another memorandum of law in support of his motion to dismiss, adding that the preaccusation delay resulted in the violation of his right to a speedy trial under the sixth amendment to the United States constitution. He also added that the delay violated his rights under the IAD.[3] On May 2, 2018, the state filed an objection to the defendant's motion, and the court heard argument on May 17, 2018. By way of a memorandum of decision filed May 18, 2018, the court denied the defendant's motion to dismiss on the grounds that the defendant had failed to prove that the preaccusation delay caused him actual substantial prejudice or that the reasons for that delay were wholly unjustifiable. The court further

[3] The precise nature of the defendant's claim under the IAD in his first motion to dismiss is difficult to ascertain. He did not, however, argue in his first motion to dismiss that his right to a final disposition within 180 days had been violated.

found that the defendant had waived any claim as to postarrest delay and, thus, rejected his claim under the IAD.

On June 1, 2018, the defendant entered conditional pleas of nolo contendere to assault in the first degree in violation of § 53a-59 (a) (1), robbery in the first degree in violation of § 53a-134 (a) (2) and criminal possession of a firearm in violation of § 53a-217 (a) (1). The court ordered a presentence investigation, over the defendant's objection,[4] and continued the case to August 9, 2018, for sentencing.

On August 7, 2018, the defendant filed a second motion to dismiss on the ground that the state failed to comply with the "180 day requirement of a final disposition of the defendant's case" under the IAD.

On August 9, 2018, at the sentencing hearing, the court, *Clifford*, *J.*, first addressed the defendant's second motion to dismiss. The court orally denied the defendant's motion, reasoning: "[Under the IAD] [t]he trial must commence within 180 days, obviously, unless [the defendant enters] pleas. I don't believe the sentencing also must occur within 180 days. The whole purpose of the statute is that these things be resolved within a time period. Resolved, to me, is either a trial or a plea. Because, what if it's a trial that starts on the 150th day and the trial takes three months; it's a major case, then you're well beyond 180 days. . . .

"No one objected on the record. The only one who objected was the defendant [who] did not want a presentence report. No one indicated that it was violating the [IAD]. . . .

"Obviously a presentence [investigation] report is mandated, normally. It can be waived under certain circumstances. It takes two sides to waive something.

[4] The defendant objected to the presentence investigation on the sole ground that it was a "waste of the court's time."

It did not happen here. . . . I will deny the motion to dismiss . . . .''

The trial court then imposed on the defendant a total effective sentence of nine years incarceration, followed by five years of special parole, and ordered that he receive credit for jail time he had served since August 30, 2017, the date that he was returned to Connecticut to face the charges in this case. This appeal followed.

On appeal, the defendant challenges the denial of both of his motions to dismiss the charges against him. ''Because a motion to dismiss effectively challenges the jurisdiction of the court, asserting that the state, as a matter of law and fact, cannot state a proper cause of action against the defendant, our review of the court's legal conclusions and resulting denial of the defendant's motion to dismiss is de novo. . . . Factual findings underlying the court's decision, however, will not be disturbed unless they are clearly erroneous. . . . The applicable legal standard of review for the denial of a motion to dismiss, therefore, generally turns on whether the appellant seeks to challenge the legal conclusions of the trial court or its factual determinations.'' (Citation omitted; internal quotation marks omitted.) *State* v. *Samuel M.*, 323 Conn. 785, 794–95, 151 A.3d 815 (2016). With these principles in mind, we address the defendant's claims in turn.

I

The defendant first claims that the trial court erred in rejecting his argument that his right to due process was violated because the three year preaccusation delay caused him actual substantial prejudice and was unreasonable and unjustifiable.[5] We are not persuaded.

[5] Although the defendant argued in his motion to dismiss that his sixth amendment right to a speedy trial was violated by the preaccusation delay, his sixth amendment claim on appeal is limited to the time period following his arrest.

"The role of due process protections with respect to preaccusation delay has been characterized as a limited one. . . . [T]he [d]ue [p]rocess [c]lause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. . . . This court need only determine whether the action complained of . . . violates those fundamental conceptions of justice which lie at the base of our civil and political institutions . . . and which define the community's sense of fair play and decency . . . . The due process clause has not replaced the applicable statute of limitations . . . [as] . . . the primary guarantee against bringing overly stale criminal charges. . . .

"[T]o establish a due process violation because of preaccusation delay, the defendant must show both that actual substantial prejudice resulted from the delay and that the reasons for the delay were wholly unjustifiable, as where the state seeks to gain a tactical advantage over the defendant. . . . [P]roof of prejudice is generally a necessary but not sufficient element of a due process claim . . . . [Additionally] the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." (Citation omitted; internal quotation marks omitted.) *State* v. *Pugh*, 190 Conn. App. 794, 806–807, 212 A.3d 787, cert. denied, 333 Conn. 914, 217 A.3d 635 (2019).

A

The defendant first challenges the trial court's determination that he failed to prove that he suffered actual substantial prejudice as a result of the preaccusation delay.[6] As to prejudice, the trial court reasoned: "No credible evidence supports [the defendant's] contention

[6] The trial court concluded that the defendant was arrested prior to the expiration of the five year statute of limitations applicable to the crimes with which he was charged. See General Statutes § 54-193 (b). The defendant has not challenged that conclusion.

[that actual substantial prejudice resulted from the preaccusation delay] here. The defendant's claim in this regard rests on the testimony of his investigator, Kevin Johnson, who testified that he was hired on October 5, 2017, and was subsequently unable to locate potential witnesses to the shooting in question. Johnson was not, however, a credible witness. He testified on direct examination that Darryl Wilson, a potential witness, 'didn't want to talk' to him. On cross-examination, Johnson was forced to admit that Wilson was, in fact, willing to talk to him but did not know anything about the incident. When pressed by the court, Johnson failed to comprehend the difference between these two propositions. In the court's view, this brings the credibility of Johnson's entire testimony into serious question.

"Even if Johnson's entire testimony were to be believed, however, nothing in the evidence would substantiate a finding that evidence helpful to the defendant would have been discovered had he been arrested earlier. There is, for example, no claim that an alibi witness has died or disappeared since the time of the shooting. Any claim that potential witnesses, once located, would have provided evidence helpful to the defendant lies wholly in the realm of speculation."

On appeal, the defendant renews his argument that the preaccusation delay deprived him of the opportunity to develop a defense to the charges against him. He reiterates his claim that he was unable to locate witnesses to the crime because many of them had relocated. The trial court rejected the defendant's claim on the ground that Johnson was not credible when he testified about his inability to locate and interview witnesses. Because the trial court is the sole arbiter of credibility; see *Pena* v. *Gladstone*, 168 Conn. App. 175, 187, 146 A.3d 51 (2016) ("[q]uestions of whether to believe or to disbelieve a competent witness are beyond our review" (internal quotation marks omitted)); its finding in this regard must stand.

Moreover, as the trial court aptly noted, the defendant failed to prove that there was any witness who could have provided exculpatory testimony on his behalf and, thus, that his claim in this regard was merely speculative. The defendant's claim that the preaccusation delay prevented him from gathering documentary evidence that "could have been exculpatory" is also speculative. He contends that he was unable to secure video surveillance from the gas station, traffic cameras or neighboring businesses that "could have included critical information that was exculpatory or otherwise pertinent to [his] defense . . . ." The defendant's argument is unsupported by any evidence that such surveillance video ever existed or that it would have been exculpatory. Consequently, his claim in this regard also is unavailing. Accordingly, the trial court properly concluded that the defendant failed to prove that actual substantial prejudice resulted from the preaccusation delay in this case.[7]

B

The defendant also challenges the trial court's conclusion that he failed to prove that the reasons for the preaccusation delay were wholly unjustifiable. In so concluding, the trial court first noted: " '[P]rosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied that they will be able to establish the suspect's guilt beyond a reasonable doubt.' *United States* v. *Lovasco*, 431 U.S. [783] 791, [97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977)]. . . .

[7] The defendant also argues that the preaccusation delay prevented him from including the charges in this case with his federal charges in negotiating a global resolution of them. He further contends that the state was able to use the federal charges against him at his state sentencing hearing and that the preaccusation delay prevented him from participating in rehabilitative programs in federal prison that otherwise might have been available to him. Although these may have been consequences of the defendant's arrest in this case, they cannot reasonably be construed as due process violations arising from the preaccusation delay.

" 'There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the [f]ourth [a]mendment if they act too soon, and a violation of the [s]ixth [a]mendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.' *Hoffa* v. *United States*, 385 U.S. 293, 310, [87 S. Ct. 408, 17 L. Ed. 2d 374] (1966)."

Applying the foregoing principles to the facts of this case, the court reasoned: "Although the police arguably had probable cause to arrest [the defendant] prior to the actual time of his arrest, the police cannot be faulted for doing a thorough investigation, including [the] DNA analysis. Similarly, the state's attorney cannot be faulted for requesting revisions in the initial arrest warrant application to strengthen the force of that application.

"The one portion of the preaccusation delay that, at least with the benefit of hindsight, is subject to criticism is the seventeen month delay between the taking of [the defendant's] DNA on September 9, 2014, and the submission of that DNA to the state forensic laboratory on February 9, 2016. No legitimate reason for this delay appears in the record. This was, however, a delay caused by negligence rather than recklessness or a tactical decision to disadvantage the defendant. . . .

"Nothing remotely resembling an improper reason for the preaccusation delay in question here appears in the record. The defendant has consequently failed to establish either prong of the applicable due process test."

On appeal, the defendant argues that the trial court erred in rejecting his claim that the state deliberately delayed his arrest to gain a tactical advantage over him. In so arguing, the defendant essentially asks this court to reexamine the evidence that was considered by the trial court, but to construe that evidence differently and in the light favorable to him. It is not the role of this court to do so. "The function of an appellate court is to review, and not to retry, the proceedings of the trial court." (Internal quotation marks omitted.) *LM Ins. Corp.* v. *Connecticut Dismanteling, LLC*, 172 Conn. App. 622, 638, 161 A.3d 562 (2017).

"We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached . . . nor do we retry the case or pass upon the credibility of the witnesses." (Internal quotation marks omitted.) *In re Brooklyn O.*, 196 Conn. App. 543, 548, A.3d (2020). "Weighing the evidence and judging the credibility of the witnesses is the function of the trier of fact and this court will not usurp that role." (Internal quotation marks omitted.) *Iino* v. *Spalter*, 192 Conn. App. 421, 478, 218 A.3d 152 (2019). Accordingly, the defendant's challenge to the trial court's determination that the preaccusation delay was not unjustifiable must fail.

II

The defendant also claims that, once he was arrested, the state failed to bring him to trial within a reasonable period of time in violation of his right to a speedy trial under the sixth amendment to the United States constitution and his right under the IAD to a final disposition of his case within 180 days from the date on which he requested a speedy disposition. We disagree.

The following additional history is relevant to the defendant's claims. On May 17, 2018, at the hearing on the first motion to dismiss, the following colloquy occurred:

"The Court: So, if I could ask just that; it's my understanding that your client is arraigned on August 31, 2017 . . . in Connecticut, and then he's brought to part A, he's brought before Judge Clifford, and starting on September . . . 24th [or] it could be [September] 29th, the speedy trial—he began a series of waivers of his right to a speedy trial because, at that point, he didn't want—he might've wanted it dismissed but he didn't want a speedy trial; is that fair to say?

"[Defense Counsel]: That's correct, Your Honor, yes.

"The Court: And that would seem—you still have your due process argument in terms of what happened prior to that time, but in terms of subsequent—

"[Defense Counsel]: There's no claim to any subsequent, Your Honor.

"The Court: Okay. So . . . it would really seem that this boils down to due process, correct, incorrect?

"[Defense Counsel]: Correct, Your Honor, yes."

On the basis of the foregoing, the trial court concluded that "the defendant conceded that he does not complain of any postarrest delay" and, thus, that he waived any claim arising from the period of time following his arrest in this case. We agree.

"[W]aiver is [t]he voluntary relinquishment or abandonment—express or implied—of a legal right or notice. . . . [W]aiver may be effected by action of counsel. . . . When a party consents to or expresses satisfaction with an issue at trial, claims arising from that issue are deemed waived and may not be reviewed on appeal. . . . Thus, [w]aiver . . . involves the idea of assent, and assent is an act of understanding. . . . The rule is applicable that no one shall be permitted to deny that he intended the natural consequences of his acts and conduct. . . . In order to waive a claim of law it is not necessary . . . that a party be certain of the correctness of the claim and its legal efficacy. It is enough

if he knows of the existence of the claim and of its reasonably possible efficacy. . . . Connecticut courts have consistently held that when a party fails to raise in the trial court the constitutional claim presented on appeal and affirmatively acquiesces to the trial court's order, that party waives any such claim. . . .

"Both our Supreme Court and this court have stated the principle that, when a party abandons a claim or argument before the trial court, that party waives the right to appellate review of such claim because a contrary conclusion would result in an ambush of the trial court . . . . This principle applies to review pursuant to [*State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989)]. [A] constitutional claim that has been waived does not satisfy the third prong of the *Golding* test because, in such circumstances, we simply cannot conclude that injustice [has been] done to either party . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Grasso*, 189 Conn. App. 186, 225–26, 207 A.3d 33, cert. denied, 331 Conn. 928, 207 A.3d 519 (2019).

The defendant, for the first time, on appeal, raises his claim that he was denied his sixth amendment right to a speedy trial by virtue of an alleged delay following his arrest. The defendant has not addressed his failure to raise this issue before the trial court and has not asked for review of this claim under *State* v. *Golding*, supra, 213 Conn. 239–40, as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[8] Even if

[8] Under *Golding*, as modified by *In re Yasiel R.*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40.

he had sought *Golding* review, to which he arguably would be entitled on this claim of constitutional magnitude, his express waiver of any claim stemming from the postarrest delay is fatal to his claim.[9] In light of that express waiver, his claim under the IAD is likewise without merit.[10]

Accordingly, we conclude that the trial court properly denied the defendant's motions to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JAMAL SUMLER (AC 43024)

Prescott, Devlin and Bishop, Js.

Syllabus

Convicted, after a jury trial, of the crimes of murder, conspiracy to commit robbery in the first degree and carrying a pistol without a permit, and, after a trial to the court, of the crime of criminal possession of a pistol or revolver, the defendant appealed. The defendant's conviction stemmed from an incident in which he shot and killed a convenience store clerk while he and another individual were robbing the store. Prior to trial, the defendant filed a motion in limine to preclude the state from introducing testimony from his former probation officer, D, regarding her identification of him in a surveillance video from a grocery store, and a motion to suppress two statements that he made during a conversation with a

[9] We note that, despite claiming in his statement of issues and in the conclusion of his appellate brief that the trial court erred in concluding "that the defendant had entirely waived the IAD right by conceding that he did not allege any postarrest delay," the defendant did not brief this claim.

[10] Because the defendant expressly waived his claim to any alleged postarrest delay, we need not address his various arguments pertaining to the commencement of that 180 period—whether it began on the date that he requested a speedy disposition under the IAD, the date that he was taken into custody in Connecticut, the date of his first court appearance or even the date that he became a suspect in the subject crimes. Likewise, we need not resolve the issue of whether "final disposition" under the IAD occurred when the defendant entered his nolo contendere plea or upon sentencing.

police officer while he was being transported to the police department following his arrest for violation of probation. Following a hearing, the trial court denied both motions. *Held*:

1. The defendant's unpreserved claim that the trial judge violated his constitutional right to due process by improperly failing to recuse himself from presiding over the defendant's trial because he previously had signed search and seizure and arrest warrants against the defendant in this case was unavailing: because the defendant did not assert actual bias on the part of the trial judge, his claim necessarily failed, and, therefore, he could not prevail pursuant to *State* v. *Golding* (213 Conn. 233), as he did not demonstrate the existence of a constitutional violation; moreover, this court was not persuaded by the defendant's assertion that the trial judge's failure to recuse himself constituted plain error because, at minimum, it created an appearance of impropriety, as the judge's conduct was not expressly prohibited by our rules, statutes, or case law, and, therefore, it did not constitute plain error or even error at all.
2. The trial court did not abuse its discretion in admitting D's testimony identifying the defendant in the surveillance video from the grocery store; contrary to the defendant's contention that D's testimony constituted her opinion on an ultimate issue reserved to the jury, namely, his criminal culpability, in violation of the applicable rule (§ 7-3) of the Connecticut Code of Evidence, and, although the defendant's presence in the grocery store may have been relevant to his participation in the acts that were committed at the convenience store, D did not express an opinion regarding the identity of the person who committed the crimes at the convenience store, and, therefore, her testimony did not constitute a legal opinion about the defendant's guilt as to the crimes with which he was charged.
3. The defendant could not prevail on his claim that the trial court improperly denied his motion to suppress the statements he made to a police officer while he was being transported to the police department following his arrest, which was based on his claim that those statements were made during custodial interrogation without his being advised of his rights pursuant to *Miranda* v. *Arizona* (384 U.S. 436); the trial court properly determined that the officer's conversation with the defendant did not constitute custodial interrogation for *Miranda* purposes because the officer's questions were not reasonably likely to elicit incriminating statements from the defendant.

Argued March 9—officially released July 21, 2020

Procedural History

Substitute information charging the defendant with the crimes of felony murder, murder, conspiracy to commit robbery in the first degree, criminal possession of

a pistol or revolver and carrying a pistol without a permit, brought to the Superior Court in the judicial district of New Haven, where the court, *Vitale*, *J.*, granted the defendant's motion to sever the charge of criminal possession of a pistol or revolver; thereafter, the court denied the defendant's motions to preclude certain evidence; subsequently, the charges of felony murder, murder, conspiracy to commit robbery in the first degree and carrying a pistol without a permit were tried to the jury before *Vitale*, *J.*, and the charge of criminal possession of a pistol or revolver was tried to the court; verdict and judgment of guilty; thereafter, the court vacated the conviction of felony murder, and the defendant appealed. *Affirmed.*

Naomi T. Fetterman, with whom, on the brief, was *Peter G. Billings*, for the appellant (defendant).

Laurie N. Feldman, deputy assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, and *Lisa D'Angelo*, assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Jamal Sumler, appeals from the judgment of conviction rendered following a trial in which a jury found him guilty of felony murder in violation of General Statutes § 53a-54c, murder in violation of General Statutes § 53a-54a (a), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (2), and carrying a pistol without a permit in violation of General Statutes § 29-35 (a), and the trial court, *Vitale*, *J.*, found him guilty of criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c (a) (1). The defendant claims that the court (1) improperly failed to recuse itself from the defendant's trial because Judge Vitale previously had signed warrants for the defendant's arrest and for the search of his home, (2) abused

its discretion by allowing opinion testimony of the defendant's identity on video surveillance footage, and (3) improperly denied the defendant's motion to suppress statements that he made to a police officer while being transported to the police department. We disagree and, therefore, affirm the judgment.

The following facts, which reasonably could have been found by the respective finder of fact, and procedural history are relevant to this appeal. On April 6, 2015, the defendant and two other individuals, Dwayne "Hoodie" Sayles and Leighton Vanderberg, were travelling together in a green Ford Focus driven by Vanderberg. The defendant sat in the front passenger seat and was wearing sweatpants, a gray hoodie, and dark sneakers. Sayles sat in the backseat and was wearing gray sweatpants, a white T-shirt, and white sneakers.[1]

The three men drove to Eddy's Food Centre (Eddy's) located at 276 Howard Avenue in Bridgeport. Once they arrived, the defendant exited the car, while Vanderberg and Sayles remained inside. Before going into the store, the defendant removed a black revolver from his waistband and put it in the center console of the car. He went into Eddy's for a few minutes, returned to the car, and then went back into the store a second time. Upon his return to the car the second time, the defendant handed Sayles a pair of black gloves. He also retrieved his revolver and put it in the waistband of his sweatpants.

Thereafter, the three men drove to the Fair Haven section of New Haven. Vanderberg pulled onto Kendall Street toward Fulton Terrace and parked the car, intending to smoke "dutches."[2] Not having enough cigars, someone suggested that they buy more cigars from a nearby store. The defendant and Sayles then

[1] At some point, Vanderberg gave Sayles a navy blue sweatshirt from his car, which Sayles put on over his white T-shirt.

[2] A "dutch" is a marijuana filled cigar.

exited the vehicle and walked up Fulton Terrace, with the defendant a few steps in front of Sayles, while Vanderberg remained in the car. The defendant entered the Pay Rite convenience store (Pay Rite) connected to a CITGO gas station located at 262 Forbes Avenue.

