KATHLEEN JACQUES *v.* COMMISSIONER OF ENERGY AND ENVIRONMENTAL PROTECTION ET AL.

(AC 42609)

Lavine, Suarez and Devlin, Js.*

Syllabus

The plaintiff property owner sought a permanent injunction against the defendants, the Commissioner of Energy and Environmental Protection and the Secretary of the Office of Policy and Management, prohibiting them from taking further action in the redevelopment of a state park and for an order precluding them from denying her alleged statutory (§ 22a-16) right to intervene in public hearings related to the redevelopment project. The plaintiff filed a complaint with the Department of Energy and Environmental Protection, seeking to intervene in the public hearings on the project pursuant to the applicable statute (§ 22a-19) and to have the opportunity to present expert witnesses on her behalf in opposition to the conclusions of the environmental impact evaluation, as well as seeking to cross-examine the department's witnesses and provide rebuttal expert testimony. The department denied that there was a proceeding in which the plaintiff could intervene. The plaintiff brought an administrative appeal, in which she claimed, inter alia, that the redevelopment plan would have irreversible environmental impacts on the area and, because her property was close to the park, the redevelopment would affect her special personal or legal interests. The trial court subsequently dismissed the action on the ground of sovereign immunity. *Held*:

1. The plaintiff could not prevail on her claim that the trial court erred in determining that she failed to allege facts sufficient to establish her statutory standing under § 22a-16, as her complaint failed to articulate a colorable claim of unreasonable pollution, impairment, or destruction of the environment; the complaint contained only two causes of action, alleging that each defendant violated § 22a-16, and the complaint's focus was entirely on how the plaintiff's rights were violated when the department denied her petition for intervention, and alleged a procedural violation without alleging facts that, if proven, would support a finding that this violation would unreasonably pollute, impair, or destroy the environment.
2. The trial court applied the proper rule of law when it construed the factual allegations in the complaint; contrary to the plaintiff's claim, the court did not state that the complaint failed to make out a "prima facie case," as opposed to a colorable claim, instead, the court used "prima facie"

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

as a descriptive phrase that captured the type of allegation required to defeat sovereign immunity and to articulate that, at first glance, the complaint did not allege facts that, when viewed in the light most favorable to the plaintiff, were sufficient to satisfy exceptions to sovereign immunity.

3. The trial court did not err in determining that the allegations of the complaint did not come within the exception to sovereign immunity for state actions alleged in violation of constitutional rights, as the public hearing in which the plaintiff sought to intervene was not a "proceeding" under § 22a-19, as that statute did not provide for intervention in the type of hearing at issue in the present case, it was within the department's discretion to reject the plaintiff's petition, and, even if the department wrongfully denied her petition, this action would not constitute a violation of the plaintiff's constitutional rights because § 22a-19 did not create a constitutional right of intervention; moreover, the plaintiff did not specifically allege that her constitutional rights had been violated and the plaintiff's claims in her complaint were not of a constitutional magnitude alleging a violation of a fundamental right.
4. The plaintiff could not prevail on her claim that the trial court erred in holding that the allegations of her complaint did not come within the exception to sovereign immunity for a substantial allegation of wrongful conduct to promote an illegal purpose in excess of a state officer's statutory authority: although her complaint alleged that the defendants improperly denied her petition for intervention in contravention of § 22a-19 and that they did so for an illegal purpose, the department had the authority to deny the plaintiff's petition for intervention on the ground that the public hearing was not a "proceeding" to which § 22a-19 applied, as § 22a-19 solely covers matters that are adversarial in nature, thus, the facts in the complaint did not support the claim that either of the defendants acted in excess of his statutory authority; moreover, the illegal purpose exception required the plaintiff to plead that the defendants' conduct was in excess of their statutory authority, regardless of whether she was required to allege that the defendants' conduct promoted an illegal purpose, and the plaintiff's claim still failed because the defendants did not act in excess of their statutory authority.
5. This court declined to reach the merits of the plaintiff's claim that the trial court erred when it ruled that the scoping process/review of the environmental impact evaluation was not a proceeding for purposes of intervention under § 22a-19, as the trial court did not address this issue when it dismissed the action, and, instead, based its decision on its determination that the doctrine of sovereign immunity barred the plaintiff's claim for relief: this court will not consider a claim that the trial court, in reaching its decision, did not address; moreover, even if this court reached the merits of the this claim, it would fail as this court concluded that the hearing in which the plaintiff sought to intervene was not a proceeding for purposes of § 22a-19.

Argued October 13, 2020—officially released March 30, 2021

Procedural History

Action seeking, inter alia, a permanent injunction preventing the defendants from further implementing a master plan to redevelop a certain state park, and for other relief, brought to the Superior Court in the judicial district of New London, where the trial court, *S. Murphy, J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Richard S. Cody, with whom, on the brief, was *Michael P. Carey*, for the appellant (plaintiff).

Lori D. DiBella, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellees (defendants).

Opinion

SUAREZ, J. The plaintiff, Kathleen Jacques, brought the action underlying this appeal against the defendants, Robert Klee, the Commissioner of Energy and Environmental Protection (commissioner), and Benjamin Barnes, Secretary of the Office of Policy and Management (secretary). The plaintiff sought, inter alia, a permanent injunction prohibiting the defendants from taking further action with respect to a plan to redevelop Seaside State Park in Waterford and an order precluding the defendants from "further denying . . . her statutory rights" to intervene in public hearings related to the redevelopment project. The plaintiff appeals from the judgment of the trial court granting the defendants' motion to dismiss on the ground of sovereign immunity and concluding that she failed to demonstrate that an exception to sovereign immunity applied. On appeal, the plaintiff claims that the court (1) erred in determining that she failed to allege facts sufficient to establish her statutory standing under General Statutes § 22a-16, (2) utilized an improper standard in construing the complaint's allegations under the sovereign immunity

exceptions for state actions in violation of the plaintiff's constitutional rights and for state actions in excess of its authority, (3) erred when it concluded that the allegations of the complaint did not come within the exception to sovereign immunity for state actions alleged in violation of constitutional rights, (4) erred when it held that the allegations of the complaint did not come within the exception to sovereign immunity for a substantial allegation of wrongful conduct to promote an illegal purpose in excess of a state officer's statutory authority, and (5) erred when it ruled that the scoping process/review of the environmental impact evaluation was not a "proceeding" for purposes of intervention under General Statutes § 22a-19.[1] We affirm the judgment of the trial court.

The following procedural history is relevant to this appeal. The plaintiff commenced the underlying action on July 12, 2018. The two count complaint sought a permanent injunction prohibiting the Department of Energy and Environmental Protection (department) from further implementing its master plan to redevelop Seaside State Park, a thirty-two acre, state owned property in Waterford, and to enjoin the defendants "from further denying the plaintiff her statutory rights" under § 22a-19. Specifically, she challenged "the record of decision, opinion, findings of fact, and determination of environmental impact concerning the Seaside State Park Master Plan, prepared by [the department] and submitted to the . . . Office of Policy and Management on January 9, 2018, which [the Office of Policy and Management] subsequently reviewed and favorably determined on or about March 2, 2018 pursuant to statutory requirement . . . ."