Pay Rite surveillance videos captured the defendant, wearing a black mask, black gloves, a gray hoodie, gray sweatpants, and dark sneakers, walk to the counter and point a gun at the clerk, Sanjay Patel, the victim in this case. While pointing the gun at the victim, the defendant walked behind the counter. The surveillance footage captured a second individual—later determined to be Sayles—dressed in a black mask and black gloves, a navy blue hoodie, black sweatpants, and white sneakers, entering the store and walking up to the counter. The victim struggled with the defendant and picked up a wooden stool. Sayles then pulled out a gun, aimed it at the victim, fired, and put the gun away in his hoodie pocket. The defendant, pointing his gun at the victim, used his other hand to pass items over the counter to Sayles, who put the items in his pocket before turning and leaving the store. As the defendant bent down to take more items, the victim hit him on his upper body with the stool. The defendant then shot the victim and ran out of the store. The victim subsequently died from his injuries.[3]

A witness, Jonathan Gavilanes, who was across the street from Pay Rite with his father, heard the gunshots and saw flashes. Subsequently, he saw the defendant and Sayles run out of the store onto Fulton Terrace.

[3] The cause of death was determined to be gunshot wounds from five bullets in his chest and abdomen and one in his hand. Jill Therriault, who worked in the division of scientific services of the Department of Emergency Services and Public Protection as a forensic science examiner in the firearm and toolmark unit, testified that the bullets had been fired from two different guns. One of the guns was .25 caliber and the other was .38 caliber.

Gavilanes' father checked inside Pay Rite and directed Gavilanes to call 911.[4]

Meanwhile, Sayles was the first to return to the car; he was still wearing the black gloves and holding a box of cigars. The defendant followed soon thereafter. The three men then drove toward Church Street South, an apartment complex where Sayles' apartment was located. After they parked in a nearby parking lot, Sayles threw the navy blue sweatshirt that he had been wearing into a dumpster. He also took the cigars out of their box and threw the box in the dumpster. Sayles then gave Vanderberg some cigars and twenty dollars as a contribution to gas money.

The three men then went to Sayles' apartment. Once inside, Vanderberg asked Sayles and the defendant about what had happened at Pay Rite. At first, neither individual told Vanderberg any specific details regarding the incident. Later, however, the defendant admitted to Vanderberg that he had "stretched" the store clerk, which Vanderberg testified at trial meant to him that the defendant had robbed the clerk.[5]

[4] The New Haven Police Department responded to a report that a person had been shot at Pay Rite. After arriving at the scene, Officer Elsa Berrios observed multiple cigars on the sidewalk at the corner of Fulton Terrace and Kendall Street; they were collected and photographed as part of the investigation.

[5] The following line of questioning between Vanderberg and the prosecutor occurred at trial:

"Q. It was just you and the defendant?

"A. Yes.

"Q. Okay. Tell us how that conversation came to be, what you said?

"A. Well, we was—when I was leaving out, he was like everybody come out here and smoke real quick. Something like that. And I just kept looking at him. I was like, yo, what really happened? What are you playing? He was like, nah, it wasn't really much. He was like just some—like some silly shit. I ended up like, I mean, robbing him. That's it.

"Q. He ended up—he said he ended up robbing him? Is that the exact words that he used?

"A. More like stretched him. . . .

"Q. Well what I'm asking you, is that what he said, stretched him? And what does that mean to you?

"A. Robbed him."

Vanderberg did not learn of the death of the victim until the next morning, when one of his friends asked if he had heard about it. He later saw news coverage of the incident at Pay Rite. After seeing the coverage, Vanderberg contacted the police and provided a statement on April 14, 2015.[6] When shown still photographs from the surveillance video from Pay Rite at the time of the incident, Vanderberg identified the subjects as the defendant and Sayles. On April 15, 2015, the police also obtained video surveillance footage from Eddy's, which showed the defendant purchasing a pair of dark colored gloves before leaving the store, reentering the store shortly thereafter, and purchasing a second pair of dark colored gloves.

On April 17, 2015, the defendant was arrested at his home on a warrant for violating his probation. The police immediately applied for a search and seizure warrant for his home, asserting that there was probable cause to believe that evidence of the robbery and murder that took place at Pay Rite would be found therein. The court, *Vitale, J.*, reviewed the application and issued a search and seizure warrant for the defendant's home.[7]

On May 14, 2015, the police submitted an application for an arrest warrant, asserting that probable cause existed to charge the defendant for the robbery and murder of the victim. Judge Vitale also reviewed this application and issued the arrest warrant. The state subsequently filed a long form information charging the defendant with felony murder, murder, conspiracy to commit robbery in the first degree, criminal possession of a pistol or revolver, and carrying a pistol without a permit.

[6] Vanderberg pleaded guilty to one count of aiding and abetting robbery in the first degree in another matter and agreed to testify for the state in this matter pursuant to a plea agreement.

[7] The police executed the search and seizure warrant at the defendant's home and seized, among other things, the following items as evidence: a plastic bag containing nine millimeter rounds and .38 caliber rounds, a pair of dark gray sweatpants, black knit gloves, and a black face mask.

The defendant elected a jury trial but moved to sever the count alleging criminal possession of a pistol or revolver and sought a bench trial on that count.[8] The motion was granted, and the state filed two substitute informations.

Prior to trial, the defendant also filed a motion in limine to preclude the state from introducing testimony from the defendant's former probation officer, Jayme DeNardis, concerning her identification of the defendant in the Eddy's surveillance footage. Citing *State* v. *Finan*, 275 Conn. 60, 881 A.2d 187 (2005), the defendant argued that DeNardis' testimony was inadmissible because it pertained to an ultimate issue of fact for the trier, namely, whether the defendant was the individual who committed the crimes. The court denied the motion in limine.

The defendant also filed a motion to suppress two statements that he made to the police following his arrest but before he was advised of his constitutional rights: "I'm infatuated with guns," and "I always wanted to be a bank robber." The defendant argued that the admission of these statements would infringe on his *Miranda* rights.[9] The court denied the motion to suppress.

The trial began on October 31, 2017, and concluded on November 7, 2017. The jury found the defendant guilty of all counts submitted to it.[10] The court found the

[8] The defendant stipulated that he had been convicted of a felony prior to April 6, 2015, and, therefore, the court should consider that element of the count as proven.

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

[10] Prior to sentencing, the court vacated the conviction of felony murder, citing *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013), *State* v. *Roberts*, 158 Conn. App. 144, 118 A.3d 631 (2015), and *State* v. *Benefield*, 153 Conn. App. 691, 103 A.3d 990 (2014), cert. denied, 315 Conn. 913, 106 A.3d 305, cert. denied, U.S. , 135 S. Ct. 2386, 192 L. Ed. 2d 172 (2015). The court stated: "Pursuant to those cases, the court vacates the conviction herein for felony murder as violative of double jeopardy. That conviction

defendant guilty of the charge of criminal possession of a pistol or revolver. The defendant subsequently was sentenced to a total effective sentence of ninety years of incarceration. This appeal followed.[11]

I

The defendant first claims that the trial judge improperly failed to recuse himself from presiding over the defendant's trial after having signed search and seizure and arrest warrants against the defendant in this matter. This claim is unpreserved because the defendant failed to seek the disqualification of Judge Vitale in the trial court. Without conceding that the claim is unpreserved, the defendant asserts that he nonetheless would be entitled to prevail on this claim pursuant to the standards set forth in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), or pursuant to the plain error doctrine. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 150, 84 A.3d 840 (2014). Specifically, the defendant asserts that the court's conduct "deprived [him] of a fair determination of guilt, in violation of his rights under article first, § 8, of the Connecticut constitution and his right to due process of law under the state and federal constitutions, U.S. Const., amends. V [and] XIV; Conn. Const., art. I, §§ 8 [and] 9." We disagree.

Generally, we do not consider claims of error on appeal that were not properly raised before the trial court. See Practice Book § 60-5. Unpreserved claims of constitutional error, however, may be reviewed when

may be reinstated if [the defendant's] conviction for murder is subsequently reversed for reasons not related to the viability of the vacated conviction."

[11] This appeal was transferred to this court from our Supreme Court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1 on June 6, 2019.

they allege the violation of a constitutional right. Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40.

Specifically, as it relates to judicial disqualification, the question under *Golding* "is not whether the trial judge's failure to disqualify himself constituted an abuse of discretion, but whether that failure resulted in a violation of the defendant's constitutional right to due process. The United States Supreme Court consistently has held that a judge's failure to disqualify himself or herself will implicate the due process clause only when the right to disqualification arises from *actual bias* on the part of that judge." (Emphasis in original.) *State* v. *Canales*, 281 Conn. 572, 593–94, 916 A.2d 767 (2007). "Recusal is required when, objectively speaking, the probability of actual bias on the part of the judge or [decision maker] is too high to be constitutionally tolerable." (Internal quotation marks omitted.) *Rippo* v. *Baker*, U.S. , 137 S. Ct. 905, 907, 197 L. Ed. 2d 167 (2017).

In the present case, the defendant fails to allege any actual bias on the part of the trial judge. In his appellate brief, the defendant points to the existence of "an appearance that the judge was not fair and impartial in this case and that is contrary to the appearance of justice." The law is clear, however, that the mere appearance of bias is insufficient to implicate a due process violation. See *State* v. *Canales*, supra, 281 Conn.

594. Because the defendant has not asserted actual bias on the part of Judge Vitale, his claim that his constitutional right to due process was violated necessarily fails. See id. Therefore, the defendant cannot prevail pursuant to *Golding* because he has not demonstrated the existence of a constitutional violation.

We turn next to the defendant's argument that Judge Vitale's failure to recuse himself as the trial judge and as the trier of fact with respect to the charge of criminal possession of a pistol or revolver despite his earlier role in signing the search and seizure and arrest warrants constitutes plain error because, at a minimum, it created an appearance of impropriety. We disagree.

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record. . . . In *State* v. *Fagan*, [280 Conn. 69, 87, 905 A.2d 1101 (2006), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007)], we described the two-pronged nature of the plain error doctrine: [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis in original; internal quotation marks omitted.) *State* v. *Jamison*, 320 Conn. 589, 596–97, 134 A.3d 560 (2016).

The defendant concedes that "[t]here is no statute or rule that expressly prohibits a judge who issues an arrest warrant or search warrant for a particular defendant, from later presiding at that defendant's trial." Nonetheless, he seems to argue that, under the totality of the circumstances, the court's failure to recuse itself

constitutes a violation of the Code of Judicial Conduct and, thereby, a violation of Practice Book § 1-22 (a).

Practice Book § 1-22 (a) provides in relevant part: "A judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to Rule 2.11 of the Code of Judicial Conduct . . . ." Rule 2.11 of the Code of Judicial Conduct expressly enumerates situations that require disqualification, although they are not exhaustive.[12] The defendant argues that the provision in rule 2.11 (a) that a judge shall disqualify himself when he has a personal bias or personal knowledge of facts in dispute is applicable in this matter. In particular, he argues that by reviewing and signing the search and seizure and arrest warrants, Judge Vitale necessarily reached conclusions about the evidence in the warrants, including the credibility of the state's witnesses. These circumstances, the defendant contends, give rise to an appearance of impropriety as contemplated by rule 2.11.

Although rule 2.11 (a) of the Code of Judicial Conduct instructs that a judge shall disqualify himself or herself when he or she has a personal bias or personal knowledge of facts in dispute, our case law has explicitly clarified that, to require recusal, a judge's potential bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."

[12] Rule 2.11 (a) of the Code of Judicial Conduct provides in relevant part: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. . . . (4) The judge has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy."

(Internal quotation marks omitted.) *Tracey* v. *Tracey*, 97 Conn. App. 278, 283–84, 903 A.2d 679 (2006). "With certain well-defined exceptions . . . a judge's participation in the preliminary stages of a case, and the knowledge he or she thereby gains, will not ordinarily preclude his or her continued participation in the same case thereafter." (Footnote omitted.) *State* v. *Rizzo*, 303 Conn. 71, 119–20, 31 A.3d 1094 (2011), cert. denied, 568 U.S. 836, 133 S. Ct. 133, 184 L. Ed. 2d 64 (2012).[13]

In the present matter, to the extent that Judge Vitale learned of facts from the warrant applications that were not introduced at trial, and, to the extent that he made preliminary determinations for purposes of the warrants, his act of presiding over the defendant's jury trial and serving as the trier of fact on one of the charges, despite such involvement in the earlier proceedings, is not expressly prohibited by our rules, statutes, or case law. Accordingly, we are not persuaded that the court's conduct was plain error, or even error at all.

II

The defendant next claims that the court abused its discretion by denying his motion in limine to preclude DeNardis from identifying him in a still photograph and a surveillance video from Eddy's, because her "testimony . . . constituted inadmissible lay opinion as to the guilt of the defendant" under *State* v. *Finan*, supra, 275 Conn. 66, and § 7-3 (a) of the Connecticut Code of Evidence. We disagree.

[13] A judge is prohibited from presiding over a proceeding in the following circumstances, as outlined in *Rizzo*: (1) in the case of a court trial, after a new trial is granted or judgment is reversed on appeal and, in the case of a jury trial, after a new trial is granted, (2) hearing a motion attacking the validity or sufficiency of an arrest warrant that the judge signed, (3) a trial for nonsummary contempt charges that arose before the judge, (4) a matter in which the judge previously acted as counsel, (5) a trial and sentencing following the judge's participation in plea negotiations that were unsuccessful, (6) a civil trial in which the judge engaged in settlement discussions. *State* v. *Rizzo*, supra, 303 Conn. 119 n.38.

The following additional facts are relevant to this issue. On April 17, 2015, detectives met with DeNardis, the defendant's previous probation officer.[14] DeNardis viewed a still photograph from video surveillance footage captured from Eddy's on April 6, 2015. She signed the photograph and identified the defendant as the individual in the footage and as being one of her probationers. The defendant filed a motion in limine to preclude DeNardis from testifying at trial as to the identity of the individual captured on surveillance video footage from Eddy's. He claimed that her identification of him in the video would, pursuant to *Finan*, constitute improper testimony as to "the ultimate issue in question: identity."

A hearing was held on October 26, 2017, during which the state presented DeNardis and Detective Christopher Perrone as witnesses.[15] The defendant reiterated his objection to the admission of DeNardis' proffered testimony on the basis that it constitutes her opinion about the ultimate issue of fact—whether he was the individual on the surveillance video committing the crimes with which he was charged—which is prohibited under *Finan*.[16]

The court denied the defendant's motion in limine, concluding that the proffered evidence is not "tantamount to a legal opinion about the defendant's criminal culpability." The court summarized its findings as follows: "The record reflects that . . . DeNardis is not

[14] DeNardis was the defendant's probation officer from June 14, 2013, until April 15, 2015.

[15] Detective Perrone was the lead detective in the case and had initially shown DeNardis the photograph of the defendant for identification purposes on April 17, 2015.

[16] We note that the defendant's argument at the hearing focused primarily on a separate issue that was not raised in the written motion, namely, that DeNardis' identification of the defendant in the video footage from Eddy's arose from unnecessarily suggestive procedures and was unreliable under the totality of the circumstances, in violation of the defendant's right to due process. See *Manson* v. *Brathwaite*, 432 U.S. 98, 113–14, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). The evidentiary issue was only briefly addressed at the end of the hearing. On appeal, the defendant does not challenge DeNardis' identification of the defendant as unnecessarily suggestive.

claimed to be an eyewitness to the crime that occurred in Pay Rite . . . and, further, that the crime now before the court did not occur at Eddy's . . . ." The court then explained that the proffered evidence "does not encompass an ultimate issue before the jury, namely, whether the defendant was one of the individuals present inside of the Pay Rite . . . at the time the crimes before the jury were committed." It explained that the jury could "view the tape, the still photograph from the tape, and the defendant himself to determine if he is the person depicted in the video or not."

At trial, DeNardis testified, among other things, that, in the course of her employment, she met with the defendant fifty-nine times from May, 2013 to April, 2015, and, that on April 17, 2015, she identified the defendant in a still photograph shown to her by New Haven police. She was shown at trial two segments from the surveillance video at Eddy's and identified the defendant as the person in the footage. At the conclusion of the trial, the court instructed the jury that "identification is a question of fact for you to decide, taking into consideration all of the evidence that you have seen and heard in the course of the trial."

We first set forth our standard of review. "Because of the wide range of matters on which lay witnesses are permitted to give their opinion, the admissibility of such evidence rests in the sound discretion of the trial court, and the exercise of that discretion, unless abused, will not constitute reversible error." (Internal quotation marks omitted.) *State* v. *Finan*, supra, 275 Conn. 65–66.

We begin our analysis with § 7-3 (a) of the Connecticut Code of Evidence, which provides: "Testimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact, except that, other than as provided in subsection (b), an expert witness may give an opinion that embraces an ultimate issue where the trier of fact needs expert

assistance in deciding the issue." "[T]he phrase ultimate issue is not amenable to easy definition. . . . It is improper for a witness to offer testimony that essentially constitutes a legal opinion about the guilt of the defendant. . . . An ultimate issue is one that cannot reasonably be separated from the essence of the matter to be decided [by the trier of fact]." (Citation omitted; internal quotation marks omitted.) *State* v. *Holley*, 160 Conn. App. 578, 617, 127 A.3d 221 (2015), rev'd on other grounds, 327 Conn. 576, 175 A.3d 514 (2018).

The defendant argues that DeNardis' identification of him in the video surveillance footage constitutes her opinion on an ultimate issue, namely, his culpability, in violation of § 7-3 of the Connecticut Code of Evidence, as interpreted by our Supreme Court in *Finan*. In *Finan*, the defendant moved to preclude the testimony of certain police officers as to their opinion that he was depicted on surveillance footage of the armed robbery for which he was charged. *State* v. *Finan*, supra, 275 Conn. 62. Our Supreme Court held that the testimony should have been precluded because the officers' opinion went to the ultimate issue in the case, which was "whether the defendant, and not some other person, was one of the two [men] who had committed the robbery." (Internal quotation marks omitted.) Id., 67.

We disagree with the defendant that DeNardis' testimony embraced an ultimate issue for the jury in the present matter. *Finan* is distinguishable because the surveillance footage in *Finan* depicted events that took place at the scene of the crime for which the defendant was charged. Here, the video that was shown to DeNardis was from Eddy's, an entirely separate location from the Pay Rite where the armed robbery took place.

In *Holley*, this court addressed a similar issue involving the identification of a defendant in video footage from a different location. *State* v. *Holley*, supra, 160

Conn. App. 617–18. In that case, the police disseminated to the public still photographs of two individuals from surveillance footage captured on a bus after the individuals committed a home burglary. Id., 583–84. At trial, a woman who knew the defendant identified him as one of the men in the video. Id., 616. This court concluded that the woman's testimony was not precluded by § 7-3 of the Connecticut Code of Evidence because the testimony did not embrace an ultimate issue. Id., 617. Specifically, this court stated that "[t]he defendant's presence on the bus . . . did not directly shed light on [among other things] his conduct at the victim's residence, [or] whether the defendant had the criminal intent related to the offenses with which he was charged . . . ." Id., 618. Therefore, this court concluded that the defendant's presence on the bus was not "the essence of the matters to be decided by the jury." Id.

The analysis conducted by this court in *Holley* is instructive in the present matter. Here, DeNardis' testimony that she recognized the defendant in the surveillance video from Eddy's did not constitute a legal opinion about his guilt as to the offenses with which the defendant was charged in this case, which occurred at Pay Rite. Although the defendant's presence in Eddy's may be relevant to his participation in acts that were committed at Pay Rite, DeNardis did not express an opinion regarding the identity of the person who committed the crimes at Pay Rite. Accordingly, we conclude that DeNardis' testimony did not constitute an opinion on the ultimate issue reserved to the jury, and, therefore, the court did not abuse its discretion in admitting the testimony.

III

Lastly, the defendant claims that the court improperly denied his motion to suppress statements that he made to a police officer after being arrested. Specifically, he claims that the statements were inadmissible because

they were made as a result of custodial interrogation and he had not received his *Miranda* warnings at the time he made those statements. We disagree with the defendant's claim that the statements should have been suppressed.

The following additional facts are relevant to this claim. After the defendant was placed under arrest on April 17, 2015, Officer Jason Aklin was tasked with transporting him to the police department. During the car ride, the defendant, unprompted, asked Officer Aklin what kind of gun he carried. Officer Aklin asked the defendant why he was concerned about that, and the defendant replied, "I'm infatuated with guns. I love them." Officer Aklin then asked the defendant, "What d[id] you want to be growing up?" The defendant replied, "I always wanted to be a bank robber." At the station, the police provided the defendant the required *Miranda* advisement.

The state sought to introduce at trial the two statements that the defendant made to Officer Aklin shortly after he was taken into custody: "I'm infatuated with guns," and "I always wanted to be a bank robber." The defendant filed a motion to suppress these statements, arguing that he made the statements while under custodial interrogation without being properly advised of his *Miranda* rights. A suppression hearing was held on October 26, 2017, during which Officer Aklin testified to his interactions with the defendant on April 17, 2015.[17]

[17] The following colloquy took place at the suppression hearing between Officer Aklin and the prosecutor:

"A. So, while I was transporting [the defendant] back to New Haven Police Department, he asked me what kind of firearm I carry, and just out of the blue. So, in just casual conversation I said, why are you worried about what kind of gun I carry? And then just to change the subject. And his response was, after I asked him why are [you] worried about what kind of firearm I carry, his response was I'm infatuated with guns.

"Q. Okay.

"A. It kind of threw me off a little bit. So, just to change the subject, I just—I asked him . . . what [did] you want to be growing up? You know. And his response to that was, I always wanted to be a bank robber.

The state conceded at the suppression hearing that the defendant was in custody and had not yet received *Miranda* warnings at the time he made the statements. The state argued, however, that, because Officer Aklin's questions were not reasonably likely to elicit incriminating responses from the defendant, the statements need not be suppressed.

The court stated that "[t]he only claim or issue [it] ha[d] been alerted to insofar as the statements are concerned . . . is whether they were the product of interrogation. The defendant bears the burden of proving that interrogation occurred." It found that "[t]here [was] no evidence Officer Aklin was involved in the investigation of the crimes charged . . . [or that he] was familiar with any aspect of the investigation . . . ." After noting that "interrogation" for purposes of *Miranda* refers to "words or actions on the part of the police other than those normally [attendant] to arrest in custody that the police should know are reasonably likely to elicit an incriminating response from the suspect," the court concluded that "the two statements in question made by the defendant were not the result of conduct by Officer Aklin designed to elicit incriminating statements," nor were they reasonably likely to elicit incriminating responses from the defendant. It denied the motion to suppress, and the statements were introduced to the jury at trial.

"Q. Okay. Now when you asked those questions, did you foresee that [the defendant] would make any kind of incriminating responses?

"A. Absolutely not.

"Q. And why did you ask those questions?

"A. You know, I just asked to . . . kind of change the subject off of what kind of firearm I carry kind of.

"Q. Okay. And . . . who started that conversation?

"A. I believe [the defendant] did. . . .

"Q. And did you ask him any questions relating to the case he was being arrested for?

"A. No. No. Because I know I can't, because I would have to Mirandize him. So, I didn't ask him anything regarding the case. . . .

"Q. Okay. Is it uncommon for you to strike up a casual conversation?

"A. Uncommon, no."

We begin by setting forth the applicable standard of review and governing legal principles. "Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . ." (Internal quotation marks omitted.) *State* v. *Ramos*, 317 Conn. 19, 30, 114 A.3d 1202 (2015).

"It is well established that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *Miranda* v. *Arizona*, [384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)]. Two threshold conditions must be satisfied in order to invoke the warnings constitutionally required by *Miranda*: (1) the defendant must have been in custody; and (2) the defendant must have been subjected to police interrogation." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 302 Conn. 287, 294, 25 A.3d 648 (2011). "[T]he ultimate determination . . . of whether a defendant already in custody has been subjected to interrogation . . . presents a mixed question of law and fact over which our review is plenary, tempered by our scrupulous examination of the record to ascertain whether the findings are supported by substantial evidence." (Internal quotation marks omitted.) *State* v. *Ramos*, supra, 317 Conn. 30.

"Whether a defendant in custody is subject to interrogation necessarily involves determining first, the factual circumstances of the police conduct in question, and second, whether such conduct is normally attendant to arrest and custody or whether the police should know that such conduct is reasonably likely to elicit an incriminating response." (Internal quotation marks omitted.) Id., 29. "The defendant bears the burden of proving custodial interrogation. . . . [T]he definition of interrogation

[for purposes of *Miranda*] can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response. . . . The test as to whether a particular question is likely to elicit an incriminating response is objective; the subjective intent of the police officer is relevant but not conclusive and the relationship of the questions asked to the crime committed is highly relevant." (Emphasis in original; internal quotation marks omitted.) *State* v. *Smith*, 321 Conn. 278, 288–89, 138 A.3d 223 (2016).

In the present case, we conclude that the trial court properly determined that Officer Aklin's conversation with the defendant did not constitute custodial interrogation for *Miranda* purposes because Officer Aklin's questions were not reasonably likely to elicit incriminating responses from the defendant. In regard to the defendant's first statement ("I'm infatuated with guns"), the record reveals that it was the defendant, and not Officer Aklin, who initiated the exchange between the two by asking the officer about his firearm. It was only in response to the defendant's spontaneous question that Officer Aklin questioned why the defendant was concerned with what type of firearm he carried. Even though the exchange that led to the defendant's second statement ("I always wanted to be a bank robber") was initiated by Officer Aklin, we are of the view that both of Officer Aklin's questions were merely conversational in nature and not made for purposes of eliciting inculpatory statements from the defendant. See *State* v. *Vitale*, 197 Conn. 396, 412, 497 A.2d 956 (1985) (statements made by defendant during general conversation with officer were not result of interrogation). In fact, regarding the second statement, the record indicates that Officer Aklin asked the defendant what he wanted to be when he grew up to change the subject away from firearms, a subject that made the officer uneasy. See *State* v. *Labarge*, 164 Conn. App. 296, 316, 134 A.3d 259 (there was no interrogation where officer's questions

to defendant were made as conversation intended to defuse stressful process and not for purposes of soliciting incriminating information), cert. denied, 321 Conn. 915, 136 A.3d 646 (2016). Moreover, Officer Aklin was not privy to the investigation of the crimes at issue before us. The defendant was arrested for an unrelated violation of probation, and, thus, it would be unreasonable to conclude that Officer Aklin reasonably should have anticipated that his questions would elicit incriminating responses regarding crimes for which the officer was unaware.

For the foregoing reasons, we are not persuaded that, in his exchanges with the defendant on the way to the police department, Officer Aklin should have known that his questions were reasonably likely to elicit incriminating statements from the defendant. Accordingly, we conclude that the court properly denied the defendant's motion to suppress the statements he made to Officer Aklin while in custody.

The judgment is affirmed.

In this opinion the other judges concurred.

THE NORWALK MEDICAL GROUP, P.C., ET AL. *v.* ARTHUR YEE (AC 42511)

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

Syllabus

The plaintiffs, a medical group, together with former physician shareholders of the medical group, sought to vacate an arbitration award in favor of the defendant, who filed an application to confirm the award, which was issued in connection with the plaintiffs' alleged breach of a shareholder employment agreement. The arbitrator denied and dismissed the defendant's claims against the physician shareholders but issued an award on his claim against the medical group. In their application to vacate the award, the plaintiffs claimed that the award was not mutual, final and definite because the arbitrator had failed to allocate arbitration costs, expenses and compensation and set forth a reasoned award with

respect to the issue of attorney's fees, having failed to award attorney's fees to the physician shareholders. The trial court denied the plaintiffs' application to vacate the award, granted the defendant's application to confirm the award and rendered judgments thereon, from which the plaintiffs appealed to this court. *Held* that the trial court properly granted the defendant's motion to confirm the arbitration award: the plaintiffs failed to sustain the heavy burden necessary to vacate an arbitration award pursuant to statute (§ 52-418) as they failed to present a reasoned legal argument for why the award should be vacated on the ground that the arbitrator failed to allocate arbitration costs, expenses and compensation, the arbitrator's award of attorney's fees was reasoned and the arbitrator's failure to explain his decision denying attorney's fees for the physician shareholders did not constitute grounds to vacate the award.

Argued February 11—officially released July 21, 2020

Procedural History

Application to vacate an arbitration award, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant filed an application to confirm the award; thereafter, the cases were consolidated and tried to the court, *Hon. Taggart D. Adams*, judge trial referee; judgment denying the application to vacate and judgment granting the application to confirm, from which the plaintiff appealed to this court. *Affirmed.*

James C. Riley, with whom, on the brief, was *Thomas P. O'Connor*, for the appellants (plaintiffs).

Anita D. Di Gioia, for the appellee (defendant).

Opinion

DiPENTIMA, C. J. Our courts "undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution. . . . Such a limited scope of judicial review is warranted given the fact that the parties voluntarily bargained for the decision of the arbitrator and, as such, the parties are presumed to have assumed the risk of and waived objection to that decision." (Citations omitted; internal quotation

marks omitted.) *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 258 Conn. 101, 110, 779 A.2d 737 (2001). Led by these overarching principles, we consider the present appeal challenging the propriety of an arbitration award rendered in favor of the defendant, Arthur Yee. The plaintiffs, The Norwalk Medical Group, P.C. (medical group), and thirteen individual physicians (physicians) who formerly were members of the medical group,[1] appeal from the judgment of the trial court denying their application to vacate an arbitration award and the judgment of the trial court granting the application to confirm the arbitration award filed by the defendant. On appeal, the plaintiffs claim that the court improperly confirmed the award because it was not mutual, final and definite due to the failure of the arbitrator to (1) allocate arbitration costs, expenses and compensation and (2) set forth a reasoned award with respect to the issue of attorney's fees. We disagree and, accordingly, affirm the judgments of the trial court.

The following facts, as found by the arbitrator or otherwise undisputed, and procedural history are necessary for our resolution of this appeal. The defendant, a physician licensed to practice medicine in the state of Connecticut, became an employee of the medical group on August 1, 1988, and, some twenty years later, executed a written shareholder employment agreement (agreement) with the medical group on or about July 7, 2008. Paragraph 30 of the agreement provided: "Any controversy, claim, or breach arising out of or relating to this [a]greement shall be submitted for resolution to the American Arbitration Association [(AAA)] before one arbitrator. Such arbitration shall be held in Norwalk, Connecticut, in accordance with the rules and practice of the [AAA] then pertaining, and the judgment upon the award rendered shall be final and determinative

[1] The physicians, former shareholders of the medical group, are Roberta Rose, Marvin Den, Richard Gervasi, Richard G. Huntley, Jr., Donald E. Leone, J. James Lewis, Donald E. McNicol, Andrew M. Murphy, Stuart N. Novack, Paulo A. Pino, Pamela J. Randolph, James Samuel, and Paul B. Wiener.

and may be entered by consent in any court having jurisdiction thereof. The arbitrator shall have no authority to order punitive or exemplary damages but may award reasonable attorney's fees to the prevailing party."

On October 19, 2016, the defendant e-mailed the chief executive officer of the medical group regarding his intention to retire from the practice of medicine prior to the merger of the medical group with another medical practice. The defendant retired from the medical group on or about June 1, 2017.

On August 7, 2017, the defendant filed a demand for arbitration, claiming that the plaintiffs had breached the agreement and sought approximately $220,242 in damages, as well as attorney's fees and arbitration costs. The defendant claimed that, following his retirement, he was entitled to a buy-out from the medical group, pursuant to appendix II of the agreement, in the amount of $215,042. He also sought an additional $5000 for his 250 shares of the medical group.[2] The medical group denied any obligation to pay the defendant. The defendant's demand was directed to all the plaintiffs.

In a response dated August 29, 2017, the plaintiffs denied the defendant's material allegations and asserted that the physicians were not parties to the agreement and that the demand for arbitration had failed to state a claim against these individuals. The plaintiffs further asserted that the medical group had "ceased the active conduct of its business and [was] in the process of winding up its affairs and liquidating its assets. Thus, there is no obligation under the [agreement] on the part

[2] Appendix II of the agreement set forth the "Buy-Out" agreement for nononcology physicians, such as the defendant, and provided as follows: "If a physician completed the purchase of 250 shares of [the medical group] and completed at least 25 years of service with the [medical group], [the physician] will be entitled to 100 [percent] of the Buy-Out Benefit . . . ." The "Buy-Out" was defined as the average of the physician's annual total compensation over the last five full calendar years of employment. Appendix II also provided that the medical group would purchase back the shares of the medical group at the rate of $20 per share.

of any of the [plaintiffs] to pay 'retirement compensation' to [the defendant]."

Following the selection of the arbitrator and an agreed upon schedule of the proceedings, the defendant filed a specification of claims on or about November 8, 2017. In count one, the defendant alleged that the medical group had breached the terms of the agreement in failing to pay him in accordance with appendix II. In count two, the defendant set forth various allegations against the physicians that, in his view, resulted in their personal liability to the defendant. In their answer and special defenses, dated November 27, 2017, the plaintiffs denied most of the defendant's allegations and repeated the special defenses set forth in the August 29, 2017 response.

After the filing of various written submissions, including a motion to dismiss filed by the plaintiffs, prehearing memoranda, a stipulation of uncontested facts, posthearing briefs and proposed orders, and after a three day hearing, the arbitrator issued his decision and award on May 22, 2018. The arbitrator concluded that the medical group had breached its contractual obligation to pay the buy-out to the defendant, but that the individual physicians had no obligation to fund it. All the claims against the individual physicians were "denied and dismissed" by the arbitrator. The arbitrator awarded the defendant $220,242, 10 percent interest from July 27, 2017, the date of the breach, and reasonable attorney's fees. The arbitrator concluded his decision and award with the following statement: "*This* [*a*]ward *is in full settlement of all claims submitted to this* [*a*]*rbitration. All claims not expressly granted herein are hereby denied.*" (Emphasis added.) The defendant's counsel subsequently submitted a claim for $162,526 in attorney's fees.

In their June 11, 2018 motion to modify the decision and award of the arbitrator, the plaintiffs sought to have the arbitrator (1) assess arbitration fees, expenses and

compensation against the defendant regarding his claims against the individual physicians and (2) award attorney's fees to the physicians as "prevailing parties." Four days later, the arbitrator denied the plaintiffs' motion to modify.[3]

On June 19, 2018, the plaintiffs filed an objection to the defendant's demand for attorney's fees. In part, they claimed that the defendant was not entitled to recover attorney's fees for his unsuccessful claims against the physicians and therefore the attorney's fees should only be $53,822.40. The defendant filed a response dated July 2, 2018.

One week later, the arbitrator issued an "amended decision" regarding the issue of attorney's fees. He awarded the defendant attorney's fees in the amount of $149,903, reducing the amount claimed by $12,623 for charges associated with the service of subpoenas and an "improper and unnecessary concurrent state court action . . . ." The arbitrator further determined that the May 22, 2018 decision and award would not be changed in any other aspect. On July 30, 2018, the arbitrator issued an "amended final decision" that "highlighted" the following "key award components": "The total award of contractual breach damages is $220,242. The interest on the damages from July 27, 2017, to June 5, 2018, at 10 [percent] is $18,886.51. The amended award of [attorney's] fees is $149,903. Total award–$389,031.51."

On August 8, 2018, the plaintiffs filed an application to vacate the arbitration award pursuant to General

[3] Specifically, the arbitrator's response to the motion to modify stated: "Having reviewed the June 11, 2018 [m]otion to [m]odify, and noting that there were no challenges as to the computations of [attorney's] fees and costs awarded to the [defendant], and after review of the [defendant's] counsel's letter to the [AAA] dated June 12, 2018, the undersigned denies the [plaintiffs'] [m]otion to [m]odify [a]ward. See [r]ule 40 of the [AAA] Rules."

Rule 40 of the [AAA] rules provides in relevant part: "Within 20 days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator to correct any clerical, typographical, technical,

Statutes § 52-418 and Practice Book § 23-1. Two days later, in a separate action, the defendant filed an application to confirm the arbitration award pursuant to General Statutes §§ 52-408 through 52-424. On October 3, 2018, the plaintiffs moved to consolidate the two actions pursuant to Practice Book § 9-5. On October 16, 2018, the court, *Genuario*, *J.*, granted the motion to consolidate.

The court, *Hon. Taggart D. Adams*, judge trial referee, held a hearing on October 22, 2018, on the parties' concomitant applications. On January 3, 2019, the court issued a memorandum of decision denying the plaintiffs' application to vacate and granting the defendant's application to confirm the arbitration award. Specifically, it rejected the plaintiffs' argument that the arbitrator had failed to make a mutual, final and definite award by failing to allocate the arbitration fees, expenses and compensation as required by rule 39 (d) of the AAA. The court also was not persuaded by the plaintiffs' contention that in not providing the rationale for the attorney's fees issues, the arbitrator had failed to issue a reasoned award.[4] This appeal followed. Additional facts will be set forth as necessary.

As a preliminary matter, we set forth the legal principles and standard of review applicable to our discussion of the plaintiffs' appellate claims and arguments. Generally, "courts favor arbitration as a means of settling private disputes, [and, therefore] we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution." (Internal quotation marks omitted.) *Asselin & Vieceli Partnership, LLC* v. *Washburn*, 194 Conn. App. 519, 526, 221 A.3d 875 (2019), cert. denied, 334 Conn. 913, 221 A.3d 449

or computation errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided."

[4] The court also rejected the plaintiffs' claim of manifest disregard of the law. That rejection is not a subject of this appeal.

(2020); see also *Benistar Employer Services Trust Co.* v. *Benincasa*, 189 Conn. App. 304, 309, 207 A.3d 67 (Connecticut takes strongly affirmative view of consensual arbitration, as it is considered favored method to prevent litigation, promote tranquility and expedite equitable settlement of disputes), cert. denied, 331 Conn. 932, 208 A.3d 280 (2019).

"The scope of our review of the arbitrator's decision is defined by whether the submission to arbitration was restricted or unrestricted. The significance . . . of a determination that an arbitration submission was unrestricted or restricted is not to determine what the [arbitrator is] obligated to do, but to determine the scope of judicial review of what [he or she has] done. Put another way, the submission tells the [arbitrator] what [he or she is] obligated to decide. The determination by a court of whether the submission was restricted or unrestricted tells the court what its scope of review is regarding the [arbitrator's] decision. . . . The authority of an arbitrator to adjudicate the controversy is limited only if the agreement contains express language restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review. In the absence of any such qualifications, an agreement is unrestricted." (Citation omitted; internal quotation marks omitted.) *Asselin & Vieceli Partnership, LLC* v. *Washburn*, supra, 194 Conn. App. 526–27; see also *Girolametti* v. *Michael Horton Associates, Inc.*, 332 Conn. 67, 81 n.6, 208 A.3d 1223 (2019); *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 273 Conn. 86, 89 n.3, 868 A.2d 47 (2005).

In the present case, the parties' arbitration agreement did not contain express language restricting the breadth of issues, reserving explicit rights or conditioning the award on court review. The parties' agreement imposed no limit or condition on the authority of the arbitrator. See *Alderman & Alderman* v. *Pollack*, 100 Conn. App. 80, 85, 917 A.2d 60 (2007). Therefore, we conclude, and

the parties do not dispute, that the submission to arbitration was unrestricted. See, e.g., *LaFrance* v. *Lodmell*, 322 Conn. 828, 852, 144 A.3d 373 (2016) (submission is unrestricted unless otherwise agreed to by parties).

The scope of our review of an unrestricted submission, as a general matter, is limited. "Judicial review of arbitral decisions is narrowly confined. . . . When the parties agree to arbitration and establish the authority of the arbitrator through the terms of their submission, the extent of our judicial review of the award is delineated by the scope of the parties' agreement. . . . Where the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds that . . . the interpretation of the agreement by the arbitrators was erroneous. . . . [T]he arbitrators' decision is considered final and binding; thus the courts will not review the evidence considered by the arbitrators nor will they review the award for errors of law or fact. . . .

"When reviewing an unrestricted submission to arbitration, however, our Supreme Court has recognized a few limited circumstances in which a court can vacate an award: (1) the award rules on the constitutionality of a statute . . . (2) the award violates clear public policy . . . [and] (3) the award contravenes one or more of the statutory proscriptions of § 52-418." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Asselin & Vieceli Partnership, LLC* v. *Washburn*, supra, 194 Conn. App. 527–28. "As a routine matter, courts review de novo the question of whether any of those exceptions apply . . . ." (Internal quotation marks omitted.) *Benistar Employer Services Trust Co.* v. *Benincasa*, supra, 189 Conn. App. 310; *Toland* v. *Toland*, 179 Conn. App. 800, 810, 182 A.3d 651, cert. denied, 328 Conn. 935, 183 A.3d 1174 (2018). Only the third circumstance is at issue in the present case.