The plaintiff alleged in her complaint that Seaside State Park is located on Long Island Sound and contains

[1] For convenience, we have reordered the plaintiff's claims as they are set forth in her brief so that we first address the claims related to sovereign immunity.

a number of buildings, including two former residences located approximately 300 feet and 550 feet from her home, respectively. She further alleged that the department intended to implement a "destination park concept" as its preferred alternative, which would involve the "restoration and reuse of existing historic buildings onsite for lodging and enhancement of the waterfront for ecological and recreational purposes . . . ." The plaintiff included in the complaint passages from the master plan that allegedly stated that "the buildings designated for lodging . . . would support up to approximately 63 rooms with associated services such as dining areas, conference space, a pool, fitness center and parking. . . . [I]f developers deem that 63 rooms are not sufficient to make the project economically viable, then [the department] will entertain proposals for up to 100 rooms of lodging."

The plaintiff alleged that the department looked at the potential environmental impacts of the proposed redevelopment and prepared an environmental impact evaluation with its findings.[2] At its discretion, the department scheduled a public hearing on the environ-

[2] General Statutes § 22a-1b governs evaluations by state agencies of actions affecting the environment. Subsection (b) details the public scoping process that the department was required to follow before it prepared of the environmental impact evaluation. Section 22a-1b (b) (1) provides: "Each sponsoring agency shall, prior to a decision to prepare an environmental impact evaluation pursuant to subsection (c) of this section for an action which may significantly affect the environment, conduct an early public scoping process." An agency must initiate the early public scoping process in accordance with § 22a-1b (b) (2).

Section 22a-1b (b) (3) provides in relevant part that members of the public "may submit comments on the nature and extent of any environmental impacts of the proposed action" for the thirty days following the agency's publication of the notice of the early public scoping process. Section 22a-1b (b) (4) provides in relevant part: "A public scoping meeting shall be held at the discretion of the sponsoring agency or if twenty-five persons or an association having not less than twenty-five persons requests such a meeting . . . ."

After the agency identifies the environmental impacts of its proposed action through the scoping process, it must prepare an environmental impact

mental impact evaluation to be held on July 31, 2017.[3] The plaintiff further alleged that on July 25, 2017, she filed with the department a verified complaint seeking to intervene in this public hearing pursuant to § 22a-19. In her complaint, she stated that by intervening, she expected to have the opportunity "to provide for evidentiary purposes the live testimony of one or more expert witnesses on her behalf in opposition to the findings, recommendations, conclusions and opinions in the [environmental impact evaluation] which came before the public hearing, and the right, as a party, to cross-examine [the department's] witnesses and to provide rebuttal expert testimony."

The plaintiff next alleged that on July 31, 2017, prior to the scheduled public hearing, the department e-mailed

evaluation in accordance with the requirements of § 22a-1b (c). General Statutes § 22a-1d (a) requires that the agency make the environmental impact evaluation available for public inspection and comment. As we note in footnote 3 of this opinion, the agency may be required to hold a public hearing on the environmental impact evaluation or do so at its discretion in order to solicit additional public comment.

[3] General Statutes § 22a-1d (a) provides in relevant part that an agency "shall hold a public hearing on the [environmental impact] evaluation if twenty-five persons or an association having not less than twenty-five persons requests such a hearing . . . ." If an agency does not receive such a request, the agency "may hold, *at its discretion*, a public hearing on an environmental impact evaluation no less than thirty (30) days after the publication of the notice of availability. . . . If a public hearing is held, the public comment period shall remain open for at least five (5) days following the close of the public hearing or until the date specified in the notice of availability of the environmental impact evaluation published in the Environmental Monitor, whichever is later." (Emphasis added.) Regs., Conn. State Agencies § 22a-1a-9 (c).

In an affidavit submitted to the court in support of the defendants' motion to dismiss, Thomas Tyler, Director of the State Parks Division of the Bureau of Outdoor Recreation within the department, stated that the department "did not receive the requisite petition by twenty-five or more people (or from an organization containing twenty-five members or more) pursuant to . . . § 22a-1d while conducting the [environmental impact evaluation] for Seaside State Park. Consequently, [the department] was not required to hold the nonadjudicative, informational public hearing for the Seaside [environmental impact evaluation] on July 31, 2017 at the Waterford Town Hall, but [the department] did so anyway based on public interest."

her a letter from the agency legal director denying that there was a "proceeding" in which she could intervene, and indicating that, "[l]ike all members of the public, [she] is afforded the opportunity to make comments on the [environmental impact evaluation]." The plaintiff stated in her complaint that, because she was prevented from participating as a party intervenor in the July 31, 2017 hearing, she was "unable to cross-examine [the department's] witnesses and/or to present her own experts."

The plaintiff further alleged that on January 9, 2018, pursuant to General Statutes § 22a-1e,[4] the department submitted the environmental impact evaluation and a record of its decision on the proposed action to the Office of Policy and Management for approval. She further alleged that on March 2, 2018, the secretary wrote a letter to the commissioner in which he concluded that the environmental impact evaluation satisfied the requirements of the Connecticut Environmental Protection Act of 1971 (act), General Statutes § 22a-14 et seq.

The plaintiff's complaint alleged potential environmental impacts cited by the department in its environmental impact evaluation and alleged that, "[a]ccording to the [environmental impact evaluation], some of the . . . impacts [would] be irreversible." She alleged that "[n]oise resulting from lodging and related increased uses of the Seaside property . . . would be easily audible from [her] property, and from within her household." Therefore, she alleged, the department's proposed action would "specially and injuriously affect the

[4] General Statutes § 22a-1e provides: "The Office of Policy and Management shall review all environmental impact evaluations together with the comments and responses thereon, and shall make a written determination as to whether such evaluation satisfies the requirements of this part and regulations adopted pursuant thereto, which determination shall be made public and forwarded to the agency, department or institution preparing such evaluation. Such determination may require the revision of any evaluation found to be inadequate. Any member of the Office of Policy and Management which has prepared an evaluation and submitted it for review shall

special personal or legal interests of [the plaintiff]." In count one, the plaintiff alleged that the commissioner violated her rights as an intervenor under § 22a-19 when the department denied her petition for intervention and subsequently forwarded the environmental impact evaluation and record of decision to the Office of Policy and Management. In count two, the plaintiff alleged that the secretary violated her rights under § 22a-19 when he issued a finding that the environmental impact evaluation satisfied the requirements of the act, despite the department's alleged violation of her rights as a would be intervenor.