Section 52-418 provides that an award shall be vacated if the arbitrator exceeded his or her powers or executed

them so imperfectly that a mutual, final and define award was not made. *Westbrook Police Union, Local 1257, Council 15* v. *Westbrook*, 125 Conn. App. 225, 227, 6 A.3d 1164 (2010). "In our construction of § 52-418 (a) (4), we have, as a general matter, looked to a comparison of the award with the submission to determine whether the arbitrators have exceeded their powers. . . . The standard for reviewing a claim that the award does not conform to the submission requires what we have termed in effect, de novo judicial review. . . . Although we have not explained precisely what in effect, de novo judicial review entails as applied to a claim that the award does not conform with the submission, that standard best can be understood when viewed in the context of what the court is permitted to consider when making this determination and the exact nature of the inquiry presented. Our review is limited to a comparison of the award to the submission. Our inquiry generally is limited to a determination as to whether the parties have vested the arbitrators with the authority to decide the issue presented or to award the relief conferred. . . .

"In determining whether an arbitrator has exceeded the authority granted under the contract, a court cannot base the decision on whether the court would have ordered the same relief, or whether or not the arbitrator correctly interpreted the contract. The court must instead focus on whether the [arbitrator] had authority to reach a certain issue, not whether that issue was correctly decided. *Consequently, as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of authority, the award must be enforced. The arbitrator's decision cannot be overturned even if the court is convinced that the arbitrator committed serious error. . . . Moreover,* [*e*]*very reasonable presumption and intendment will be made in favor of the award and of the arbitrator's acts and proceedings. Hence, the burden rests on*

the party challenging the award to produce evidence sufficient to show that it does not conform to the submission." (Emphasis added; internal quotation marks omitted.) Id., 227–28. Guided by these principles, we address the specifics of the plaintiffs' appeal.

I

The plaintiffs first claim that the court improperly confirmed the award because it was not mutual, final and definite due to the failure of the arbitrator to allocate arbitration costs, expenses and compensation as required by rule 39 (d) of the AAA. Specifically, they argue that the failure to include this allocation in the arbitration award requires that it be vacated pursuant to § 52-418 (a) (4). We are not persuaded.

Paragraph 30 of the agreement required the parties to use an AAA arbitration in the event of a dispute arising from the agreement. The AAA Employment Arbitration Rules and Mediation Procedures, effective November 1, 2009, and amended fee schedule effective July 1, 2016, set forth the following in rule 39 (d): "The arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs, in accordance with applicable law. The arbitrator shall, in the award, assess arbitration fees, expenses, and compensation as provided in Rules 43, 44, and 45 in favor of any party and, in the event any administrative fees or expenses are due to the AAA, in favor of the AAA, subject to the provisions contained in the Costs of Arbitration section."

In the defendant's demand for arbitration, he indicated that the amount of his claim totaled $220,242, and that he also sought attorney's fees and arbitration costs. On this form, the defendant indicated that the flexible fee schedule for individually negotiated con-

tracts applied,[5] and that he had submitted payment of $1650. In a letter dated September 27, 2017, the AAA informed the parties that the arbitrator charged a rate of $500 per hour. During the proceedings, the defendant again requested that the plaintiffs be ordered to pay the arbitration expenses. Following the decision and award, the plaintiffs, in their June 11, 2018 motion to modify the award, argued that the arbitrator was required to allocate the arbitration expenses.

In their application to vacate the award, the plaintiffs argued, inter alia, that the arbitrator had not rendered a mutual, final and definite award because he had "failed to allocate arbitration fees, expenses and compensation as required by the governing AAA rules." They explained further, as a result of this omission, the arbitration award should be vacated pursuant to § 52-418 (a) (4). In his application to confirm the arbitration award, the defendant countered that the arbitrator's award stated that it constituted a full settlement of all claims submitted, and that any claim not specifically granted had been denied. In its memorandum of decision, the trial court concluded that the plaintiff's arguments regarding the allocation of arbitration fees, expenses and costs were "not very persuasive." The court noted that AAA rules 43,[6] 44[7] and

[5] For this type of arbitration, the AAA fee schedule provides that arbitrator compensation is not part of the administrative fees and that, "[u]nless the parties' agreement provides otherwise, arbitrator compensation and administrative fees are subject to allocation by an arbitrator in an award."

[6] Rule 43 of the AAA Rules, entitled "Administrative Fees," provides in relevant part: "As a not-of-profit organization, the AAA shall prescribe filing and other administrative fees to compensate it for the cost of providing administrative services. The AAA administrative fee schedule in effect at the time the demand for arbitration or submission agreement is received shall be applicable.

"AAA fees shall be paid in accordance with the Costs of Arbitration section. The AAA may, in the event of extreme hardship on any party, defer or reduce the administrative fees. . . ."

[7] Rule 44 of the AAA rules, entitled "Neutral Arbitrator's Compensation," provides: "Arbitrators shall charge a rate consistent with the arbitrator's stated rate of compensation. If there is disagreement concerning the terms of compensation, an appropriate rate shall be established by the AAA and confirmed by the parties.

45[8] addressed these items and appeared "to have been respected by the parties." The court concluded: "Frankly, neither side has offered compelling arguments in favor of either vacating or confirming the award based [on] the contention that AAA rule 39 (d) was or was not violated, and the court will not vacate the award on those nebulous arguments and counterarguments."

On appeal, the plaintiffs reassert their argument that the arbitrator failed to allocate the arbitration fees, expenses and compensation in the award pursuant to rule 39 (d). They further contend that, in the absence of the allocation, the award must be vacated. We are not persuaded.

At the outset, we note that the plaintiffs have not provided this court with any legal support for their argument regarding the allocation issue.[9] See, e.g., *Alpert* v. *Bennett Law Firm, P.C.*, United States District

"Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator. Payment of the arbitrator's fees and expenses shall be made by the AAA from the fees and moneys collected by the AAA for this purpose.

"Arbitrator compensation shall be borne in accordance with the Costs of Arbitration section."

[8] Rule 45 of the AAA rules, entitled "Expenses," provides: "Unless otherwise agreed by the parties or as provided under applicable law, the expenses of witnesses for either side shall be borne by the party producing such witnesses.

"All expenses of the arbitrator, including required travel and other expenses, and any AAA expenses, as well as the costs relating to proof and witnesses produced at the direction of the arbitrator shall be borne in accordance with the Costs of Arbitration section."

[9] This court has stated: "[W]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." (Internal quotation marks omitted.) *NRT New England, LLC* v. *Jones*, 162

Court, Docket No. H-06-1642 (NKJ) (S.D. Tex. August 21, 2007) (party provided District Court with no legal standard that arbitration award should be vacated even if AAA rules had been violated and, therefore, said claim failed), aff'd, 295 Fed. Appx. 725 (5th Cir. 2008).[10] Furthermore, the plaintiffs' position that such a violation of the AAA rules *mandates* that the arbitration award be vacated does not comport with the law. See, e.g., *Circle Industries USA, Inc.* v. *Parke Construction Group, Inc.*, 183 F.3d 105, 109 (2d Cir.) (violation of AAA rules can, under certain circumstances, require vacatur of arbitration award, but party seeking vacatur bears heavy burden of establishing sufficient grounds), cert. denied, 528 U.S. 1062, 120 S. Ct. 616, 145 L. Ed. 2d 510 (1999); *New York Newspaper Printing Pressman's Union No. 2* v. *New York Times Co.*, United States District Court, Docket No. 91 Civ. 4677 (CSH) (S.D.N.Y. May 22, 1992) (violations of AAA rules, although relevant to issue of arbitrator misconduct, are not sufficient in and of themselves to vacate arbitration award).

Finally, we are mindful of the principles applicable to this type of claim. Our Supreme Court has stated that "[a]n award conforming to an unrestricted submission should generally be confirmed by the court." *Garrity* v. *McCaskey*, 223 Conn. 1, 12, 612 A.2d 742 (1992). Further, a heavy burden is placed on a party seeking to vacate an award pursuant to § 52-418 (a). See *Doctor's Associates, Inc.* v. *Windham*, 146 Conn. App. 768, 774, 81 A.3d 230 (2013) (parties consent to arbitration, and, therefore, court will make every reasonable presumption in favor of arbitration award and arbitrator's acts

Conn. App. 840, 856, 134 A.3d 632 (2016); see also *Darin* v. *Cais*, 161 Conn. App. 475, 483, 129 A.3d 716 (2015).

[10] In the absence of precedent from Connecticut courts, this court previously has looked to the federal courts for guidance in examining the AAA rules. See, e.g., *SBD Kitchens, LLC* v. *Jefferson*, 157 Conn. App. 731, 748, 118 A.3d 550, cert. denied, 319 Conn. 903, 122 A.3d 638 (2015); see generally *Nussbaum* v. *Kimberly Timbers, Ltd.*, 271 Conn. 65, 73 n.6, 856 A.2d 364 (2004) (Connecticut appellate courts guided by federal precedent with respect to state statutes comparable to federal law).

and proceedings). With respect to this claim, we agree with the trial court that the plaintiffs failed to present "compelling arguments in favor" of vacating the arbitration award based on an alleged violation of rule 39 (d) of the AAA, and we decline to vacate that award on the basis of their unsupported contentions. The plaintiffs have not produced a well supported, reasoned legal argument containing a cogent analysis to persuade this court that the arbitration award should be vacated on this ground. Accordingly, this claim must fail.

II

The plaintiffs next claim that the court improperly confirmed the award because it was not mutual, final and definite due to the failure of the arbitrator to set forth a reasoned award with respect to attorney's fees. Specifically, the plaintiffs argue that the parties bargained for a reasoned award and the arbitrator failed to meet that standard in granting attorney's fees to the defendant and denying attorney's fees to the physicians. We are not persuaded and agree with the court's rejection of this claim.

The following facts and procedural history are necessary for our discussion. Rule 39 (c) of the AAA rules provides that the arbitration award "shall be in writing . . . and shall provide the written reasons for the award unless the parties agree otherwise." All parties sought attorney's fees. In the May 22, 2018 decision and award, the arbitrator found that no evidence had been presented that the physicians had agreed to personally pay the defendant's buy-out. Thus, he concluded that the physicians had no obligation to fund the buy-out of the defendant and that the claims directed against the physicians were "denied and dismissed." The arbitrator further determined that the medical group had breached the agreement by failing to pay the defendant's buy-out on or about July 27, 2017. The arbitrator awarded the

defendant $220,242 from the medical group, plus interest of 10 percent from July 27, 2017, to June 5, 2018. He also awarded reasonable attorney's fees to the defendant, pursuant to paragraph 30 of the agreement and the AAA rules. The defendant's counsel was instructed to draft a judgment, including the interest calculation and an affidavit of attorney's fees, for review within two weeks of the arbitration award. The arbitrator concluded his decision by stating that his award resolved all of the parties' claims, and that any claim not expressly granted had been denied. In the draft judgment submitted by the defendant's counsel, the interest was calculated in the sum of $18,886.51, and the claimed attorney's fees totaled $162,526.

In the plaintiffs' June 11, 2018 motion to modify the arbitration award, they argued, inter alia, that the arbitrator had failed to address whether the physicians were entitled to attorney's fees as prevailing parties and that there was no legal or logical basis for awarding attorney's fees to the defendant and not awarding attorney's fees to the physicians. The arbitrator denied the plaintiffs' motion to modify on June 15, 2018. In response to the plaintiffs' challenge to the attorney's fees requested by the defendant, the arbitrator issued an "Amended Decision Re: Attorney Fees" on July 9, 2018. In that decision, he awarded the defendant $149,903 in attorney's fees, a reduction of $12,623 from the requested amount of $162,526. He reaffirmed his earlier decision by concluding that "[i]n all other regards, the [d]ecision and [a]ward of [a]rbitrator, dated May 22, 2018 remains the same." Finally, on July 30, 2018, the arbitrator issued an "Amended FINAL Decision" awarding $389,031.51 to the defendant.

In considering the parties' competing motions, the trial court considered the plaintiffs' contention that the arbitrator had failed to issue a reasoned award with respect to attorney's fees, and, therefore, it did not

constitute a mutual, final and definite award pursuant to § 52-418 (a). The court concluded that the arbitrator had explained the reasons for awarding attorney's fees to the defendant and that those fees were reasonable. "Furthermore, the arbitrator had before him ample submissions by the counsel for all parties on the issue of the amount and reasonableness of the fee request and reduced the fee request by [the defendant] for several articulated reasons."

With respect to whether the arbitrator had issued a reasoned award as to his decision to not award attorney's fees to the physicians, the court stated: "On their face the arguments in favor of assessing attorney's fees against [the defendant] in connection with his failed claims against the [physicians] have some appeal. However, the court finds the [rejection of the physicians' claim for attorney's fees] well within the scope of the arbitrator's power and not subject to this court's second-guessing. In addition, and with some reluctance, the court will not vacate the [a]ward because the arbitrator failed to articulate reasons for denying an award of attorney's fees to [the medical group and the physicians]. As noted the denial was well within the arbitrator's discretion. In addition, the court particularly notes that this claim for fees was brought to the arbitrator's attention on numerous occasions. . . . Under these circumstances the court will not vacate a decision, whether the reasons are articulated or not, when the arbitrator had many opportunities to consider and reconsider granting fees, but eventually determined not do so."

On appeal, the plaintiffs reassert that the arbitrator failed to issue a reasoned award with respect to the attorney's fees awarded to the defendant and the denial of attorney's fees to the physicians. They further contend that, as a result of this deficiency, the court erred

in confirming the arbitration award and the entire award must be vacated. We are not persuaded.

As a general matter, the decision of an arbitrator need not include expansive reasoning to obtain judicial confirmation. See *Bic Pen Corp.* v. *Local No. 134*, *United Rubber*, *Cork*, *Linoleum & Plastic Workers of America*, 183 Conn. 579, 585, 440 A.2d 774 (1981) (arbitrator required only to render award in conformity to submission and need not include explanation of means by which award was reached); see also *Henry* v. *Imbruce*, 178 Conn. App. 820, 827–28, 177 A.3d 1168 (2017) (under federal law, only barely colorable justification for outcome necessary to confirm award). The parties, via the terms of an arbitration agreement, can require that the arbitrator issue a reasoned award, which contains greater details than a standard award. See, e.g., *SBD Kitchens*, *LLC* v. *Jefferson*, 157 Conn. App. 731, 747–48, 118 A.3d 550 (parties may agree to have arbitrator issue one of several types of arbitration awards, including reasoned award), cert. denied, 319 Conn. 903, 122 A.3d 638 (2015); *Lawson* v. *Privateer*, *Ltd.*, Superior Court, judicial district of Middlesex, Docket No. CV-06-4006118-S (February 1, 2007) (noting difference between standard award and reasoned award); see also *Tully Construction Co.* v. *Canam Steel Corp*, United States District Court, Docket No. 13 Civ. 3037 (PGG) (S.D.N.Y. March 2, 2015) (noting difference between "general, regular, standard or bare" award, which simply announces result, and "reasoned award," which includes something more than simple result).

In *SBD Kitchens*, *LLC* v. *Jefferson*, supra, 157 Conn. App. 740–41, this court addressed what constitutes a reasoned award in the arbitration context. In that case, the appellants claimed that the arbitrator's award of punitive damages, consisting of attorney's fees and costs, should be vacated because it was made in manifest disregard of the law. In resolving that claim, we

set forth the meaning of a reasoned award under the AAA rules. Id., 747. First, we explained that the AAA rules do not define the term "reasoned award." Id., 747–48. Second, we noted that, although no Connecticut appellate case law specifically had defined that term, many federal courts had. Id., 748. "The common theme of those federal authorities, with which we agree, is that a reasoned award means something more than a simple result and less than specific findings of fact and conclusions of law." Id.; see also *Leeward Construction Co., Ltd.* v. *American University of Antigua-College of Medicine*, 826 F.3d 634, 640 (2d Cir. 2016).

Next, it is necessary to review briefly the relevant legal principles pertaining to awards of attorney's fees and a prevailing party. "The general rule of law known as the American rule is that attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception. . . . This rule is generally followed throughout the country. . . . Connecticut adheres to the American rule. . . . There are few exceptions. For example, a specific contractual term may provide for the recovery of attorney's fees and costs . . . or a statute may confer such rights. . . . [W]e review the trial court's decision to award attorney's fees for abuse of discretion." (Citations omitted; internal quotation marks omitted.) *Broadnax* v. *New Haven*, 270 Conn. 133, 178, 851 A.2d 1113 (2004); see also *Francini* v. *Riggione*, 193 Conn. App. 321, 330, 219 A.3d 452 (2019).

We also note that "[o]ur Supreme Court has stated: [P]revailing party has been defined as [a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded." *Giedrimiene* v. *Emmanuel*, 135 Conn. App. 27, 34–35, 40 A.3d 815 (citing *Wallerstein* v. *Stew Leonard's Dairy*, 258 Conn. 299, 303, 780 A.2d 916 (2001)), cert. denied, 305 Conn. 912, 45 A.3d 97 (2012). In this context, however, the question of whether a party

has, in fact, "prevailed" is a question reserved for the arbitrator, and the propriety of the arbitrator's conclusion is not subject to review for errors of law or fact by the courts. *Comprehensive Orthopaedics & Musculoskeletal Care, LLC* v. *Axtmayer*, 293 Conn. 748, 758, 980 A.2d 297 (2009).

Applying the foregoing legal principles to the facts of the present case, we conclude that the plaintiffs cannot sustain their heavy burden necessary to vacate an arbitration award. In the May 22, 2018 award, the arbitrator concluded that the medical group had breached its contractual obligation to pay the retirement buy-out for the defendant, that the physicians had no personal liability for this buy-out, and that the defendant's claims against the physicians were not viable. The arbitrator awarded attorney's fees only to the defendant, and, following the plaintiffs' motion to modify, declined to modify the award. The arbitrator, in response to a challenge of the attorney's fees awarded to the defendant's counsel, issued an amended decision reducing that award by $12,623. Specifically, the arbitrator explained that he had reduced the award for fees associated with the service of subpoenas and an "improper and unnecessary concurrent state court action . . . ."

It is clear, therefore, that the arbitrator considered and issued a reasoned award regarding the attorney's fees awarded to the defendant. He concluded that the medical group had failed to pay the retirement buy-out to the defendant as required by the agreement and, therefore, as the prevailing party, the defendant was entitled to attorney's fees. Furthermore, the arbitrator reviewed the timesheets submitted by the defendant's counsel and disallowed certain aspects of the claimed fees in the amended decision. We conclude, therefore, that the arbitrator met the reasoned award standard with respect to the attorney's fees awarded to the defendant.

Regarding the denial of attorney's fees to the physicians, we share the concern set forth in the trial court's decision that the arbitrator had failed to explain the basis for denying these fees and agree with the trial court's ultimate conclusion that the arbitration award should nevertheless be confirmed. Our conclusion is informed by the clarification of the reasoned award standard from the United States Court of Appeals for the Second Circuit: "We agree with our sister [c]ircuits, and hold . . . that a reasoned award is something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel. A reasoned award sets forth the basic reasoning of the arbitral panel on the central issue or issues raised before it. It need not delve into every argument made by the parties. The award here satisfies that standard: while it does not provide a detailed rationale for each and every line of damages awarded, it does set forth the relevant facts, as well as the key factual findings supporting its conclusions. The summary nature of its analytical discussion reflects only that, as the district court found, [t]he parties had ample opportunity to contest [the plaintiff's] entitlement to compensation for change order work, and the summary nature of the discussion in the decision shows that the panel simply accepted [the plaintiff's] arguments on this particular point. . . . No more is needed." (Citation omitted; internal quotation marks omitted.) *Leeward Construction Co., Ltd.* v. *American University of Antigua-College of Medicine*, supra, 826 F.3d 640.

As explained by the trial court, the issue of whether the physicians were entitled to an award of attorney's fees "was brought to the [a]rbitrator's attention on numerous occasions." The arbitrator declined to exercise his discretion and award these fees several times. Further, the arbitrator explained that, although the defendant was entitled to his retirement buy-out, it was

the medical group, and not the physicians, who had breached the agreement and was financially responsible. The arbitrator set forth his factual finding and key legal conclusions for the decision on the central issue of the case, that is, whether the defendant was entitled to a buy-out pursuant to the terms of the written shareholder agreement. His failure to include details on the subordinate issue of whether the physicians should be awarded attorney's fees, although perhaps regrettable, does not constitute grounds to warrant judicial interference in the arbitration process.[11] To do so would undercut the strong public policy favoring arbitration. As we

[11] The plaintiffs rely on *Smarter Tools, Inc.* v. *Chongqing Senci Import & Export Trade Co., Ltd.*, United States District Court, Docket No. 18-CV-2714 (AJN) (S.D.N.Y. March 26, 2019), appeal dismissed, Docket Nos. 19-943 and 19-1155, 2019 WL 8403145 (2d Cir. November 12, 2019), to support their claim that the arbitrator failed to issue a reasoned award and therefore, it must be vacated. In *Smarter Tools, Inc.*, the plaintiff purchased gas-powered generators from the named defendant. Id. A dispute ensued and arbitration commenced. Id. The parties requested that the arbitrator issue a reasoned award. Id. The named defendant sought payment for the remaining balance on the generators, while the plaintiff contended that the generators were defective and not compliant with certain regulations. Id.

The arbitrator issued a six page final award that detailed the parties and proceedings, ruled on an issue of admissibility, incorporated the parties' stipulation that the plaintiff's outstanding balance totaled approximately $2.4 million, found that the named defendant's claims were "well-founded and supported by the evidence" and determined that the plaintiff's counterclaims were not supported. The arbitrator did not make any findings as to whether the generators were defective, compliant with the applicable regulations or had been unilaterally canceled by the named defendant. The District Court concluded that the arbitrator failed to meet the reasoned award standard because it failed to contain any rationale for rejecting the plaintiff's claims. Id.

We are not persuaded by the plaintiffs' reliance on this nonbinding authority. In that case, the arbitrator failed to provide any explanation or reasoning for his decision on the central issue, that is, whether the generators at issue had been defective or compliant with the governmental regulations. In contrast, the arbitrator in the present case met the reasoned award standard with respect to the principal issue of whether the defendant should receive his buy-out. Further, the subsidiary matter of whether the physicians should receive attorney's fees was presented to the arbitrator, who, in the exercise of his discretion, declined to award them.

noted at the outset, "the parties voluntarily bargained for the decision of the arbitrator and, as such, the parties are presumed to have assumed the risks and waived objections to that decision." *American Universal Ins. Co.* v. *DelGreco*, 205 Conn. 178, 186–87, 530 A.2d 171 (1987); see generally *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, supra, 258 Conn. 110; *United States Fidelity & Guaranty Co.* v. *Hutchinson*, 244 Conn. 513, 519–20, 710 A.2d 1343 (1998); *Design Tech, LLC* v. *Moriniere*, 146 Conn. App. 60, 66–67, 76 A.3d 712 (2013). Accordingly, we conclude that the court properly granted the defendant's motion to confirm the arbitration award and properly denied the plaintiffs' motion to vacate.

The judgments are affirmed.

In this opinion the other judges concurred.

STEPHEN S.* *v.* COMMISSIONER OF CORRECTION (AC 42384)

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

Syllabus

The petitioner, who had been convicted of multiple charges involving the sexual abuse of a minor, filed a third petition for a writ of habeas corpus, claiming that his trial counsel and appellate counsel had rendered ineffective assistance. The first two habeas courts denied the first two petitions. The third habeas court rendered judgment declining to issue the writ, determining, pursuant to the applicable rule of practice (§ 23-24 (a) (2)), that the petition was frivolous on its face. The court stated that the petitioner's third petition raised claims that were identical to those raised, litigated and resolved against the petitioner in his first two habeas petitions. The court thereafter granted the petitioner certification to appeal, and the petitioner appealed to this court, asserting that his

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

third petition was not wholly frivolous because the claims it raised were different from the claims raised in his first two petitions. After the parties submitted their briefs to this court, the respondent Commissioner of Correction conceded that the habeas court had erroneously declined to issue the writ and concluded that the matter had to be remanded to the habeas court with direction to issue the writ. *Held* that the habeas court abused its discretion in declining to issue the writ of habeas corpus on the ground that the petitioner's habeas petition was wholly frivolous on its face; the petition alleged cognizable claims of ineffective assistance of trial counsel and prior habeas counsel, and a claim of actual innocence that had not been pleaded in previous petitions, and the petitioner's claims should have survived the screening function of Practice Book § 23-24 and entitled the petitioner to present evidence in support of his claims.

Submitted on briefs March 17—officially released July 21, 2020

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson*, *J.*, rendered judgment declining to issue a writ of habeas corpus; thereafter, the petitioner, on the granting of certification, appealed to this court. *Reversed; judgment directed*; *further proceedings*.

Vishal K. Garg, assigned counsel, filed a brief for the appellant (petitioner).

Kevin T. Kane, chief state's attorney, and *Timothy J. Sugrue*, assistant state's attorney, filed a brief for the appellee (respondent).

Opinion

KEEGAN, J. The petitioner, Stephen S., appeals from the judgment of the habeas court declining to issue a writ of habeas corpus pursuant to Practice Book § 23-24 (a) (2) because the petition was "wholly frivolous on its face." On appeal, the petitioner claims that the habeas court improperly declined to issue the writ of habeas corpus because the claims raised in his current habeas petition are different from the claims raised in his two prior habeas petitions, and, therefore, his pleading is not wholly frivolous. After the parties submitted their briefs, the respondent, the Commissioner

of Correction, citing to *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 560, 223 A.3d 368 (2020), conceded that the habeas court erroneously declined to issue the writ and concluded that the matter must be remanded to the habeas court with direction to issue the writ. We agree that a remand to the habeas court is appropriate, and, thus, the judgment is reversed and the case is remanded with direction to issue the writ of habeas corpus.

The following facts and procedural history are relevant to this appeal. Following a jury trial, the petitioner was found guilty of multiple charges involving the sexual abuse of a minor and was sentenced to sixty years of incarceration. The petitioner appealed from the judgment of conviction to this court, claiming that the trial court improperly allowed (1) pornographic materials to be admitted into evidence even though the victim had not specifically identified them, (2) the admission of prejudicial hearsay pursuant to the constancy of accusation doctrine, and (3) prosecutorial misconduct to occur. This court disagreed and affirmed the judgment of the trial court.

Thereafter, the petitioner filed his first petition for a writ of habeas corpus in which he alleged the ineffective assistance of his trial counsel, Martin McQuillan, and his appellate counsel, David T. Grudberg. Specifically, the petitioner claimed that McQuillan had failed (1) to "conduct sufficient consultation regarding the medical proofs available to the state," (2) to "meaningfully challenge the testimony of medical personnel who testified for the state," (3) to "present medical testimony to support the petitioner's declaration of innocence," (4) to "introduce as evidence medical reports concerning the complaining witness' behavior and mental health," (5) to "object to constancy of accusation witnesses," and (6) to "object to the state's attorney's cross-examination of the [petitioner]." Thereafter, the petitioner amended his petition to include a claim that McQuillan

had failed to adequately consult with an expert, and to present expert testimony, regarding child abuse and sexual child abuse "within the context of the criminal case allegations and available information." Additionally, the petitioner claimed that Grudberg had failed (1) to "raise as an issue the trial court's overruling of [the petitioner's] objection to allowing the constancy of accusation witnesses to testify that the [victim] told them about oral, anal and vaginal contact," and (2) to adequately "[present] the prosecutorial misconduct claim regarding the prosecutor's cross-examination of the [petitioner] because he failed to detail all of the instances of claimed misconduct and failed to provide a [harm] analysis."

After a trial on the merits, the habeas court, *T. Santos*, *J.*, concluded that the petitioner had failed to prove any of his claims of ineffective assistance of counsel and, accordingly, denied the petition in a lengthy and comprehensive memorandum of decision. The petitioner appealed from the judgment of the habeas court, claiming that the habeas court erred in denying his claim of ineffective assistance of counsel because his trial counsel failed to sufficiently consult with an expert witness (1) regarding the physical evidence of sexual abuse and (2) in the field of child sexual abuse to refute the prosecution's witness. See *Stephen S.* v. *Commissioner of Correction*, 134 Conn. App. 801, 802, 40 A.3d 796, cert. denied, 304 Conn. 932, 43 A.3d 660 (2012). This court affirmed the judgment of the habeas court. Id.

Thereafter, the petitioner filed his second habeas petition, in which he claimed that McQuillan, his criminal trial counsel; Bruce B. McIntyre, his habeas counsel; and Mary Trainer, his appellate habeas counsel, were ineffective. Specifically, the petitioner alleged that McQuillan failed to properly and adequately to investigate evidence underlying the petitioner's case and to consult with and to present expert testimony needed to refute allegations of sexual assault against the peti-

tioner. McIntyre, he claimed, had failed to properly and adequately raise and argue the petitioner's constitutional right to the effective assistance of counsel pursuant to the sixth and fourteenth amendments to the United States constitution and article first, §§ 8 and 9, of the constitution of Connecticut. Last, the petitioner claimed that Trainer failed to raise a claim on appeal contesting the determination of the habeas court that the petitioner's right to the effective assistance of counsel was not violated when McQuillan failed "to consult with a medical expert." Following a trial, the habeas court, *Fuger*, *J.*, held that the claims asserted against McQuillan were successive to the claims that had been pleaded against him in the first habeas petition. Additionally, the court concluded that the petitioner's claims were "absurd given the fact that he actually consulted with and used" the medical expert in question. Finally, the court concluded that the remaining claims against McIntyre and Trainer were unsupported by the evidence that was presented to the court. The petitioner filed an appeal from the second habeas court's judgment but later withdrew it.

Subsequently, the petitioner filed his third habeas petition, as a self-represented party, which is the subject of the present appeal. Again, the petitioner claimed that McQuillan and Grudberg had been ineffective. Specifically, the petitioner claimed that McQuillan was ineffective in his representation because he failed (1) to file a motion to dismiss the charges, (2) to investigate and to present evidence regarding the petitioner's custody battle with his former wife, (3) to impeach the testimony of his former wife regarding access she and the victim had to his apartment and his belongings, (4) to challenge the testimony of the state's witness, Janet Murphy, a nurse practitioner, regarding her credentials and qualifications, and her physical and psychological examination of the victim, (5) to present the testimony of various medical and psychological experts, (6) to object to,

obtain, challenge, and preserve medical and psychiatric clinic and hospital records relating to the victim that had been redacted at trial, (7) to investigate and to present the testimony of a defense character witness, (8) to move to compel a pretrial competency hearing regarding the victim, and (9) to move for a judgment of acquittal "on a case that was a 'credibility contest.' " Additionally, the petitioner further claimed that Grudberg had failed to raise a claim on direct appeal regarding the redacted records that served as the basis for the claim against McQuillan previously set forth. Last, the petitioner asserted a claim of actual innocence, which was predicated on McQuillan's alleged deficiencies.

Following the filing of the petitioner's petition for a writ of habeas corpus, the court, *Newson*, *J.*, issued a judgment declining to issue the writ: "Pursuant to Practice Book § 23-24 (a) (2) . . . the [petition] is wholly frivolous on its face, to wit: The petition raises claims identical to those already raised, litigated, and resolved against the petitioner in [the first and second habeas actions]." Thereafter, the petitioner filed a motion for rectification requesting that the habeas court "rectify the record to include any materials from the petitioner's prior cases upon which the [court] relied when arriving at its decision." The habeas court denied the petitioner's motion, explaining that rectification is not necessary, as the court may take judicial notice of the petitioner's previous habeas files. Thereafter, the petitioner filed a petition for certification to appeal, which was granted. This appeal followed.

We begin with the standard of review. The habeas court's determination that a petition for a writ of habeas corpus is frivolous, and its decision declining to issue the writ of habeas corpus, are reviewed for an abuse of discretion. *Fernandez* v. *Commissioner of Correction*, 125 Conn. 220, 223, 7 A.3d 432 (2010), cert. denied, 300 Conn. 924, 15 A.3d 630 (2011).

Practice Book § 23-24, titled "Preliminary Consideration of Judicial Authority," provides in relevant part: "(a) The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that . . . (2) the petition is wholly frivolous on its face . . . ." In the present matter, the sole issue before this court is whether the habeas court abused its discretion in declining to issue the petitioner's writ of habeas corpus pursuant to § 23-24 (a) (2) because the petition was "wholly frivolous on its face . . . ."

Although there is limited authority addressing Practice Book § 23-24 (a) (2), we find three cases, *Alvarado* v. *Commissioner of Correction*, 75 Conn. App. 894, 818 A.2d 797, cert. denied, 264 Conn. 903, 823 A.2d 1220 (2003), *Fernandez* v. *Commissioner of Correction*, supra, 125 Conn. App. 220, and *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 548, to be particularly instructive to the resolution of the present appeal.

In *Alvarado*, the self-represented petitioner alleged that his confinement was illegal because a "parole hearing was denied [to him] or the hearing was improper." (Internal quotation marks omitted.) *Alvarado* v. *Commissioner of Correction*, supra, 75 Conn. App. 894–95. Thereafter, the habeas court dismissed the petition for a writ of habeas corpus pursuant to Practice Book § 23-24 (a) (2) because the petition was "frivolous on [its] face," as it failed "to allege specific facts of ineffective assistance of counsel or 'any other claim[s] as to why [the petitioner's] conviction is illegal.' " Id., 895. Upon a review of the record, this court concluded that, because the petitioner failed to allege any specific facts of ineffective assistance of counsel or any other claim as to why his underlying conviction was illegal, the habeas court did not abuse its discretion in declining to issue a writ of habeas corpus pursuant to § 23-24 (a) (2). Id., 896.

In *Fernandez*, the self-represented petitioner alleged that he was a "foreign national, who is being treated as a 'slave' and a 'prisoner of war' in that he is being held at the 'plantation of MacDougall-Walker' [Correctional Institution] in violation of his constitutional rights and 'Geneva Convention Treaties, Convention Against Torture, European Convention on Human Rights and U.S. Human Rights Acts.' " *Fernandez* v. *Commissioner of Correction*, supra, 125 Conn. App. 224. On appeal, this court concluded that, because the petitioner was incarcerated as a result of convictions of crimes of which he had been found guilty, the habeas court did not abuse its discretion in declining to issue a writ of habeas corpus. Id.

Additionally, we find that *Gilchrist*, a recent decision of our Supreme Court, provides clarity as to the precise issue before us, although it is procedurally distinct from the present case. In *Gilchrist*, the self-represented petitioner filed a petition for a writ of habeas corpus. *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 550. He included with the petition an application for a waiver of fees and the appointment of counsel. Id., 551. Thereafter, the habeas court assigned a docket number to the petition and granted the petitioner's application for a waiver of fees but took no action regarding his request for the appointment of counsel. Id. One week later, the habeas court, sua sponte and without providing notice to the petitioner or giving him an opportunity to be heard, rendered judgment of dismissal because the court lacked jurisdiction pursuant to Practice Book § 23-29 (1). Id., 551–52. The habeas court granted the petitioner's petition for certification to appeal, and this court affirmed the habeas court's judgment of dismissal. Id., 552. Our Supreme Court granted the petitioner's petition for certification to appeal. The revised certified question before our Supreme Court was as follows: "Did the Appellate Court properly affirm the habeas court's dismissal of the petition under . . . [Practice

Book] § 23-29 when that dismissal occurred before the habeas court ordered the issuance of the writ pursuant to . . . [Practice Book] § 23-24?" Id. Our Supreme Court answered that question in the negative, explaining that, "when a petition for a writ of habeas corpus alleging a claim of illegal confinement is submitted to the court, the following procedures should be followed. First, upon receipt of a habeas petition that is submitted under oath and is compliant with the requirements of Practice Book § 23-22; see Practice Book §§ 23-22 and 23-23; the judicial authority must review the petition to determine if it is patently defective because the court lacks jurisdiction, the petition is wholly frivolous on its face, or the relief sought is unavailable. Practice Book § 23-24 (a). If it is clear that any of those defects are present, then the judicial authority should issue a judgment declining to issue the writ, and the office of the clerk should return the petition to the petitioner explaining that the judicial authority has declined to issue the writ pursuant to [Practice Book] § 23-24. Practice Book § 23-24 (a) and (b). If the judicial authority does not decline to issue the writ, then it must issue the writ, the effect of which will be to require the respondent to enter an appearance in the case and to proceed in accordance with applicable law. At the time the writ is issued, the court should also take action on any request for the appointment of counsel and any application for the waiver of filing fees and costs of service. See Practice Book §§ 23-25 and 23-26. After the writ has issued, all further proceedings should continue in accordance with the procedures set forth in our rules of practice, including Practice Book 23-29." *Gilchrist* v. *Commissioner of Correction*, supra, 562–63.

In clarifying this procedure, our Supreme Court explained that habeas courts should proceed "with a lenient eye" and "[allow] borderline cases to proceed" when determining whether to issue a writ of habeas

corpus: "To be clear, the screening function of Practice Book § 23-24 plays an important role in habeas corpus proceedings, but it is intended only to weed out obviously and unequivocally defective petitions, and we emphasize that [b]oth statute and case law evince a strong presumption that a petitioner for a writ of habeas corpus is entitled to present evidence in support of his claims." (Internal quotation marks omitted.) Id., 560. As our Supreme Court explained, "[t]he justification for this policy is apparent. If the writ of habeas corpus is to continue to have meaningful purpose, it must be accessible not only to those with a strong legal background or the financial means to retain counsel, but also to the mass of uneducated, unrepresented prisoners." (Internal quotation marks omitted.) Id.

Upon a review of case law in our jurisdiction, we conclude that the facts in both *Alvarado* and *Fernandez* are distinguishable from the present case. In the present case, the petitioner's petition for a writ of habeas corpus alleged cognizable claims of ineffective assistance of trial and prior habeas counsel along with a claim of actual innocence. These claims on their face are not "obviously and unequivocally defective"; id.; but, rather, are cognizable claims that should have survived the "screening function" of Practice Book § 23-24 and entitled the petitioner to present evidence in support of his claims. Specifically, the petitioner alleged a claim of ineffective assistance of second habeas counsel in which he asserted that first habeas counsel had been ineffective for failing to claim that his trial and appellate counsel were ineffective. To support his claim, the petitioner identified specific witnesses' testimony that would have been favorable to him, raised issues pertaining to the adequacy of medical professionals who were called to testify as to the reliability of the allegations against him, and argued that a "toluidine blue dye test" should have been conducted. Addition-

ally, the petitioner asserted a claim of actual innocence, a claim that had not been pleaded in previous petitions. In light of the foregoing facts and case precedent, we conclude that the habeas court abused its discretion in declining to issue the writ on the ground that the petition was wholly frivolous on its face.

The judgment is reversed and the case is remanded with direction to issue the writ and for further proceedings according to law.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* CHARLES J. INGALA (AC 41135)

DiPentima, C. J., and Moll and Devlin, Js.

Syllabus

Convicted, on a conditional plea of nolo contendere, of possession of a sawed-off shotgun and criminal possession of a firearm, the defendant appealed to this court. The defendant allegedly fled the scene of a motor vehicle accident and thereafter assaulted a witness to the accident with a sawed-off shotgun. The police met the defendant at his home in an attempt to locate the shotgun. The defendant gave the police permission to search his apartment and the backyard of the property but the search was unsuccessful. The police thereafter conducted a ruse; they stated that they were leaving the property but, instead, continued their surveillance of the defendant to see if he would recover the weapon after the police left. The defendant then walked outside to an area of the property, where he was stopped by the police. The police then resumed their search of that area and seized the shotgun. On appeal to this court, the defendant claimed that the trial court improperly denied his motion to suppress the shotgun because there were no exigent circumstances that permitted the officers to conduct a warrantless search and seizure of the shotgun under the fourteenth amendment to the federal constitution. *Held* that the trial court properly concluded that the search was lawful under the exigent circumstances exception to the warrant requirement and properly denied the defendant's motion to suppress, as the police had strong reason to believe that the defendant had used the sawed-off shotgun to assault the witness earlier that evening and it was likely that the shotgun was on the property despite the defendant's assertions to the contrary; the record indicated that the defendant was visibly

intoxicated and had stated in the presence of the officers that he was willing to resort to violence in response to someone who bullied him, it was reasonable and prudent for the police to believe that the shotgun could have been loaded, and, under the circumstances, it was reasonable for the police to conclude that the defendant believed that the police had all left his property, that the defendant was intent on recovering the shotgun, and that such actions were prompted by the defendant's desire to avoid arrest, and the record sufficiently demonstrated that the police were concerned that the defendant could soon arm himself and present a threat of safety to the officers had the defendant discovered them surveilling the property.