On September 6, 2018, the defendants moved to dismiss the plaintiff's cause of action in its entirety, pursuant to Practice Book § 10-30, on the ground that the court lacked subject matter jurisdiction on the basis of sovereign immunity. The plaintiff filed a memorandum of law in opposition to the motion to dismiss in which she relied on each of the following three exceptions to the doctrine of sovereign immunity. First, she argued that the legislature waived the state's sovereign immunity for her to challenge the department's environmental impact evaluation process when it enacted the act. Second, she argued that the allegations of the complaint demonstrated that she "had a colorable claim to a constitutional due process property interest in intervention." Third, she argued that the department acted in excess of its authority and in derogation of its duties under the act, specifically § 22a-19, when it denied her verified petition for intervention. Additionally, she argued that the environmental impact evaluation and scoping projects were "proceedings" for the purposes of § 22a-19, and, therefore, the department's decision to reject her petition "was legally incorrect and beyond [its] authority to make."

not participate in the decision of the office on such evaluation. The sponsoring agency shall take into account all public and agency comments when making its final decision on the proposed action."

The defendants filed a reply in which they argued that the plaintiff failed to allege facts in her complaint sufficient to satisfy any of the three exceptions to sovereign immunity. They also contended that the public hearing on the environmental impact evaluation was not a "proceeding" for the purposes of intervention.

The court held a hearing on the motion to dismiss on October 22, 2018, during which the court ordered supplemental briefing. The parties submitted supplemental briefs on October 26, 2018.

The court granted the defendants' motion to dismiss and rendered judgment dismissing the action on December 17, 2018. The court issued a memorandum of decision on the same date. In its memorandum of decision, the court concluded, pursuant to the doctrine of sovereign immunity, that the plaintiff lacked standing. First, the court concluded that the allegations of "the plaintiff's complaint [fell] short of articulating a colorable claim of unreasonable pollution, impairment or destruction of the environment" as required by General Statutes § 22a-16 and, thus, "failed to establish statutory standing . . . ." (Internal quotation marks omitted.) Second, the court concluded that the allegations of the complaint "failed to establish standing by way of the exception to sovereign immunity where the plaintiff's constitutional rights have been violated." The court stated that there was "no mention of a constitutional violation anywhere in the complaint, nor [were] there any facts upon which the court [could] infer a constitutional violation." Third, the court concluded that the plaintiff's complaint "[failed] to allege facts showing prima facie that . . . any state officer committed wrongful conduct to promote an illegal purpose in excess of his or her statutory authority." Further, the court concluded that "the plaintiff's first and second causes of action [contained] nothing more than conclusory allegations concerning the defendants' conduct." The plaintiff filed

a motion to reargue the motion to dismiss on January 7, 2019, which the court denied on January 28, 2019.

The plaintiff filed the present appeal on February 19, 2019. Additional procedural history will be set forth as necessary.

I

The plaintiff first claims that the court erred in determining that she failed to allege facts sufficient to establish her statutory standing under § 22a-16.[5] We disagree.

Our standard of review is well established. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional 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 . . .

[5] General Statutes § 22a-16 provides: "The Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the superior court for the judicial district wherein the defendant is located, resides or conducts business, except that where the state is the defendant, such action shall be brought in the judicial district of Hartford, for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity, acting alone, or in combination with others, for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction provided no such action shall be maintained against the state for pollution of real property acquired by the state under subsection (e) of section 22a-133m, where the spill or discharge which caused the pollution occurred prior to the acquisition of the property by the state."

admits all facts which are well pleaded, invokes the existing record and must be decided on that alone.

"Sovereign immunity relates to a court's subject matter jurisdiction over a case, and therefore presents a question of law over which we exercise de novo review. . . . In so doing, we must decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record. . . . The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law. . . . Not only have we recognized the state's immunity as an entity, but [w]e have also recognized that because the state can act only through its officers and agents, a suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the state." (Citations omitted; internal quotation marks omitted.) *Stotler* v. *Dept. of Transportation*, 142 Conn. App. 826, 833–34, 70 A.3d 114 (2013), aff'd, 313 Conn. 158, 96 A.3d 527 (2014).

"[T]he sovereign immunity enjoyed by the state is not absolute. There are [three] exceptions . . . . The first exception . . . occurs when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity; the second exception occurs when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights; and the third exception occurs when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority." (Citation omitted; internal quotation marks omitted.) *Jezouit* v. *Malloy*, 193 Conn. App. 576, 594–95, 219 A.3d 933 (2019). We will apply this same standard of review to parts II, III, and IV of this opinion, as these sections address the plaintiff's challenge to the court's granting of the defendant's motion to dismiss on the grounds of sovereign immunity.

As the court stated in its memorandum of decision, § 22a-16 "waives sovereign immunity as to actions for declaratory or equitable relief against the state and its agencies 'for the protection of the public trust in the air, water and other natural resources of the state from *unreasonable* pollution, impairment or destruction.' " (Emphasis in original.) "It is settled that the existence of statutory standing depends on whether the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute . . . . Under § 22a-16, standing . . . is conferred only to protect the natural resources of the state from pollution or destruction. . . . Accordingly, all that is required to invoke the jurisdiction of the Superior Court under § 22a-16 is a colorable claim, by any person [or entity] against any person [or entity], of conduct resulting in harm to one or more of the natural resources of this state. . . . Although it is true, of course, that the plaintiff need not prove its case at [the pleading] stage of the proceedings . . . the plaintiff nevertheless must articulate a *colorable claim* of unreasonable pollution, impairment or destruction of the environment." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *New London*, 265 Conn. 423, 432, 829 A.2d 801 (2003).

We note that the plaintiff did not cite § 22a-16 in her complaint and, instead, referenced only the act as a whole. The court, nevertheless, addressed the statutory exception claim under § 22a-16.[6] We will, therefore,

[6] In its memorandum of decision on the defendants' motion to dismiss, the court stated: "Although the plaintiff does not specifically cite § 22a-16 standing alone, the plaintiff does reference the Connecticut Environmental Protection Act at §§ 22a-14 through 22a-20 in claiming standing. . . . Read broadly, this paragraph, albeit a stretch, could be construed as an assertion of a claim under § 22a-16, wherefore this court will address the statutory waiver exception." We agree with the court's interpretation of the plaintiff's complaint as seeking relief under § 22a-16.

review the facts alleged in the complaint to determine if the plaintiff made out a colorable claim under § 22a-16.