Argued March 10—officially released July 21, 2020

Procedural History

Information charging the defendant with the crimes of interfering with an officer, possession of a sawed-off shotgun, criminal possession of a firearm, and breach of the peace in the second degree, brought to the Superior Court in the judicial district of Waterbury, geographical area number four, where the court, *Cremins*, *J.*, denied the defendant's motion to suppress; thereafter, the state entered a nolle prosequi as to the charges of interfering with an officer and breach of the peace in the second degree; subsequently, the defendant was presented to the court, *Fasano*, *J.*, on a conditional plea of nolo contendere to possession of a sawed-off shotgun and criminal possession of a firearm; judgment of guilty in accordance with the plea, from which the defendant appealed to this court. *Affirmed.*

Adele V. Patterson, senior assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Joseph S. Danielowski*, for the appellee (state).

Opinion

DEVLIN, J. The defendant, Charles J. Ingala, appeals from the judgment of conviction, rendered after a conditional plea of nolo contendere,[1] of possession of a

[1] General Statutes § 54a-94a provides: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the

sawed-off shotgun in violation of General Statutes § 53a-211 and criminal possession of a firearm in violation of General Statutes § 53a-217. The plea followed the trial court's denial of the defendant's motion to suppress the sawed-off shotgun seized by the police. The sole issue in this appeal is whether the warrantless search of the defendant's backyard and the warrantless seizure of the shotgun may be justified under the exigent circumstances exception to the warrant requirement of the fourth amendment to the United States constitution.[2] We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the resolution of the defendant's claims on appeal.[3] At approximately 11 p.m. on August 28, 2016, police officers with the Watertown Police Department were called to the scene of a motor vehicle accident

right to take an appeal from the court's denial of the defendant's motion to suppress or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law provided a trial court has determined that a ruling on such motion to suppress or motion to dismiss would be dispositive of the case. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

[2] On appeal, the defendant raises numerous arguments in addition to contesting the state's reliance on the exigent circumstances doctrine to justify the warrantless search and seizure. Specifically, the defendant additionally argues that the trial court erroneously determined that (1) the shotgun was abandoned, and (2) the defendant's consent to an earlier search still applied to the later search after the police officers left the backyard and later returned. He also argues that the court implicitly decided that he had a legitimate expectation of privacy in his backyard, thus affording him standing to assert a violation of his fourth amendment rights. In its brief to this court, the state concedes each of these arguments. As a result, the sole issue for this court to decide is whether the exigent circumstances exception applies.

[3] When "the trial court's factual findings in its ruling on [a] defendant's motion to suppress are very limited, in summarizing the relevant facts, we include facts that are implicitly included in the trial court's ruling, and we also look to the record for evidence that supports the trial court's ruling." *State* v. *Kendrick*, 314 Conn. 212, 224, 100 A.3d 821 (2014).

that had occurred in Waterbury near the border of Watertown.[4] Upon arriving at the scene of the accident, the officers learned that one of the vehicles involved had fled the accident. One of the officers, Jeffrey McKirryher, left in an attempt to locate this vehicle. Shortly thereafter, McKirryher was flagged down by George Petro, a motorcyclist, who had seen the accident. Petro told McKirryher that he had spoken to the driver of the vehicle who had left the scene of the accident and that the driver had pointed a sawed-off shotgun at Petro's head. Petro had a cut on his forehead and later explained that the driver had struck him in the head with the shotgun. Petro then informed McKirryher that the driver had fled to a nearby home and led McKirryher to the defendant's home at 411 Falls Avenue in Watertown. Petro indicated that the driver "was down around [the] back" of the property. McKirryher alerted other police officers over his radio of the situation and informed them of his location. Shortly thereafter, four more officers from the Watertown Police Department arrived at 411 Falls Avenue, namely, Officer Jack Conroy, Officer Mark Raimo, Sergeant Jason Demarest, and Sergeant David Ciarleglio.

The officers later described the defendant's home as follows. Falls Avenue runs north to south, and 411 Falls Avenue is located on the western side of the road. The primary structure at 411 Falls Avenue is a multifamily, three-story home with a few separate units. The defendant resides in the basement apartment of this structure. To the north of the property is a wooded area. A large commercial building, which was vacant at the time of the investigation, abuts the property to the west. On the southern border, there is a chain link fence that is approximately four feet high, which separates the

[4] Ultimately, the Waterbury Police Department assumed control over the scene of the accident and conducted a separate investigation to the search for the shotgun at issue in this appeal.

property from a neighboring residential property. The land slopes down from Falls Avenue toward the western edge of the property such that the basement is visible and accessible from the rear of the property. A driveway runs from Falls Avenue to the rear of the property between the home and the northern edge of the property. Both the southern and northern sides of the property were open to the backyard.

After alerting the other officers over his radio, McKirryher walked down the driveway with his service weapon drawn and loudly announced his presence. As he reached the rear of the building, McKirryher saw the defendant's vehicle with severe front end damage parked at the end of the driveway. McKirryher then saw the defendant walk out of his apartment and instructed the defendant to raise his hands. When the police approached the defendant, he was visibly intoxicated. The defendant was placed in handcuffs and McKirryher questioned him about the shotgun. The defendant denied possessing a shotgun. The defendant then gave his consent to the officers to search his apartment and the backyard.

Over the course of approximately one-half hour, the officers searched the backyard and the defendant's apartment, but were unable to locate the shotgun. While the search was being conducted, the defendant was asked several times for the location of the shotgun, to which he repeatedly claimed that there was no shotgun. At one point, Demarest warned the defendant of the potential that a child could stumble across the shotgun in the woods, which appeared to concern the defendant despite his claim that there was no shotgun. When discussing the altercation with Petro, the defendant described Petro as a "bully" and remarked, "Don't bully me. . . . I'll kill ya." During the search, one of the defendant's upstairs neighbors informed Raimo that he had observed the altercation between the defendant and Petro, saw the defendant holding a shotgun, and

believed that he knew where the defendant normally kept the gun inside the basement apartment.

Eventually, the officers decided to return to the front yard and removed the handcuffs from the defendant. As they were walking toward the street, Demarest remarked to the defendant: "We're leaving." This statement was a pretense because, although some officers left, several officers remained. They firmly believed that the shotgun was on the property and they were not going to leave until it was found.

Upon reaching the front yard, two officers—Mckirryher and Conroy—left the scene to resume their nightly patrol duties. Unbeknownst to the defendant, the three officers who remained on the scene—Demarest, Raimo, and Ciarleglio—decided to keep watch over the backyard to see if the defendant would try to locate the shotgun. Demarest waited on the southern side of the front yard where he could see the southwest portion of the backyard. Meanwhile, Raimo and Ciarleglio remained on the northern side of the front yard where they could see the northwest portion of the backyard. Within a few minutes, Demarest saw the defendant walk out of his apartment directly toward the southwest corner of the yard, using the flashlight on his cell phone to illuminate the ground. Seeing this, Demarest was convinced that the defendant was retrieving the shotgun and moved into the backyard to intervene. Demarest stopped the defendant approximately six feet from a bushy area in the southwest corner of the yard. When Raimo and Ciarleglio reentered the backyard, Ciarleglio searched the bushy area and found the shotgun hidden under some scrap wood. The defendant then was placed under arrest.

The defendant was charged with two offenses: possession of a sawed-off shotgun and criminal possession

of a firearm.[5] On May 26, 2017, the defendant filed a motion to suppress the shotgun as evidence, arguing that the search violated his rights under the fourth amendment and article first, § 7, of the constitution of Connecticut, and that none of the exceptions to the warrant requirement of the fourth amendment applied to the seizure of the gun. In response, the state argued, inter alia, that the danger of the defendant arming himself and harming someone with the gun justified the police intervention. The trial court, *Cremins*, *J.*, held a hearing on the motion to suppress and, over the course of two days, heard testimony from all five of the officers involved in the search of the defendant's home. After the parties concluded their arguments on June 8, 2017, the court issued its decision from the bench and denied the motion to suppress. The court found the officers' testimony credible and concluded that the officers reasonably believed that the shotgun was located somewhere on the defendant's property. The court further concluded that the warrantless search of the defendant's backyard was lawful for three reasons: (1) the defendant had abandoned the shotgun and, thus, had no expectation of privacy to it; (2) the second search conducted when the officers returned to the backyard was a continuation of the first search and, therefore, the defendant's consent to the first search extended to the second search; and (3) the probability that the defendant would endanger human lives or destroy evidence constituted an exigent circumstance that excused the warrantless search.

Following the denial of his motion to suppress, the defendant entered a conditional plea of nolo contendere

[5] The defendant also was charged with interfering with an officer in violation of General Statutes § 53a-167a and breach of the peace in the second degree in violation of General Statutes § 53a-181. Following the defendant's conditional plea of nolo contendere to the other two charges, the court entered a nolle prosequi as to each of the remaining charges.

to both charges on the condition that he could appeal the denial of his motion to suppress. The court, *Fasano*, *J.*, accepted the defendant's plea and determined that a ruling on the motion to suppress would be dispositive of the case. Thereafter, the court sentenced the defendant to a term of incarceration of three years for each charge, to be served consecutively, with a mandatory minimum sentence of two years of incarceration. This appeal followed.

We begin by setting forth our standard of review. "As a general matter, the standard of review for a motion to suppress is well settled. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record. . . . [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, [however] and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence. . . . [W]here the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision. . . . Accordingly, the trial court's legal conclusion regarding the applicability of the exigent circumstances doctrine is subject to plenary review." *State* v. *Kendrick*, 314 Conn. 212, 222, 100 A.3d 821 (2014).

"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 particu-

larly describing the place to be searched, and the persons or things to be seized."[6] (Internal quotation marks omitted.) *State* v. *Liam M.*, 176 Conn. App. 807, 819, 172 A.3d 243, cert. denied, 327 Conn. 978, 174 A.3d 196 (2017).

The trial court analyzed the defendant's motion to suppress under a number of exceptions to the warrant requirement, including the exigent circumstances doctrine, and we agree that this doctrine is implicated by the facts of the present case. "The exigent circumstances doctrine is one of three exceptions to the warrant requirement that are triggered by the need for swift action by the police. All three exceptions, the exigent circumstances doctrine, the protective sweep doctrine and the emergency doctrine, must be supported by a reasonable belief that immediate action was necessary. . . . Of the three, the exigent circumstances doctrine arguably encompasses the widest variety of factual scenarios. [Our Supreme Court] previously [has] recognized the [catchall] quality of the doctrine, explaining that [t]he term, exigent circumstances, does not lend itself to a precise definition but generally refers to those situations in which law enforcement agents will be unable or unlikely to effectuate an arrest, search or seizure, for which probable cause exists, unless they act swiftly and, without seeking prior judicial authorization. . . . There are three categories of circumstances that are exigent: those that present a risk of danger to human life; the destruction of evidence; or flight of a suspect. . . . The exigent circumstances doctrine, however, is limited to instances in which the police initially have probable cause either to arrest or to search." (Citations omitted; internal quotation marks omitted.) *State* v. *Kendrick*, supra, 314 Conn. 225–27.

[6] Although the defendant claims a due process violation under our state constitution, he does not provide a separate analysis thereunder or argue that the Connecticut constitution provides greater protection than the federal constitution. Accordingly, our review of his claims is limited to the federal

Our Supreme Court has adopted a totality of circumstances test to evaluate whether an exigency exists, which inquires "whether, under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest [or entry] were not made, the accused would have been able to destroy evidence, flee or otherwise avoid capture, or might, during the time necessary to procure a warrant, endanger the safety or property of others. This is an objective test; its preeminent criterion is what a reasonable, [well trained] police officer would believe, not what the . . . officer actually did believe. . . . Put simply, given probable cause to arrest or search, exigent circumstances exist when, under the totality of the circumstances, the officer reasonably believed that immediate action was necessary to protect the safety of those present, or to prevent the flight of the suspect, or the destruction of evidence." (Citation omitted; internal quotation marks omitted.) Id., 227–28. The test requires a reasonable belief, not a level of certainty approaching probable cause. Id., 238–39. That said, "[w]hen there are reasonable alternatives to a warrantless search, the state has not satisfied its burden of proving exigent circumstances." (Internal quotation marks omitted.) *State* v. *Liam M.*, supra, 176 Conn. App. 822. Moreover, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Kentucky* v. *King*, 563 U.S. 452, 466, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011).

On appeal, the state does not contest that the defendant had a reasonable expectation of privacy, and the defendant does not challenge the trial court's conclusion that the police had probable cause to search the

constitution. See *State* v. *Johnson*, 288 Conn. 236, 244 n.14, 951 A.2d 1257 (2008).

property. Accordingly, we need inquire only into whether the police reasonably believed that immediate action was necessary. The state claims that the defendant's retrieval of the shotgun presented a threat to the safety of the officers on the scene and justified the warrantless search. We agree.[7]

While positioned in the front yard, before the defendant emerged from his apartment, the police had strong reason to believe that the defendant, earlier that evening, had used the sawed-off shotgun—a highly dangerous weapon that is per se illegal—to violently assault Petro, and that it was likely that the shotgun was on the property notwithstanding the defendant's repeated assertions that he had never possessed a shotgun. See General Statutes § 53a-211. While the defendant never verbally threatened the officers, he repeatedly remarked in the officers' presence that he was willing to resort to violence in response to someone who bullied or wronged him. The police also knew that the defendant was intoxicated. Although the police had no indication as to whether the shotgun was loaded, it was reasonable and prudent of them to believe that it could have been loaded.

It was approximately midnight when the police used the pretense that they were all leaving when, in fact, three remained in the front yard. On appeal, the defendant does not challenge the right of the officers to lie to create this pretense, nor does he challenge the officers' right to remain in the front yard. After only a few minutes, the defendant left his apartment and walked toward the back corner of his yard, using his cell phone flashlight for illumination.

[7] On appeal, the state also argues that the risk that the defendant could have destroyed evidence or could have removed the shotgun also justified the warrantless search. Because we conclude that the safety concerns of the police justified the search, we need not address these additional claims of exigent circumstances.

Under these circumstances, it was reasonable for the police to conclude that (1) the defendant believed that the police had all left, (2) he was intent on recovering the shotgun, and (3) such actions were prompted by the defendant's desire to avoid arrest. The officers testified that they were concerned that the defendant would soon arm himself and present a threat to the safety of the officers, and we conclude that such concern was reasonable. At the time that the defendant attempted to retrieve the shotgun from the backyard, Demarest was standing approximately six feet from the southeast corner of the home in the front yard. In the footage from the officers' body cameras submitted to the trial court, the front yard was dimly lit by light coming from the house and from a light post on the edge of the street. Based on this evidence, it certainly would be reasonable for an officer in Demarest's position to conclude that, if the defendant had looked toward the street, he would have seen the silhouette of Demarest standing unobstructed in the front yard and quickly discovered the police surveillance. This posed an imminent threat to the officers' safety if the officers had not intervened and prevented the defendant from arming himself. See *State* v. *Correa*, 185 Conn. App. 308, 338, 197 A.3d 393 (2018) ("the possibility that a suspect knows or may learn that he is under surveillance or at risk of immediate apprehension may constitute exigent circumstances, on the theory that the suspect is more likely to destroy evidence, to attempt escape or to engage in armed resistance" (internal quotation marks omitted)).

On the basis of the totality of the circumstances, the court properly concluded that the search was lawful under the exigent circumstances exception to the warrant requirement and properly denied the defendant's motion to suppress.

The judgment is affirmed.

In this opinion the other judges concurred.

TINA M. CARRICO *v.* MILL ROCK LEASING, LLC, ET AL.
(AC 42460)

DiPentima, C. J., and Moll and Devlin, Js.

Syllabus

The plaintiff sought to recover damages for the alleged negligence of the defendant J Co., an independent contractor hired by a possessor of land to render snow and ice removal/remediation services for premises on which the plaintiff slipped on an accumulation of ice and fell to the ground, sustaining injuries. The trial court granted the motion for summary judgment filed by J Co., interpreting the counts against it as sounding in premises liability, and finding that because the plaintiff did not allege that J Co. possessed and controlled the premises, J Co. did not owe a duty to the plaintiff. On the plaintiff's appeal to this court, *held* that the trial court improperly rendered summary judgment as to those counts of the complaint against J Co. by mischaracterizing the plaintiff's claims as sounding in premises liability; the counts against J Co. alleged ordinary negligence in that the plaintiff did not allege that J Co. owed her a duty because it owned or controlled the premises, but that the duty J Co. owed to her arose from the snow services agreement it had with the third-party land possessor, and, pursuant to § 324A of the Restatement (Second) of Torts, because the plaintiff alleged that J Co. undertook to render snow and ice removal/remediation services on the premises, which activity J Co. should have recognized as necessary for the protection of persons such as the plaintiff, J Co. may have been liable to the plaintiff for the injuries she allegedly sustained that resulted from any failure by J Co. to exercise reasonable care in removing/remediating snow and/or ice from the premises.

Argued March 10—officially released July 21, 2020

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendants' alleged negligence, brought to the Superior Court in the judicial district of New London, where the named defendant et al. filed a cross complaint; thereafter, the court, *Swienton*, *J.*, granted in part the motion for summary judgment filed by the defendant Jones Landscaping, LLC, et al., and the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Kevin G. Smith, with whom, on the brief, was *Kara M. Burgarella*, for the appellant (plaintiff).

Richard E. Fennelly III, with whom, on the brief, was *Jonathan P. Ciottone*, for the appellees (defendant Jones Landscaping, LLC, et al.).

Opinion

DiPENTIMA, C. J. The plaintiff, Tina M. Carrico, appeals from the judgment of the trial court rendering summary judgment in favor of the defendant Jones Landscaping, LLC.[1] On appeal, the plaintiff claims that the court improperly determined that counts three through five of the complaint alleged premises liability claims and did not sound in ordinary negligence. We agree with the plaintiff and reverse the judgment of the trial court.

The following facts, as alleged in the complaint, and procedural history are relevant to our decision. The plaintiff commenced the action in January, 2017, and filed a five count revised complaint on June 22, 2017. In counts one and two, respectively, the plaintiff alleged negligence and vicarious liability against Mill Rock Leasing, LLC (Mill Rock). Counts three through five are identical except that the defendant is identified differently in each count.[2] The plaintiff labeled counts three through five as "negligence" counts and alleged the following. On February 3, 2015, the plaintiff, who was

[1] The plaintiff's complaint contained three identical counts against three limited liability companies with similar names and the same principal place of business. See footnote 2 of this opinion. All references herein to the defendant are to the three entities listed in footnote 2 of this opinion. The complaint also named Mill Rock Leasing, LLC, as a defendant. The counts of the complaint brought against Mill Rock Leasing, LLC, were not part of the defendant's motion for summary judgment. Mill Meadow Development, LLC, was also named in the complaint as a defendant, but the plaintiff later withdrew the complaint as to Mill Meadow Development, LLC.

[2] Counts three through five are alleged against Jones Landcape, LLC, Jones Landscape, LLC, and Jones Landscaping, LLC, respectively.

a lawful business invitee, was walking in the parking lot of a commercial property located at 137-139 Mill Rock Road East in Old Saybrook, when she slipped on an accumulation of ice and fell to the ground, sustaining injuries in the process. Mill Rock owned and controlled the premises. The plaintiff did not allege that the defendant controlled or possessed the premises, but alleged that, at the time of the plaintiff's fall, the defendant "was responsible pursuant to a contract and/or an agreement with . . . Mill Rock . . . to remove and/or remediate snow and ice and to provide ice melt, sand or other abrasive materials and/or chemical deterrents to the parking lot that is the subject of this lawsuit."

On March 26, 2018, the defendant filed a motion for summary judgment as to counts three through five of the revised complaint, arguing, inter alia, that no genuine issue of material fact existed that the defendant did not owe a duty of care to the plaintiff because the defendant did not own, possess, or control the premises where the plaintiff allegedly slipped; rather, the defendant argued that Mill Rock and Mill Meadow Development, LLC, had a nondelegable duty to maintain the parking lot located at 137-139 Mill Rock Road East. The plaintiff filed an objection in which she argued, in part, that genuine issues of material fact existed because counts three through five sounded in ordinary negligence, and, pursuant to the duty of care owed in ordinary negligence actions, the defendant—as an independent contractor hired by the possessor of land, Mill Rock, to render snow and ice removal/remediation services for the premises—owed the plaintiff a duty of care.