In its memorandum of decision, the court relied on *Fort Trumbull Conservancy, LLC* v. *New London*, supra, 265 Conn. 428, a case in which a conservation organization brought an action under § 22a-16 seeking to bar the implementation of a municipal development plan based on alleged violations of federal, state, and local law. The organization's appeal to our Supreme Court focused on allegations in the complaint "(1) that the defendants failed to follow certain procedural requirements in adopting the development plan; and (2) that the plan called for demolition without consideration of 'feasible and prudent alternatives.' " Id., 431. In concluding that the organization failed to establish statutory standing under § 22a-16, our Supreme Court stated that "the allegations of the complaint do not give rise to an inference of unreasonable harm to the environment because it is not evident how the defendants' failure to follow certain procedural requirements in adopting the development plan or to consider alternatives to the demolition of buildings in the Fort Trumbull area is likely to cause such harm." Id., 433. The court noted: "The complaint . . . expressly challenges both the legality of the process pursuant to which the defendants adopted the development plan and the necessity of the demolition component of the plan. These allegations, however, provide no indication as to how or why the adoption and implementation of the development plan is likely to cause unreasonable harm to the environment." Id., 432. Our Supreme Court concluded that the plaintiff had not articulated a colorable claim of unreasonable pollution, impairment, or destruction of the environment. Id., 433. Therefore, under *Fort Trumbull Conservancy, LLC*, when a party seeks to intervene in a proceeding based on allegations that the department did not follow the act's procedural requirements, it must also

allege in the complaint how the alleged procedural violations could result in unreasonable harm to the environment. See id., 432.

In the present case, the plaintiff argues that *Burton* v. *Commissioner of Environmental Protection*, 291 Conn. 789, 970 A.2d 640 (2009) (*Burton I*),[7] controls, and that the court erred in relying on *Fort Trumbull Conservancy, LLC*. In *Burton I*, the plaintiff, Nancy Burton, moved to intervene, pursuant to § 22a-19, in the department's permit renewal proceeding for an electric generating facility powered by two nuclear power generating units. Id., 793–94. The hearing officer allowed Burton to intervene for the purpose of raising some of the claims set forth in her motion for intervention, but excluded her claims concerning the department's alleged collusion with the facility operator and past illegal activities, as well as the potential impact of radioactive waste from the facility. Id., 795. Burton brought an action in Superior Court, alleging in her complaint, among other things, that the hearing officer had a conflict of interest and was biased. Id., 796. She further alleged that the

[7] In addition to *Burton I*, our Supreme Court has decided two other *Burton* matters. See *Burton* v. *Dept. of Environmental Protection*, Conn. , A.3d (2021) (*Burton III*); *Burton* v. *Commissioner of Environmental Protection*, 323 Conn. 668, 150 A.3d 666 (2016) (*Burton II*). The plaintiff relies only on *Burton I* in her appellate brief.

We note that our Supreme Court recently decided *Burton III*, in which it briefly discusses a plaintiff's rights under § 22a-19. In *Burton III*, supra, Conn. , Burton argued, among other things, that "the administrative [licensing] proceeding was inadequate because the hearing officer precluded certain claims on which she sought to intervene." Although *Burton III* addressed the department's discretion under § 22a-19, this discussion does not impact our analysis in the present case. First, in *Burton III*, Burton intervened in a licensing proceeding, which, for the reasons set forth in part IV of this opinion, is distinguishable from the purported public hearing at issue in the present case. Second, in *Burton III*, the court focused on the hearing officer's discretion to preclude certain claims after Burton already had intervened in the department's proceeding. The present case, on the other hand, concerns whether the department has the discretion to preclude someone from intervening at all.

department had prejudged her permit renewal application and had declined to consider the environmental impact of the facility's discharge water. Id. The complaint also contained allegations pertaining to how the facility's operations would pollute the surrounding waters and harm marine life. Id. The defendants moved to dismiss the action, and the trial court granted the motion, concluding that, "because the conduct that [Burton] alleged in her complaint arose out of a permitting proceeding, [she] lacked standing." Id., 797. Burton appealed.

On appeal, the defendants in *Burton I* argued that Burton lacked standing under § 22a-16 because her claims were premised entirely on flaws in the permitting process. Id., 805. In reversing the judgment of the trial court, our Supreme Court stated that the complaint contained specific allegations of harm to the environment, and specifically alleged that the existing permit renewal proceeding was inadequate to protect the rights recognized by the act because the hearing officer was biased and the department had prejudged the matter. Id., 804–805. The court reasoned that, "[i]n essence, therefore, [Burton] [alleged] that, if the hearing officer and the department had fairly and impartially conducted the permit renewal proceeding, they would not have allowed [the facility owner] to continue [the facility's] operations under the emergency authorization or issued the tentative decision to renew the discharge permit because the impact of the operations on the marine life in the neighboring bodies of water is more harmful than that permitted by the applicable regulatory scheme." Id., 805. Thus, although Burton's claims were premised on flaws in agency process, the complaint sufficiently alleged facts that would support a finding that the flawed process could potentially cause harm to the environment. See id., 807 ("we have recognized that the mere fact that conduct comes within the scope of a statutory permitting scheme does not preclude a claim under the act

if, as in the present case, the plaintiff makes a colorable claim that the conduct will cause unreasonable pollution").

In the present case, the complaint alleges one cause of action against the commissioner and one cause of action against the secretary. These causes of action allege only that each defendant violated § 22a-19, and focus entirely on how the plaintiff's rights were violated when the department denied her petition for intervention. The complaint merely restates findings contained in the environmental impact evaluation and it fails to articulate a colorable claim of unreasonable pollution, impairment or destruction of the environment. As in *Fort Trumbull Conservancy, LLC*, the complaint alleges a procedural violation without alleging facts that, if proven, would support a finding that this violation would unreasonably pollute, impair, or destroy the environ-ment. We will not speculate as to how the defendants' alleged wrongdoing confers standing on the plaintiff under § 22a-16. See *Mystic Marinelife Aquarium, Inc.* v. *Gill*, 175 Conn. 483, 502, 400 A.2d 726 (1978) ("No pleading [in this case] . . . alleges any specific conduct as to what is claimed to constitute any alleged unreasonable pollution, impairment or obstruction of any natural resource. We cannot supply such an omission."). Accordingly, we conclude that the court did not err in determining that the allegations in the plaintiff's complaint did not make out a colorable claim under § 22a-16.

II

The plaintiff next claims that the court utilized an improper standard in construing the complaint's allegations under the sovereign immunity exceptions for state actions in violation of the plaintiff's constitutional rights and state actions in excess of its authority. We disagree.

In its memorandum of decision granting the defendants' motion to dismiss, the trial court set forth the following standard: "A motion to dismiss shall be used to assert lack of jurisdiction over subject matter. Practice Book § 10-30 (a) (1). A motion to dismiss tests whether, based on the record, the court has jurisdiction. *MacDermid, Inc.* v. *Leonetti*, 310 Conn. 616, 626, 79 A.3d 60 (2013). 'When a . . . court decides a jurisdictional 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.' . . . *Stroud* v. *Mid-Town Tire & Supply, Inc.*, 146 Conn. App. 806, 811–12, 81 A.3d 243 (2013). In their motion, the defendants asserted sovereign immunity as the ground for the court's lack of subject matter jurisdiction. The doctrine of sovereign immunity implicates subject matter jurisdiction and, thus, is grounds for granting a motion to dismiss. *Housatonic Railroad Co.* v. *Commissioner of Revenue Services*, 301 Conn. 268, 274, 21 A.3d 759 (2011). Sovereign immunity applies to the state and the state's officers. See *Daimler Chrysler Corp.* v. *Law*, 284 Conn. 701, 711, 937 A.2d 675 (2007)."

In addition to our standard of review articulated in part I of this opinion, we note that "[t]he construction of a judgment is a question of law for the court, such that our review of the [plaintiff's] claim is plenary. As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment." (Internal quotation marks omitted.) *In re Jason B.*, 137 Conn. App. 408, 414, 48 A.3d 676 (2012).

The trial court construed the allegations of the plaintiff's complaint in light of the facts alleged with regard to the environmental impact evaluation and the defendants' conduct in approving the Seaside State Park master plan. In discussing the second and third exceptions to sovereign immunity,[8] the court stated: "The complaint fails to allege facts showing *prima facie* that the state or any of its officers violated the plaintiff's constitutional rights or that any state officer committed wrongful conduct to promote an illegal purpose in excess of his or her statutory authority." (Emphasis added.)

The plaintiff takes issue with the court's use of the term "prima facie," arguing that the court required the allegations of the complaint to make out a "prima facie case," rather than a colorable claim, as required by *Burton I*. She further argues that "a prima facie showing is an evidential matter," which "can involve the establishment of a legally required rebuttable presumption or a party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." She cites the Black's Law Dictionary definition of "prima facie case" to support this argument.

When used as an adverb, Black's Law Dictionary defines "prima facie" as: "At first sight; on first appearance but subject to further evidence or information." Black's Law Dictionary (11th Ed. 2019) p. 1441. When used as an adjective, Black's Law Dictionary defines the term as: "*Sufficient* to establish a fact or raise a presump-

[8] To reiterate, "the second exception [to sovereign immunity] occurs when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights; and the third exception occurs when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority." (Internal quotation marks omitted.) *Jezouit* v. *Malloy*, supra, 193 Conn. App. 595.

tion unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue." (Emphasis added.) Id. Our Supreme Court similarly has described "prima facie evidence" as "evidence which, if credited, is *sufficient* to establish the fact or facts which it is adduced to prove." (Emphasis added; internal quotation marks omitted.) *Rapuano* v. *Oder*, 181 Conn. 515, 520, 436 A.2d 21 (1980). Phrases such as "prima facie" and "sufficient" do not describe standards that are qualitatively different from the phrase "substantial allegation," which is used in cases such as *Jezouit* v. *Malloy*, supra, 193 Conn. App. 595.

In the present case, the court did not state that the complaint failed to make out a "prima facie case." Instead, the court used "prima facie" as a descriptive phrase that captures the type of allegation required to defeat sovereign immunity. In other words, the court used "prima facie" to articulate that, *at first glance*, the complaint did not allege facts that, when viewed in the light most favorable to the plaintiff, were *sufficient* to satisfy the second and third exceptions to sovereign immunity. Accordingly, on the basis of our construction of the court's decision, we conclude that the court applied the proper rule of law when it construed the factual allegations in the complaint according to the standard it articulated earlier in the decision.

III

Next, the plaintiff claims that the court erred when it concluded that the allegations of the complaint did not come within the exception to sovereign immunity for state actions alleged in violation of constitutional rights. We disagree.

We begin by noting that, in her complaint, the plaintiff did not specifically allege that her constitutional rights

had been violated. The court concluded in its memorandum of decision granting the defendants' motion to dismiss that the complaint did not allege "facts upon which the court [could] infer a constitutional violation." After a careful review of the complaint, we conclude that the plaintiff's claims are not of constitutional magnitude alleging the violation of a fundamental right.

This court has noted that "[t]he procedural right involved in administrative proceedings properly is described as a right to fundamental fairness, as distinguished from the due process rights implicated in judicial proceedings." *Burton* v. *Connecticut Siting Council*, 161 Conn. App. 329, 341 n.12, 127 A.3d 1066 (2015), cert. denied, 320 Conn. 925, 133 A.3d 459 (2016); see also *Megin* v. *Zoning Board of Appeals*, 106 Conn. App. 602, 607 n.6, 942 A.2d 511 ("The right to fundamental fairness in administrative proceedings encompasses a variety of procedural protections, including the right to adequate notice. . . . [Our Supreme Court at times has] characterized these procedural protections as due process rights. . . . Although the due process characterization, at first blush, suggests a constitutional source, there is no discussion in these cases of a property interest in terms of constitutional due process rights. These decisions are, instead, based on a line of administrative law cases and reflect the development, in Connecticut, of a common-law right to due process in administrative hearings." (Citation omitted; internal quotation marks omitted.)), cert. denied, 289 Conn. 901, 957 A.2d 871 (2008). Additionally, we note that the United States Court of Appeals for the Second Circuit has held that the right to intervene under § 22a-19 is not a protected property interest under the federal constitution. *West Farms Associates* v. *State Traffic Commission*, 951 F.2d 469, 472 (2d Cir. 1991).[9]

[9] "Federal case law, particularly decisions of the United States Court of Appeals for the Second Circuit . . . can be persuasive in the absence of state appellate authority . . . ." *Designs for Health, Inc.* v. *Miller*, 187 Conn.

On appeal, the plaintiff argues that § 22a-19 creates a right of intervention, and that the department had no legal discretion but to grant her petition for intervention. She contends that, in enacting this statute, the legislature conferred upon intervening citizens due process rights, which vest when citizens file verified petitions for intervention with the department. To support this assertion, she cites *Polymer Resources, Ltd.* v. *Keeney*, 32 Conn. App. 340, 348–49, 629 A.2d 447 (1993), which states: "As we have noted, § 22a-19 (a) compels a trial court to permit intervention in an administrative proceeding or judicial review of such a proceeding by a party seeking to raise environmental issues upon the filing of a verified complaint. The statute is therefore not discretionary." We note that in *Zoning Commission* v. *Fairfield Resource Management, Inc.*, 41 Conn. App. 89, 104–105, 674 A.2d 1335 (1996), this court concluded that the decision in *Polymer Resources, Ltd.*, was not legally viable because in its companion case, *Polymer Resources, Ltd.* v. *Keeney*, 227 Conn. 545, 630 A.2d 1304 (1993), our Supreme Court remanded the case to the trial court with direction to render judgment dismissing the complaint. Thus, the case was not persuasive authority when this court rendered its decision. *Zoning Commission* v. *Fairfield Resource Management, Inc.*, supra, 104. Accordingly, the plaintiff's reliance on this case is misplaced.