The court heard oral argument on the motion on December 17, 2018. In a December 20, 2018 memorandum of decision, the court framed the issue before it as "whether counts three through five of the plaintiff's claims against the defendant . . . sound in ordinary

negligence or negligence based upon a theory of premises liability." In granting the motion, the court interpreted counts three through five of the revised complaint as sounding in premises liability and accordingly granted the motion for summary judgment. This appeal followed.

The following standard governs our review of a court's decision to grant a defendant's motion for summary judgment.[3] "The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Citations omitted; internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018).

Our resolution of the claim before us is guided by the analysis in two pivotal cases. To place the trial court's decision and the plaintiff's claim in the proper context, we begin our analysis with an overview of these cases. In the first case, *Gazo* v. *Stamford*, 255

[3] In *Larobina* v. *McDonald*, 274 Conn. 394, 399–403, 876 A.2d 522 (2005), our Supreme Court clarified the circumstances under which a motion for summary judgment may be used instead of a motion to strike to challenge the legal sufficiency of a complaint. On appeal, the plaintiff does not challenge the propriety of the court's granting of the defendant's motion for summary judgment on the grounds that the motion improperly challenged the sufficiency of the complaint and that the plaintiff was not given an opportunity to replead. Accordingly, we do not address whether the motion for summary judgment properly was used to challenge the legal sufficiency of counts three through five of the complaint.

Conn. 245, 253, 765 A.2d 505 (2001), our Supreme Court adopted § 324A of the Restatement (Second) of Torts and held that an independent contractor who performs snow removal services pertaining to a third party's sidewalk can be directly liable to a pedestrian who slips on accumulated ice and snow on that sidewalk. The court in *Gazo* specifically held that the defendant, an independent contractor who had entered into a contract with a property owner to clear an abutting sidewalk, owed a direct duty to the plaintiff pedestrian who had slipped on an accumulation of ice and snow on the sidewalk. Id., 248–58. Our Supreme Court stated that the plaintiff's claim was not based on whether the independent contractor "may be liable to the plaintiff on a theory of premises liability, which requires that the party to be held liable be in control of the property. That is not a basis of the plaintiff's claims." Id., 249. In holding that the independent contractor owed the pedestrian a direct duty, our Supreme Court adopted § 324A of the Restatement (Second) of Torts, "at least in the circumstances of the present case, in which it is clear that the service was performed for consideration and in a commercial context"; id., 253; and reasoned that § 324A "recognizes such a duty as a matter of policy." Id., 252. Section 324A provides in relevant part: "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if . . . (b) he has undertaken to perform a duty owed by the other to the third person . . . ." 2 Restatement (Second), Torts § 324A (1965).

In a later case, our Supreme Court iterated that *Gazo* "held that a contractor who undertakes the snow removal duties of a landowner is liable to a plaintiff who slips as a result of the contractor's negligent perfor-

mance. . . . [U]nder § 324A [b] of the Restatement [Second] [the defendant contractor] is subject to liability to the plaintiff for his physical injuries if the plaintiff can show that [the contractor] failed to exercise reasonable care when performing the duty owed by [the landowner who hired the contractor] to the plaintiff. . . . [I]t should be emphasized that [the contractor] may be held liable to the plaintiff [under § 324A (b)] only to the extent that [1] his contractual undertaking permits, and [2] his breach of duty to the plaintiff is part and parcel of [the landowner's] duty to the plaintiff." (Citations omitted; internal quotation marks omitted.) *Demond* v. *Project Service, LLC*, 331 Conn. 816, 826–27, 208 A.3d 626 (2019).

Our Supreme Court in *Gazo* provided the following additional reasons for concluding that the independent contractor owes the pedestrian a direct duty of care. First, it was not beyond the scope of foreseeability to hold the independent contractor liable for the injuries to the pedestrian plaintiff because "the potential for harm from a fall on ice was significant and foreseeable. . . . It is also reasonable to conclude that an ordinary person in [the independent contractor's] position, knowing what he knew or should have known, would anticipate that severe injuries were likely to result from a slip and fall if the sidewalk was not cleared properly of ice and snow. It is not unreasonable, or beyond the scope of foreseeability, therefore, to hold [the independent contractor] accountable for the plaintiff's injuries if they were caused by [the independent contractor's] negligent performance of his contract . . . ." (Citation omitted; internal quotation marks omitted.) *Gazo* v. *Stamford*, supra, 255 Conn. 250–51.

The court further reasoned that, "[s]econd, there are valid public policy reasons for holding [the independent contractor] responsible for his conduct. [The indepen-

dent contractor's] liability to the plaintiff fits comfortably within the general rule that every person has a duty to use reasonable care not to cause injury to those whom he reasonably could foresee to be injured by his negligent conduct, whether that conduct consists of acts of commission or omission. . . . [T]he ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised . . . . [A] duty to use care may arise from a contract . . . ." (Citations omitted; internal quotation marks omitted.) Id., 251.

Lastly, the court reasoned that it already "adopted an analogous duty in construction cases. . . . We see no meaningful distinction between an independent contractor who has created a dangerous condition on the land, such as installing a faulty septic system or negligently supervising a construction project, and an independent contractor who has agreed to perform a service that is essential to keeping foreseeable third parties safe." (Citations omitted; internal quotation marks omitted.) Id., 253–54.

In the second case relevant to our analysis, *Sweeney* v. *Friends of Hammonasset*, 140 Conn. App. 40, 58 A.3d 293 (2013), this court reasoned that § 324A of the Restatement (Second) of Torts was inapplicable under the circumstances of that case. In *Sweeney*, the plaintiff, who had attended an event at Hammonasset Beach State Park, which was owned by the state of Connecticut, brought an action against the Friends of Hammonasset, a volunteer organization promoting the event, and the president of the organization, after he slipped and fell while walking on a driveway road during the event. Id., 44. This court affirmed the judgment of the trial court, interpreting the complaint as sounding in premises liability. This court reasoned: "Reading the complaint in its entirety, the allegations of negligence pertain to the alleged failure of the defendants either

reasonably to inspect and maintain the defective premises in order to render them reasonably safe or to warn of dangers that the plaintiff, as an invitee of the defendants, could not reasonably be expected to discover. Though these allegations are not inconsistent with a duty under a theory of ordinary negligence, the gravamen of the plaintiff's complaint pertains to the dangerous and unsafe icy conditions of the walking area . . . . Section 324A does not apply because, as the trial court aptly noted, the plaintiff in the present action does not allege that the defendants owed him a duty based upon their arrangement with a third party to render certain services. Rather, he alleges that the defendants owed him a duty based on the services that were rendered to him, as an invitee on the premises. As the plaintiff's allegations stem from an injury caused by a dangerous condition on the premises, liability is dependent on possession and control of the dangerous premises." (Citation omitted; internal quotation marks omitted.) Id., 48–49.

In the present case, the trial court determined that "the plaintiff has not alleged the crucial fact that would clearly create a premises liability case—possession and control. The gravamen of the plaintiff's complaint is that her injuries stemmed from a dangerous condition on the premises, an accumulation of ice. Under *Sweeney* [v. *Friends of Hammonasset*, supra, 140 Conn. App. 48] this allegation is sufficient to find that the negligence alleged is founded on a theory of premises liability. . . . Simply by omitting the crucial element of possession and control of a premises liability cause of action does not automatically result in a cause of action sounding in ordinary negligence. The only theory of liability presented in counts three through five is based upon negligence for failure to exercise due care in responding to the icy conditions in the parking lot. Thus, these counts are properly construed as premises liability

claims." The court noted that, as in *Sweeney*, "the plaintiff in the present action does not allege that the defendant . . . owed [her] a duty based upon its arrangement with a third party to render certain services. For this reason, § 324A of the Restatement (Second) of Torts . . . is . . . inapplicable to the present action . . . ." After concluding that the counts sounded in premises liability, the court granted the motion for summary judgment, reasoning that the defendant "did not owe a duty to the plaintiff because there is no genuine issue of material fact as to whether it owned, possessed or controlled the premises where the plaintiff alleges she was injured. Without possession or control of the premises at issue, the defendant has no duty to the plaintiff, and thus, is entitled to judgment as a matter of law."

On appeal, the plaintiff claims that the court improperly determined that counts three through five of the complaint allege premises liability claims.[4] The plaintiff argues that the reasoning in *Gazo* applies and that the claims at issue sound in ordinary negligence. The defendant counters that the reasoning in *Sweeney* v. *Friends of Hammonasset*, supra, 140 Conn. App. 48, demonstrates that the claims at issue are premises liability claims because the gravamen of the plaintiff's claims against the defendant is an icy condition in the parking lot on the premises. We agree with the plaintiff.

[4] We note that, although the counts of the complaint against Mill Rock may still be pending, this appeal is properly before us because the summary judgment rendered on counts three through five of the complaint disposed of all causes of action against the defendant and is therefore a final judgment pursuant to Practice Book § 61-3. That section provides in relevant part that "[a] judgment disposing of only a part of a complaint . . . is a final judgment if that judgment disposes of all causes of action in that complaint . . . brought by or against a particular party or parties.

"Such a judgment shall be a final judgment regardless of whether judgment was rendered on the granting of a motion to strike pursuant to Section 10-44, by dismissal pursuant to Section 10-30, by summary judgment pursuant to Section 17-44, or otherwise." Practice Book § 61-3; see also *Harnage* v. *Commissioner of Correction*, 141 Conn. App. 9, 13–14, 60 A.3d 308 (2013).

"The interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary. . . . [W]e long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he 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, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension. . . . Although essential allegations may not be supplied by conjecture or remote implication . . . the 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, and do substantial justice between the parties. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the complaint is insufficient to allow recovery." (Citations omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 536–37, 51 A.3d 367 (2012).

In granting the defendant's motion for summary judgment, the court concluded that, under a theory of premises liability, one who possesses or controls the premises owes a duty to the plaintiff and concluded that because no genuine issue of material fact existed that the defendant did not possess or control the premises where the plaintiff's alleged injury occurred, the defen-

dant owed no duty to the plaintiff. In contrast, under a theory of ordinary negligence, as advocated by the plaintiff, an independent contractor under certain circumstances owes a duty of care to the plaintiff. See *Gazo* v. *Stamford*, supra, 255 Conn. 248–58. Accordingly, whether the defendant owed the plaintiff a duty in the present case may depend on whether the claims at issue sound in premises liability or ordinary negligence. To assist in our interpretation of the complaint, we examine the following general principles of the duty owed under both types of claims.

"[T]he essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury . . . and [t]he existence of a duty of care is a prerequisite to a finding of negligence . . . . The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant [breached] that duty in the particular situation at hand. . . . If a court determines, as a matter of law, that a defendant owes no duty to a plaintiff, the plaintiff cannot recover in negligence from the defendant. . . . Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action. . . . We have stated that the test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case. . . . Additionally, [a] duty to use care may arise from a contract, from a statute, or from circumstances under which a reasonable person, knowing what he knew or should have known, would anticipate that harm of the

general nature of that suffered was likely to result from his act or failure to act." (Citations omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, supra, 306 Conn. 538–39.

With respect to the element of duty in a premises liability action, possession and control of the premises by the defendant is dispositive. "Liability for injuries caused by defective premises . . . does not depend on who holds legal title, but rather on who has possession and control of the property. . . . Thus, the dispositive issue in deciding whether a duty exists is whether the [defendant] has any right to possession and control of the property." (Citation omitted.) *LaFlamme* v. *Dallessio*, 261 Conn. 247, 251–52, 802 A.2d 63 (2002); id. (applying principles of premises liability action).

We agree with the plaintiff that the reasoning in *Gazo* applies to the present case. Applying that reasoning, we conclude that counts three through five allege ordinary negligence. The plaintiff does not allege in those counts that the defendant owes her a duty *because* it owned or controlled the premises. Rather, the plaintiff alleges that "Mill Rock . . . owned, leased, possessed, controlled, operated, managed, and/or maintained a commercial property located at 137-139 Mill Rock Road East, Old Saybrook . . . which property included a parking lot . . . ." The plaintiff further alleges that, on February 3, 2015, the defendant "was responsible pursuant to a contract and/or agreement with . . . Mill Rock . . . to remove and/or remediate snow and ice and to provide ice melt, sand or other abrasive materials and/or chemical deterrents to the parking lot that is the subject of this lawsuit" and that her injuries were caused by the negligence and carelessness of the defendant in multiple ways relating to an allegedly inadequate snow and ice removal process, including a failure to "adequately plow, shovel or otherwise remove and/or remediate snow and/or ice in the parking lot . . . ."

Accordingly, the plaintiff alleges that the duty the defendant owed to her arises from the snow services agreement the defendant had with Mill Rock.

In *Gazo*, our Supreme Court did not require that the independent contractor own or control the premises in order to hold that the independent contractor owed the plaintiff a duty of care under a theory of negligence. See *Gazo* v. *Stamford*, supra, 248–58. Similar to the factual circumstances in *Gazo*, in the present case, the plaintiff alleges that the defendant's snow and ice removal/remediation services were rendered to a third party pursuant to an agreement in a commercial context. Pursuant to § 324A of the Restatement (Second) of Torts, because it is alleged that the defendant undertook to render snow and ice removal/remediation services on Mill Rock's premises, which activity the defendant should recognize as necessary for the protection of persons such as the plaintiff, the defendant may be liable to the plaintiff for the injuries she allegedly sustained that resulted from any failure by the defendant to exercise reasonable care in removing/remediating snow and/or ice from the premises.

We also agree with the plaintiff that the present case is distinguishable from *Sweeney* v. *Friends of Hammonasset*, supra, 140 Conn. App. 40. In *Sweeney*, this court reasoned that § 324A of the Restatement (Second) of Torts did not apply because the plaintiff did not allege that the defendants owed a duty to him based on an arrangement the defendants had with a third party to render certain services but, rather, the defendants' duty arose from services that the defendants rendered to him. Id., 49. Unlike in *Sweeney*, the plaintiff in the present case *did* allege that the defendant owed her a duty based on an arrangement it had with a third party to provide services, and does not allege that the defendant owed her a duty based on services rendered *to her*. These critical factual differences between the present

case and *Sweeney* offer further support for the applicability of § 324A here. Additionally, the gravamen of the plaintiff's allegations in counts three through five is that the defendant was negligent in its performance of its agreement with Mill Rock for snow and ice removal/remediation services and, thus, the plaintiff does not allege liability based on control or possession of the premises as would be required in a premises liability claim. Rather, she alleges liability based on the allegedly negligent performance of services under an agreement with a third party, which fits squarely within the ambit of a claim sounding in ordinary negligence pursuant to *Gazo* and § 324A. For the foregoing reasons, we conclude that the trial court improperly rendered summary judgment as to counts three through five of the complaint by mischaracterizing the plaintiff's claims against the defendant as sounding in premises liability.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

GEORGE LABISSONIERE, COEXECUTOR (ESTATE OF ROBERT LABISSONIERE) ET AL. *v.* GAYLORD HOSPITAL, INC., ET AL.

(AC 42581)

Lavine, Moll and Sheldon, Js.

Syllabus

The plaintiffs, coexecutors of the estate of R, sought to recover damages for the alleged medical malpractice of the defendants, a hospital, a physician practice group, and several individual physicians. The plaintiffs, pursuant to statute (§ 52-190a), appended to their complaint an opinion letter authored by M, a physician and general surgeon who was board certified in surgery; the individual physicians were board certified in internal medicine. The plaintiffs alleged in their complaint that the physicians' diagnosis and postsurgical treatment of R was within the medical specialty of surgery, that the physicians were acting outside

the scope of their specialty and, therefore, M could be considered a "similar health care provider" as defined by statute (§ 52-184c (c)). The defendants filed motions to dismiss in which they claimed, inter alia, that the trial court lacked personal jurisdiction over them because M was not a "similar health care provider" to them as defined by § 52-184c (c). The physician practice group also claimed that the trial court lacked subject matter jurisdiction because it was not a legal entity at the time R received treatment. The trial court granted the motions to dismiss on the ground that it lacked personal jurisdiction over the defendants and rendered judgment thereon, from which the plaintiffs appealed to this court. *Held*:

1. The trial court did not lack subject matter jurisdiction over the claim against the physician practice group; it was irrelevant that the physician practice group was not a legal entity at the time that R was treated, as it was a legal entity at the time the action was brought against it and, therefore, the court had subject matter jurisdiction.
2. The trial court properly dismissed the plaintiffs' action for lack of personal jurisdiction; the plaintiffs' unsupported conclusory allegation that the individual physicians were acting outside the scope of their specialty of internal medicine was insufficient to establish that they were acting as surgeons when they treated R and, therefore, the letter authored by M, a surgeon, was not authored by a "similar health care provider."

Argued March 9—officially released July 21, 2020

Procedural History

Action to recover damages for the defendants' alleged medical malpractice, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Dubay*, *J.*, granted the defendants' motions to dismiss and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Keith Yagaloff, for the appellants (plaintiffs).

Thomas Anderson, with whom, on the brief, was *Cristin E. Sheehan*, for the appellees (defendant Eileen Ramos et al.).

Michael G. Rigg, for the appellee (named defendant).

Laura E. Waltman, with whom, on the brief, was *R. Cornelius Danaher, Jr.*, for the appellee (defendant Sound Physicians of Connecticut, LLC).

Opinion

LAVINE, J. This appeal arises out of a medical malpractice action brought by the plaintiffs, George Labissoniere and Helen Civale, coexecutors of the estate of Robert Labissoniere (decedent), against the defendants, internal medicine physicians, Moe Kyaw, Madhuri Gadiyaram, and Eileen Ramos (collectively, physicians), and their employers, Gaylord Hospital, Inc. (hospital), and Sound Physicians of Connecticut, LLC (Sound Physicians). The plaintiffs appeal from the judgment of the trial court dismissing their claims for lack of personal jurisdiction pursuant to General Statutes § 52-190a.[1] The plaintiffs' central claim on appeal is that the court erred in concluding that the physicians were internists acting within their specialty when they treated the decedent. The plaintiffs therefore assert that the trial court erred in concluding that the opinion letter attached to their complaint, which was written by a surgeon, failed to

[1] General Statutes § 52-190a provides in relevant part: "(a) No civil action . . . shall be filed to recover damages resulting from personal injury or wrongful death . . . whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action . . . has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint . . . shall contain a certificate of the attorney or party filing the action . . . that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . . . To show the existence of such good faith, the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. Such written opinion shall not be subject to discovery by any party except for questioning the validity of the certificate. The claimant or the claimant's attorney . . . shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate. . . .

"(c) The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action."

meet the personal jurisdictional requirement of § 52-190a and the allegations of the complaint did not satisfy the personal jurisdictional exception provided by General Statutes § 52-184c (c).[2] We reject the plaintiffs' claim. Sound Physicians argues on appeal, as an alternative ground for affirmance, that the trial court lacked subject matter jurisdiction over the claim against it because it was not a legal entity at the time that the decedent was treated at the hospital. We disagree that the trial court lacked subject matter jurisdiction. We therefore affirm the judgment dismissing the action for lack of personal jurisdiction over the defendants.

In May, 2015, the plaintiffs instituted a prior action against the physicians and the hospital on the basis of allegations that are substantially similar to those in the present case. In September, 2016, the trial court, *Cobb*, *J.*, dismissed that action for lack of personal jurisdiction because the opinion letter attached to the plaintiffs' complaint was not authored by a "similar health care provider," as required by § 52-190a. This court affirmed the judgment of dismissal on direct appeal. See *Labissoniere* v. *Gaylord Hospital, Inc.*, 182 Conn. App. 445, 185 A.3d 680 (2018) (*Labissoniere I*).