In the present case, for the reasons set forth in part IV of this opinion, the public hearing in which the plaintiff sought to intervene was not a "proceeding" under § 22a-19. Therefore, because the statute does not provide for intervention in the type of hearing at issue in the present

App. 1, 11 n.8, 201 A.3d 1125 (2019). In her appellate brief, the plaintiff does not cite legal authority for the proposition that § 22a-19 creates a constitutional right of intervention in proceedings by the department. We are unaware of any state appellate authority addressing whether such a right exists. The decision of the Second Circuit Court of Appeals is, therefore, instructive.

case, it was within the department's discretion to reject the plaintiff's petition. Furthermore, even if the department wrongfully denied her petition, this action would not constitute a violation of the plaintiff's constitutional rights because § 22a-19 does not create a constitutional right of intervention. Accordingly, we conclude that the court did not err in determining that the allegations of the complaint did not come within the exception to sovereign immunity for alleged violations of constitutional rights.

IV

The plaintiff next claims that the court erred when it held that the allegations of the complaint did not come within the exception to sovereign immunity for a substantial allegation of wrongful conduct to promote an illegal purpose in excess of a state officer's statutory authority. In this regard, she argues that the complaint alleged that the defendants improperly denied her petition for intervention in contravention of § 22a-19 *and* that they did so for an illegal purpose. We disagree.

"For a claim under the third exception [regarding illegal purpose], the [plaintiff] must do more than allege that the defendants' conduct was in excess of their statutory authority; [she] also must allege or otherwise establish facts that reasonably support those allegations. . . . In the absence of a proper factual basis in the complaint to support the applicability of these exceptions, the granting of a motion to dismiss on sovereign immunity grounds is proper." (Citation omitted; internal quotation marks omitted.) *DaimlerChrysler Corp.* v. *Law*, supra, 284 Conn. 721.

To determine, as the plaintiff argues, whether the defendants acted wrongfully in denying her petition for intervention, it is first necessary to determine whether the public hearing in which the plaintiff sought to intervene was a "proceeding" for the purposes of § 22a-19a.

For the reasons we set forth herein, we conclude that the public hearing was not a "proceeding" to which the statute applied. Thus, the department had the authority to deny the plaintiff's petition for intervention on this ground.

"When a case presents only questions of law, an administrative agency's legal determinations are not entitled to any special deference, unless they previously have been subject to judicial review or to a governmental agency's time-tested interpretation. . . . Because statutory interpretation is a question of law, our review is de novo." (Citations omitted; internal quotation marks omitted.) *Planning & Zoning Commission* v. *Freedom of Information Commission*, 316 Conn. 1, 9, 110 A.3d 419 (2015).

General Statutes § 22a-1d governs review of environmental impact evaluations and provides in relevant part: "The sponsoring agency preparing an environmental impact evaluation shall hold a public hearing on the evaluation if twenty-five persons or an association having not less than twenty-five persons requests such a hearing within ten days of the publication of the notice in the Environmental Monitor." Pursuant to § 22a-1a-9 of the Regulations of Connecticut State Agencies, if twenty-five persons do not request a public hearing, the department may still hold one "at its discretion." This regulation requires the department to publish notice of the availability of environmental impact evaluations that includes information about the public comment period. Regs., Conn. State Agencies § 22a-1a-9 (a) (4). If there is no public hearing planned, the department must keep the public comment period open for at least forty-five days after the date that it publishes the notice. Id. If the department holds a public hearing, the department must keep the public comment period open for at least five days after the public hearing, or for at least

forty-five days after the publication date of the notice, whichever is later. Id.

Section 22a-19 (a) (1) provides: "In any administrative, licensing or other proceeding, and in any judicial review thereof made available by law, the Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subivision thereof, any person, partnership, corporation, association, organization or other legal entity may intervene as a party on the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state."

In *Zoning Commission* v. *Fairfield Resources Management, Inc.*, supra, 41 Conn. App. 89, this court applied principles of statutory construction to determine whether an association of property owners and other individuals could utilize § 22a-19 to intervene in an enforcement action brought by a town zoning commission in Superior Court. This court held that the parties should have been granted intervenor status because the enforcement action fell within the "other proceeding" category of the statute. Id., 97–98. It stated that "the words 'administrative' and 'licensing' as used in § 22a-19 (a) are directed to agency proceedings." Id., 115. The court then concluded that "[i]f 'other proceedings' is to be given meaning in § 22a-19 (a), it can refer *only to court proceedings* . . . ." (Emphasis added.) Id.

In the present case, the public hearing on the environmental impact evaluation was not a licensing proceeding, nor was it a court proceeding that would fall under the "other proceedings" category of § 22a-19. Therefore, we must determine whether the department's public

hearing on the environmental impact evaluation constituted an "administrative proceeding" under the statute.

Neither the act nor the Uniform Administrative Procedure Act, General Statutes § 4-166 et seq., defines the terms "proceeding" or "administrative proceeding." In their supplemental briefs on the defendants' motion to dismiss, both parties acknowledged that Connecticut courts have yet to define the word "proceeding" in the context of § 22a-19. Thus, we must interpret the term "proceeding" as it is used in the statute.

We begin by setting forth the guiding principles of statutory interpretation. General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from 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." "The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *State* v. *Brown*, 310 Conn. 693, 702, 80 A.3d 878 (2013).

"In the absence of a definition of terms in the statute itself, [w]e may presume . . . that the legislature intended [a word] to have its ordinary meaning in the English language, as gleaned from the context of its use. . . . Under such circumstances, it is appropriate to look to the common understanding of the term as expressed in a dictionary." (Internal quotation marks omitted.) *Efstathiadis* v. *Holde*r, 317 Conn. 482, 488, 119 A.3d 522 (2015).

Merriam-Webster's Collegiate Dictionary defines "proceeding" as a "legal action. . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 990.

Black's Law Dictionary provides more detail, defining a "proceeding" as: "1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment. 2. Any procedural means for seeking redress from a tribunal or agency. 3. An act or step that is part of a larger action. 4. The business conducted by a court or other official body; a hearing. 5. Bankruptcy. A particular dispute or matter arising within a pending case—as opposed to the case as a whole." Black's Law Dictionary (11th Ed. 2019) p. 1457. It also defines "administrative proceeding" as: "A hearing, inquiry, investigation, or trial before an administrative agency, [usually] adjudicatory in nature but sometimes quasi-legislative." Id., p. 56. Each of these definitions reveals that "proceeding" refers to a matter that takes place in court as part of a lawsuit or criminal case, or an adversarial[10] matter before an administrative body.[11]

Section 1-2z next directs us to look at the relationship between § 22a-19 and other statutes. The term "proceeding" is only used in one other section of the act. General Statutes § 22a-18, which discusses the powers of reviewing courts, mentions the term in two instances. Subsection (b) of § 22a-18 provides in relevant part: "If administrative, licensing or other such proceedings are

[10] In *State* v. *Anonymous*, 30 Conn. Supp. 302, 304–307, 312 A.2d 715 (1973), the Superior Court determined that the issuance of a bench warrant was not a "proceeding" within the meaning of General Statutes § 54-41*l*, Connecticut's wiretap statute. In reaching this determination, the court cited federal cases in which courts concluded that under a similar federal wiretap statute, the word "proceeding" was limited to "adversary-type hearings." Id., 305. We find this case to be persuasive in addition to our textual analysis.

[11] Black's Law Dictionary includes the term "hearing" in both of its definitions, which suggests that public hearings on environmental impact evaluations could fall under the umbrella of "proceedings." However, when read within the context of the definitions as a whole, it is apparent that "hearing" references a single event that is part of a larger legal action against a particular defendant, such as a hearing on a motion, rather than a public hearing to solicit comments on a proposed agency action.

required or available to determine the legality of the defendant's conduct, the court in its discretion may remand the parties to such proceedings. . . ." Subsection (d) of § 22a-18 provides: "Where, as to any administrative, licensing or other proceeding, judicial review thereof is available, the court originally taking jurisdiction shall maintain jurisdiction for purposes of judicial review." When read alongside the portion of the subsection (b) of § 22a-18 that states "to determine the legality of the defendant's conduct," the term "administrative proceeding" appears to reference proceedings before an agency that are adjudicatory in nature.

The General Statutes define "proceeding" in the Business Corporation Act, General Statutes § 33-600 et seq., and the Revised Nonstock Corporation Act, General Statutes § 33-1000 et seq., both of which provide: " 'Proceeding' includes civil suit and criminal, administrative and investigatory action." General Statutes § 33-602 (27); General Statutes § 33-1002 (25). Additionally, our Penal Code defines an "official proceeding" as "any proceeding held or which may be held before any legislative, judicial, administrative or other agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner or notary or other person taking evidence in connection with any proceeding." General Statutes § 53a-146 (1).

Our analysis leads us to conclude that the term "proceeding," as it is used in § 22a-19, solely covers matters that are adversarial in nature. The dictionary definitions of the term, as well as its use in other statutes, demonstrate that a proceeding is something that takes place before a tribunal or decision maker, with a resulting decision that is based on principles of law, statutes, or agency regulations. Moreover, it involves basic due process rights such as a right for interested parties to be heard, present evidence, and to argue on their behalf.

Furthermore, the legal concept of intervention inherently relates to participation in an adjudicatory proceeding. See, e.g., Black's Law Dictionary (11th Ed. 2019) p. 983 ("Intervention" is defined as: "1. The entry into a lawsuit by a third party who, despite not being named a party to the action, has a personal stake in the outcome. . . . The intervenor sometimes joins the plaintiff in claiming what is sought, sometimes joins the defendant in resisting what is sought, and sometimes takes a position adverse to both the plaintiff and the defendant. . . . 2. The legal procedure by which such a third party is allowed to become a party to the litigation. . . ."). Without intervention, parties would not otherwise have the opportunity to be heard. In a public hearing, on the other hand, there is no need to intervene because an agency's purpose in holding one is specifically to gather input from members of the public.

Here, the department was not mandated by statute to hold a hearing, but did so at its discretion to solicit public comment. Even if it did not hold this hearing, the plaintiff would have had the opportunity to submit written comments to the department.[12] The plaintiff, however, alleged in her complaint that by filing a verified pleading for intervention under § 22a-19, she expected "to provide for [evidentiary] purposes the live testimony of one or more expert witnesses on her behalf in opposition to the findings, recommendations, conclusion and opinions in the [environmental impact evaluation] which came before the public hearing, and the right, as a party, to cross-examine [the department's] witnesses and to provide rebuttal expert testimony." These

[12] In fact, the plaintiff participated in the statutory environmental impact evaluation review process in multiple ways. In the affidavit referenced in footnote 2 of this opinion, Tyler attested that the plaintiff made "seven submissions of written or oral comments that were received into the [environmental impact evaluation] record and considered by the agency." He further attested that the department included in the record and considered the statements contained in the plaintiff's pleading for intervention.

procedures are characteristics of an adversarial process, rather than an agency-led hearing to solicit public comment.

The plaintiff cites *Keeney* v. *Fairfield Resources, Inc.*, 41 Conn. App. 120, 674 A.2d 1349 (1996), in support of her claim that the department itself has adopted an expansive interpretation of "proceeding" under § 22a-19. In that case, however, the plaintiffs sought to intervene in an enforcement action brought by a zoning commission in the Superior Court. Id., 121. The claim involved conduct by the defendants that allegedly violated a condition of a permit issued by the department, along with actions taken by the defendants without obtaining the required permits from the department. Id., 122. Not only does *Keeney* involve a matter entirely different from a public hearing, it is also a companion case to *Zoning Commission* v. *Fairfield Resources Management, Inc.*, supra, 41 Conn. App. 115, which limited the meaning of "other proceedings" to court proceedings. Thus, *Keeney* has no bearing on nonadjudicatory matters conducted by the department outside of court.

Moreover, the plaintiff does not point to any case in which a Connecticut court has permitted intervention in a hearing similar to the one at issue here. Interpreting the statute in the way the plaintiff requests would yield unworkable results by giving members of the public the right to turn public hearings into trial like proceedings, which would impose additional procedures beyond those required by the act and the department's regulations.

In light of our analysis, we conclude that the department had the authority to deny the plaintiff's petition for intervention on the ground that the public hearing was not covered by § 22a-19 because it was not a "proceeding." Accordingly, the facts alleged in the complaint

do not support the claim that either defendant acted in excess of his statutory authority.

In her brief to this court, the plaintiff also argues that the trial court improperly relied on its conclusion that the plaintiff did not adequately plead that the defendants acted with an illegal purpose. She attempts to demonstrate that because her complaint sought equitable relief, and not money damages, she did not need to prove the "illegal purpose" prong of this exception to sovereign immunity. The illegal purpose exception nonetheless requires a plaintiff to plead that the defendants' conduct was in excess of their statutory authority, regardless of whether she was required to allege that the defendants' conduct promoted an illegal purpose. Thus, even if the plaintiff's argument were correct, her claim would still fail because we already have concluded that the defendants did not act in excess of their statutory authority. Therefore, the plaintiff's claim fails.

V

Finally, the plaintiff claims that the court "erred when it ruled that the scoping process/review of the [environmental impact evaluation] was not a 'proceeding' for purposes of intervention under § 22a-19 . . . ." We decline to reach the merits of this claim.

As the defendants note, the court did not address this issue when it dismissed the action. Instead, the court based its decision on its determination that the doctrine of sovereign immunity barred the plaintiff's claim for relief. We will not consider a claim that the court, in reaching its decision, did not address. See, e.g., *State* v. *Carrasquillo*, 191 Conn. App. 665, 692–93, 216 A.3d 782 (court unable to review ruling that does not exist), cert. denied, 333 Conn. 930, 218 A.3d 69 (2019); *Lane* v. *Cashman*, 179 Conn. App. 394, 416, 180 A.3d 13 (2018) (court declined to review defendants'

claim about ruling that trial court did not make). Furthermore, even if we reached the merits of this claim, it would fail for the reasons set forth in part IV of this opinion, in which we concluded that the hearing in which the plaintiff sought to intervene was not a proceeding for purposes of § 22a-19.