In *Labissoniere I*, the plaintiffs alleged that the decedent was admitted to the hospital on February 14, 2013, for medical care and rehabilitation following a hip replacement surgery performed at St. Francis Hospital and Medical Center (St. Francis Hospital). Id., 448. The plaintiffs further alleged that, while under the care of

[2] General Statutes § 52-184c (c) provides: "If the defendant health care provider is certified by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a 'similar health care provider' is one who: (1) Is trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty; *provided if the defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a 'similar health care provider.'* " (Emphasis added.)

the physicians at the hospital, the decedent suffered from "a retroperitoneal hematoma, a postoperative condition that resulted in irreversible nerve damage, as well as hemorrhagic shock and multiorgan failure, requiring the decedent to be transferred back to St. Francis Hospital as an emergency admission on March 11, 2013."[3] Id. The plaintiffs alleged that the physicians were board certified in internal medicine and that they "provided the decedent with treatment and diagnosis for a postoperative condition which was within the specialty of surgery." In an attempt to comply with § 52-190a (a), the plaintiffs appended to their complaint an opinion letter authored by David A. Mayer, a physician and board certified general surgeon. *Labissoniere* v. *Gaylord Hospital, Inc.*, supra, 182 Conn. App. 448–49.

The physicians and the hospital moved to dismiss the plaintiffs' claims against them for lack of personal jurisdiction on the ground that Mayer was not an internist and, therefore, was not a "similar health care provider," as defined in § 52-184c. Id., 449. The plaintiffs countered that Mayer was a "similar health care provider" pursuant to § 52-184c (c) because the physicians were acting as surgeons during their diagnosis and treatment of the decedent's retroperitoneal hematoma. In ruling on the motion to dismiss, Judge Cobb reasoned that "neither the . . . complaint . . . nor the surgeon's written opinion letter allege[s] or state[s] that the [physicians and the hospital] were acting outside their specialty of internal medicine in treating the [decedent] or that they undertook the diagnosis and treatment of a condition outside of their specialty such that their conduct should be judged against the standards of care applicable to that specialty. Such an allegation and expert opinion is necessary to fall within the exception contained in [§ 52-184c (c)]." (Internal quotation marks omitted.) Id., 451. Accordingly, Judge Cobb dis-

[3] Neither *Labissoniere I* nor the present action alleges a wrongful death cause of action.

missed the plaintiffs' complaint for lack of personal jurisdiction.

On appeal in *Labissoniere I*, the plaintiffs claimed, inter alia, that the court erred in determining that the opinion letter did not comply with § 52-190a, and that the exception set forth in § 52-184c (c) was inapplicable. Id., 454. Specifically, the plaintiffs argued that "the exception in § 52-184c (c) applie[d] because they alleged that the treatment and care the physicians rendered to the decedent fell 'within the specialty of surgery' and, therefore, the physicians were acting outside of their specialty of internal medicine." Id., 456. The physicians and the hospital argued in response that "because the plaintiffs did not allege that the physicians were acting outside the scope of their medical specialty of internal medicine, the exception under § 52-184c (c) did not apply, and the plaintiffs were thus obligated to obtain an opinion letter authored by a physician board certified in internal medicine." Id. This court agreed with the physicians and the hospital, determining that Mayer was not a "similar health care provider" because he was not board certified in internal medicine. Id., 455.

This court further concluded that "the decedent was admitted to the hospital for 'medical care and rehabilitation' following a hip replacement, the actual surgical procedure having been performed at another hospital, by an independent surgeon. While under the . . . care [of the physicians and the hospital], the decedent developed complications, which required treatment and diagnosis by the physicians. Although the physicians appear initially to have misdiagnosed the decedent's postoperative condition, nothing contained in the plaintiffs' complaint or opinion letter suggests that the physicians were not acting as internists. In fact, the crux of the plaintiffs' complaint was that the physicians were negligent in their initial assessment of the decedent's condition, not that the physicians were negligent in performing a surgical procedure." Id., 457. This court thus

concluded that "[b]ecause the plaintiffs here have not alleged that the physicians acted outside the scope of their specialty of internal medicine, the exception to the definition of similar health care provider in § 52-184c (c) does not apply. Accordingly, the plaintiffs were required to obtain an opinion letter from an expert who (1) had training and experience in internal medicine, and (2) was board certified in internal medicine." Id., 459. This court, therefore, affirmed the judgment dismissing the action in *Labissoniere I*. Id.

In January, 2017, while *Labissoniere I* was pending in this court, the plaintiffs commenced the present action against the hospital, the physicians, and Sound Physicians. As previously noted, the plaintiffs' complaint contains allegations that are substantially similar to those set forth in *Labissoniere I*. The plaintiffs also appended the same opinion letter authored by Mayer to the complaint, in which Mayer opined that the conduct of the hospital and the physicians fell below the applicable standard of care by failing to timely diagnose a retroperitoneal bleed in the decedent, conduct a CT scan of the decedent, and transfer the decedent back to St. Francis Hospital. The plaintiffs also named Sound Physicians as a defendant and pleaded a count of negligence against it. The plaintiffs further alleged that the physicians were employed by both the hospital and Sound Physicians.

The plaintiffs again alleged that, on February 14, 2013, the decedent was admitted to the hospital for medical care following a previous hip replacement surgery performed at St. Francis Hospital. They further alleged that, while under the care of the defendants, the decedent developed a retroperitoneal hematoma, which resulted in irreversible nerve damage. The plaintiffs alleged that the diagnosis and treatment of that hematoma and the decedent's postsurgical condition were within the specialty of surgery, and not within the specialty of internal medicine. They also alleged that "[t]he defendants

lacked the specialized training to determine whether the decedent needed intervention for treating the decedent's condition, a retroperitoneal hematoma. The specialized training required was in the area of general surgery." Moreover, the plaintiffs alleged that neither the hospital nor Sound Physicians had a surgeon available for consultation by the physicians.

The plaintiffs alleged that the decedent's injuries were caused by the negligence of the physicians in failing, inter alia, to timely obtain a consultation with a surgeon, to perform diagnostic imaging, and to diagnose and treat the decedent's condition. The plaintiffs further alleged that the hospital and Sound Physicians were negligent in failing to ensure that the physicians did not commit the alleged negligence.

The hospital filed a motion to dismiss for lack of personal jurisdiction on the ground that the plaintiffs failed to comply with § 52-190a because (1) a board certified surgeon is not a similar healthcare provider, (2) merely alleging that the defendants were acting outside the scope of their specialty did not satisfy the statutory requirements of §§ 52-190a and 52-184c (c), (3) the opinion letter failed to detail Mayer's qualifications and, therefore, failed to show that he was qualified to opine as to the care and treatment rendered by internists, and (4) the plaintiffs were engaging in impermissible forum shopping because *Labissoniere I* was filed in the judicial district of Tolland and the present case was filed in the judicial district of Hartford. The hospital subsequently filed a motion to "preclude [the] plaintiffs from contesting [its] motion to dismiss," arguing that the action was barred by the doctrine of collateral estoppel because the plaintiffs had been afforded a full and fair opportunity to litigate the adequacy of Mayer's opinion letter in *Labissoniere I*.[4] The physicians also filed

[4] The hospital later amended its motion to dismiss and memorandum of law in support thereof, asserting collateral estoppel as its primary argument for dismissal.

a motion to dismiss and memorandum of law in support thereof, arguing, among other things, that the plaintiffs had failed to offer an expert opinion authored by a similar health care provider, thus warranting dismissal. Sound Physicians moved to dismiss the count against it by incorporating the same arguments set forth by the hospital and by asserting that the claim against it "should be dismissed because [it] was not a legal entity at the time of the [allegedly negligent treatment of the decedent]." The plaintiffs objected to the defendants' motions on the basis that *Labissoniere I* had been dismissed without prejudice, and, therefore, the present case was not barred by collateral estoppel. The plaintiffs further argued that they had complied with the requirements of § 52-190a, but they did not provide any analytical support for that argument, aside from summarizing case law. The motions were argued before the court, *Dubay, J.*, on October 4, 2018. The plaintiffs asserted at the hearing on the motions that "[t]he issue in the [*Labissoniere I*] complaint was resolved by modifying the pleading to specifically state that it was outside of the medical specialty of the internists."

Subsequently, prompted by Judge Dubay's inquiries at the hearing, both Sound Physicians and the plaintiffs filed supplemental memoranda on the question of subject matter jurisdiction. Sound Physicians argued that "the plaintiffs do not, and cannot, dispute that Sound Physicians was *not* a business entity at the time of [the decedent's] treatment at [the hospital]" and, therefore, the trial court lacked subject matter jurisdiction over the action asserted against it. (Emphasis in original.) The plaintiffs filed a reply, in which they contested Sound Physicians' argument.

On December 7, 2017, Judge Dubay issued a memorandum of decision, in which he sua sponte imposed a stay pending the outcome of the appeal in *Labissoniere I*. While the stay was in effect, this court affirmed the

judgment dismissing *Labissoniere I*. The physicians and the hospital thereafter filed supplemental briefs in support of their motions, arguing that this court's decision in *Labissoniere I* required dismissal of the present action, in which the plaintiffs assert virtually identical allegations as those made in *Labissoniere I*.

On January 23, 2019, Judge Dubay dismissed the plaintiffs' action and issued a memorandum of decision that set forth the following reasoning: " '[A] broad specialty such as internal medicine often overlaps with other medical specialties. . . . [P]hysicians who are board certified in that specialty are often called upon to diagnose and treat a variety of conditions that could fall within a variety of medical specialties.' [*Labissoniere I*, supra, 182 Conn. App. 458]. For this reason, courts have often declined to create scenarios in which health care providers in broad specialties such as internal medicine or emergency medicine may be considered to be working outside their specialty. . . . This is not to say, however, that physicians with broad specialties can never act outside their scope. But given a primary responsibility of an internist or emergency room doctor is to initially diagnose and treat on a wide array of injuries and illnesses, courts will not place negligence in doing so outside their scope, regardless of the type of injury or illness in question.

"In the present case, it is undisputed that the defendant physicians are board certified specialists in internal medicine. Accompanying the plaintiffs' complaint is an opinion letter authored and signed by a board certified general surgeon. To fit the opinion letter [required by] § 52-190a, the plaintiffs rely on the § 52-184c (c) exception.

"The complaint alleges the diagnosis and treatment of the decedent's postsurgical complication was . . . within the specialty of surgery. The complaint also alleges that [the] defendants failed to exercise care

and diligence by, among other claims, failing to timely obtain a consult or perform a CT scan. In sum, the defendant [physicians] allegedly failed to appreciate the decedent's injury for what it was and therefore failed to appropriately diagnose and treat him. Importantly, however, the alleged actions (or inactions), regardless of how negligent, fall within the generally accepted practice of internal medicine and are therefore insufficient to place the defendants outside the scope of their specialty.

"Therefore, given that the defendant physicians are internists who acted within their specialty, the § 52-184c (c) exception does not apply and the plaintiffs are required to present an opinion letter from a physician specializing in internal medicine. Under these circumstances, the court agrees with the defendants that the opinion letter is deficient [pursuant] to § 52-190a, and the motions to dismiss are granted." (Citations omitted.) This appeal followed.

I

We must first address Sound Physicians' claim that the trial court lacked subject matter jurisdiction because it was not a legal entity at the time of the decedent's treatment at the hospital. See *Park National Bank* v. *3333 Main, LLC*, 127 Conn. App. 774, 778, 15 A.3d 1150 (2011) ("Once the question of lack of [subject matter] jurisdiction of a court is raised, [it] must be disposed of no matter in what form it is presented. . . . The court must fully resolve it before proceeding with the case." (Internal quotation marks omitted.)).

"We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Moreover, [i]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court

lacks discretion to consider the merits of a case over which it is without jurisdiction. . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) Id. "[S]ubject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it . . . and a judgment rendered without subject matter jurisdiction is void." (Internal quotation marks omitted.) *Bruno* v. *Travelers Cos.*, 172 Conn. App. 717, 724, 161 A.3d 630 (2017).

As stated previously, Sound Physicians moved in the trial court to dismiss the claim asserted against it on the basis that it was not a legal entity at the time that the physicians treated the decedent at the hospital. Following oral argument in the trial court, Sound Physicians filed a supplemental memorandum of law, in which it argued that "the plaintiffs do not, and cannot, dispute that Sound Physicians was *not* a business entity at the time of [the decedent's] treatment at [the hospital] (February 14, 2013 to March 11, 2013). Sound Physicians was incorporated and commenced [doing] business in the state of Connecticut on April 25, 2013. . . . Accordingly, the plaintiffs' claim against Sound Physicians is void ab initio and should be dismissed." (Emphasis in original.) Judge Dubay dismissed the claim against Sound Physicians for lack of personal jurisdiction but did not address the issue of subject matter jurisdiction in his memorandum of decision.

On appeal, Sound Physicians argues that "to confer subject matter jurisdiction upon the court, each party to the dispute must be an actual legal entity. An entity [without] legal existence can neither sue nor be sued. It is undisputed that [Sound Physicians] was not a legal entity at the time of the decedent's medical treatment at [the hospital]." Sound Physicians cites numerous

cases in support of this argument, including *Omerin USA, LLC* v. *Infinity Group*, Superior Court, judicial district of Hartford, Docket No. CV-17-6085890-S (May 24, 2018); *Prout* v. *Mukul Luxury Boutique Hotel & Spa*, Superior Court, judicial district of New Britain, Docket No. CV-15-6029341-S (February 28, 2017); *Washington* v. *Tracey*, Superior Court, judicial district of Hartford, Docket No. CV-10-5034700-S (August 3, 2011); and *State* v. *Lamar Advertising of Hartford*, Superior Court, judicial district of Hartford, Docket No. CV-08-5020325-S (April 5, 2011); among others.

There is a critical distinction between those cases and the present one. In each of the cited cases, the Superior Court dismissed the action for lack of subject matter jurisdiction because the plaintiff brought an action against a defendant in its trade name. In the matter at hand, however, the plaintiffs did not sue Sound Physicians in a trade name. The plaintiffs commenced their action on January 11, 2017, against Sound Physicians of Connecticut, LLC, which was and had been a limited liability company in the state of Connecticut since its registration on April 25, 2013. Sound Physicians' emphasis on the fact that it was not a registered legal entity *at the time of the decedent's treatment* is a red herring as it relates to the issue of subject matter jurisdiction. The relevant question is whether Sound Physicians was a legal entity *at the time that it was sued by the plaintiffs*. Because the plaintiffs sued Sound Physicians, a limited liability company, not a trade name, we reject Sound Physician's alternative ground for affirmance.[5]

We now turn to the remaining issue of whether the trial court correctly concluded that personal jurisdiction over the defendants was lacking.

[5] In light of our conclusion herein, we need not address the question of whether a trial court lacks subject matter jurisdiction when a *defendant* is sued in its trade name only. We leave that question open for another day.

II

The plaintiffs claim that the trial court erred in dismissing the action for lack of personal jurisdiction by improperly concluding that the defendant physicians were acting within their specialty of internal medicine and, therefore, improperly concluding that the plaintiffs' opinion letter written by a surgeon was deficient pursuant to § 52-190a and did not fall within the exception created by § 52-184c (c).[6] We are not persuaded.

We begin with the standard of review and the applicable principles of law. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *Bennett* v. *New Milford Hospital, Inc.*, 300 Conn. 1, 10, 12 A.3d 865 (2011). "Our Supreme Court has held that the failure of a plaintiff to comply with the statutory requirements of § 52-190a (a) results in a defect in process that implicates the personal jurisdiction of the court. . . . Thus, where such a failure is the stated basis for the granting [of] a motion to dismiss, our review is plenary. . . . Further, to the extent that our review requires us to construe the nature of the cause of action alleged in the complaint, we note that [t]he interpretation of pleadings is always a question of law for the court. . . . Our review of the trial court's interpretation of the pleadings therefore is plenary." (Citation omitted; internal quotation marks omitted.) *Perry* v. *Valerio*, 167 Conn. App. 734, 739, 143 A.3d 1202 (2016).

[6] Specifically, the plaintiffs claim that the trial court (1) "impermissibly created a new statutory definition of the specialty of internal medicine, and an exception thereto, without the required consideration, deference to the factual allegations in the complaint and the circumstances surrounding [the] decedent's injuries," (2) "erred in finding that the plaintiffs' expert was not a 'similar health care provider' within the meaning of [§§] 52-190a and . . . 52-184c (c)," and (3) erred in dismissing the plaintiffs' claim that the hospital was vicariously and independently liable for the physicians' conduct.

"When a . . . court decides a . . . question raised by a pretrial motion to dismiss, 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. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." (Internal quotation marks omitted.) *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 10–11.

"[W]e long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically . . . . [T]he 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, and to substantial justice between the parties . . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension . . . . [E]ssential allegations may not be supplied by conjecture or remote implication . . . ." (Internal quotation marks omitted.) *Caron* v. *Connecticut Pathology Group, P.C.*, 187 Conn. App. 555, 564, 202 A.3d 1024, cert. denied, 331 Conn. 922, 206 A.3d 187 (2019).

The plaintiffs argue that the trial court failed to give due deference to the factual allegations in their complaint in making its determination that the challenged actions by the physicians fell within the specialty of internal medicine. Specifically, they argue that the trial court was obligated to accept as true their allegations

that the diagnosis and treatment of the decedent's postsurgical complications were within the specialty of general surgery and outside the specialty of internal medicine. Accordingly, the plaintiffs contend that their opinion letter authored by a surgeon was sufficient to meet the requirements of § 52-190a. The defendants counter that the plaintiffs' mere addition of an allegation that the physicians were acting outside their specialty of internal medicine is insufficient to cure the deficiency that was identified in *Labissoniere I*. The physicians further argue that the complaint is devoid of any factual allegation that the physicians actually rendered surgical care, beyond the conclusory allegation to that effect. We agree with the defendants.

Our resolution of this claim is controlled by this court's decision in *Labissoniere I*, which addressed the same jurisdictional question arising out of the allegations of a complaint that are nearly identical to those in the present case.[7] Accordingly, the narrow question with which we are presented is whether the plaintiffs cured the jurisdictional defect as identified in *Labissoniere I*.[8] The essential allegations in the present complaint are the same as those in *Labissoniere I*. The plaintiffs alleged in both cases that the decedent was admitted to the hospital for medical care following a hip replacement surgery and that the physicians were negligent in failing to timely diagnose the hematoma and consult with a surgeon. The plaintiffs, however, added a conclusory allegation that the physicians had provided the decedent with treatment and diagnosis for a condition that was outside the specialty of internal medicine and within the specialty of surgery, in an

[7] For a more detailed discussion of the jurisdictional question, as it pertains to the broad specialty of internal medicine, see *Labissoniere I*, supra, 182 Conn. App. 445.

[8] One panel of this court may not overrule the decision of a previous panel without en banc consideration. See *Boccanfuso* v. *Conner*, 89 Conn. App. 260, 285 n.20, 873 A.2d 208, cert. denied, 275 Conn. 905, 882 A.2d 668 (2005), and cert. denied, 275 Conn. 905, 882 A.2d 668 (2005).

attempt to comply with the statutory requirements. The plaintiffs' argument that we must accept as true that new conclusory allegation is unavailing. See *Caron* v. *Connecticut Pathology Group, P.C.*, supra, 187 Conn. App. 564 ("[e]ssential allegations may not be supplied by conjecture or remote implication" (internal quotation marks omitted)). Whether the physicians were acting as internists or surgeons is undoubtedly an essential allegation, and the plaintiffs failed to allege any *facts* from which we can infer that the physicians were indeed acting outside the scope of internal medicine, irrespective of the label that they attach to their claim. We, therefore, decline to accept as true the plaintiffs' unsupported conclusory allegation that the physicians were acting as surgeons.[9]

In light of the foregoing, it is still the case that "nothing contained in the plaintiffs' complaint or opinion letter suggests that the physicians were not acting as internists. In fact, the crux of the plaintiffs' complaint was that the physicians were negligent in their initial assessment of the decedent's condition, not that the physicians were negligent in performing a surgical procedure." *Labissoniere I*, supra, 182 Conn. App. 457. Accordingly, we conclude that the trial court properly dismissed the plaintiffs' action for lack of personal jurisdiction.

The judgment is affirmed.

In this opinion the other judges concurred.

[9] The plaintiffs' claim brings to mind a story attributed to Abraham Lincoln. He used to refer to a boy who, when asked how many legs his calf would have if he called a tail a leg, replied "five," to which the response was made that *calling* a tail a leg does not *make* it a leg. A. McClure, "Abe" Lincoln's Yarns and Stories: A Complete Collection of the Funny and Witty Anecdotes that Made Lincoln Famous as America's Greatest Story Teller (1901) p. 409. Similarly, simply claiming that the physicians were acting as surgeons, and not as internists, does not make it so in light of the factual allegations in the complaint.