The judgment is affirmed.

In this opinion the other judges concurred.

CHARLES CARROLL *v.* GEORGE B. YANKWITT
(AC 39693)
(AC 42730)

Prescott, Elgo and Moll, Js.

Syllabus

The plaintiff sought to recover the security deposit he paid to the defendant, his former landlord, in connection with the second of two residential leases that the parties had executed. The first lease was for approximately twelve months and had an open-ended commencement date that began on the date the plaintiff commenced occupancy. The parties thereafter executed the second lease, which also ran for one year, and, under which, the plaintiff tendered the payment of the security deposit to the defendant pursuant to statute ([Rev. to 2013] § 47a-21 (d) (2)). On the day the plaintiff's tenancy concluded under the second lease, the defendant sent him an e-mail informing him of various items of damage to the property and inquiring whether he would repair the damage. When the plaintiff did not respond, the defendant sent him a second e-mail two weeks later, itemizing the damages and stating that he had incurred remediation costs, a loss of rent as a result of his inability to relet the property because of the damage, and that the plaintiff owed him unpaid rent for the final week of the first lease. The plaintiff then sent the defendant a letter by certified mail, return receipt requested, seeking the return of the security deposit. The postal service returned the letter to the plaintiff with a notation that it was unclaimed and unable to be forwarded. In addition to the return of the security deposit, the plaintiff sought double damages pursuant to § 47a-21 (d) (2), and attorney's fees, costs and punitive damages as a result of the defendant's alleged violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. The defendant filed a counterclaim seeking damages for the remediation costs he incurred. The case was tried to an attorney trial referee, who recommended

judgment for the plaintiff as to the security deposit, double damages and CUTPA claims, and for the defendant on his counterclaim in part. The trial court adopted the referee's recommendations and rendered judgment accordingly. The court thereafter granted in part the plaintiff's motion for attorney's fees but did not rule on his request for punitive damages. On the defendant's appeal and the plaintiff's cross appeal to this court, *held*:

1. The attorney trial referee improperly recommended, and the trial court wrongly awarded, double damages to the plaintiff, as the defendant's second e-mail complied with the requirements of § 47a-21 (d) (2) by sufficiently apprising the plaintiff of the items of damage that allegedly were caused by his failure to comply with his obligations as a tenant and which exceeded the amount of the security deposit; the referee improperly imposed additional requirements on the defendant that were not set forth in § 47a-21 (d) (2), and, because the amount of the damages alleged in the defendant's e-mail exceeded the amount of the security deposit and interest, the defendant was not required by § 47a-21 (d) (2) to include an explicit statement that no balance of the security deposit remained.

2. The trial court improperly rendered judgment in favor of the plaintiff on the count of his complaint alleging a violation of CUTPA:

   a. The attorney trial referee improperly concluded that the defendant violated CUTPA on the ground that the defendant's written statement of damages failed to satisfy the requirements of § 47a-21 (d) (2): although the plaintiff's counsel and the referee acknowledged at trial that the plaintiff's sole theory of recovery under CUTPA was that the defendant's failure to comply with § 47a-21 (d) (2) constituted a per se violation of CUTPA, the referee went beyond that theory in concluding that the defendant provided an inadequate written statement of damages, as the plaintiff, in his pleadings, did not challenge the adequacy of the defendant's written statement of damages; moreover, the plaintiff could not prevail on either theory of recovery, this court having previously rejected a claim that a landlord's failure to comply with § 47a-21 (d) (2) is a per se violation of CUTPA when the landlord had complied with the requirements of § 47a-21 (d) (2).

   b. The trial court improperly determined that the defendant violated CUTPA on the ground that his statement of damages was pretextual, the court having inaccurately recited in its articulation the attorney trial referee's determination as to damages and disregarded its obligation to accept the referee's findings, which were supported by evidence adduced at trial; the referee did not find, nor did the plaintiff allege, that the damages were pretextual but, rather, found that the defendant had proven several of the damages he claimed and did not meet his burden of proof as to others, which the referee did not find were pretextual or fabricated, and, contrary to the court's articulation, the referee did not

find that the damages the defendant claimed were either not suffered by the defendant or proven at trial to be obligations of the plaintiff.

3. The trial court properly accepted the attorney trial referee's findings that the defendant was not entitled to damages on the third and fifth counts of his counterclaim:

a. The referee's finding that there was no evidence that the plaintiff was aware of the accumulation or cause of mud in the crawl space of the property was not clearly erroneous; the defendant failed to prove that the condition occurred after the plaintiff took possession of the property or that there was any nexus between the plaintiff's conduct and the accretion of the mud or water, and the referee was free to reject the defendant's claim that the crawl space was immaculate at the time the plaintiff's tenancy commenced and to credit the plaintiff's testimony that he did not allow water or mud to accumulate in the crawl space.

b. The defendant could not prevail on his claim that the trial court improperly adopted the attorney trial referee's finding that he was not entitled to damages for one week of unpaid rent under the first lease as alleged in the fifth count of his counterclaim: the referee properly had rejected the defendant's claim that some amount of pro rata rent was due for the week at issue, as the first lease, which had an open-ended commencement date, neither indicated nor implied an agreement for pro rata rent; moreover, the first lease expressly contemplated the apportionment of monthly rent to the number of days the plaintiff occupied the property, and, although the parties knew how to add a pro rata payment obligation in the lease, they declined to do so with respect to the open-ended commencement date.

4. There was no basis for the plaintiff's claim on cross appeal that the trial court improperly failed to award him the full amount of his attorney's fee request, this court having concluded that the trial court improperly rendered judgment in his favor on the CUTPA count of his complaint, and, because there was no CUTPA violation, this court declined to address his challenge to the trial court's failure to rule on his request for punitive damages.

Argued September 21, 2020—officially released March 30, 2021

Procedural History

Action for, inter alia, the return of a security deposit, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, Housing Session at Norwalk, where the defendant filed a counterclaim; thereafter, the case was referred to *Joseph DaSilva, Jr.*, attorney trial referee, who filed a report recommending judgment in part for the plaintiff on the complaint and

for the defendant in part on the counterclaim; subsequently, the court, *Rodriguez*, *J.*, rendered judgment in accordance with the attorney trial referee's report, from which the defendant appealed to this court; thereafter, this court dismissed the appeal in part; subsequently, the court, *Rodriguez*, *J.*, granted in part the plaintiff's motion for attorney's fees, and the defendant filed an amended appeal and the plaintiff cross appealed to this court; thereafter, this court consolidated the appeals. *Judgment in AC 39693 reversed in part*; *further proceedings*; *appeal in AC 42730 vacated.*

Thomas J. O'Neill, with whom were *Jennifer L. Shukla*, and, on the brief, *Bryan J. Orticelli*, for the appellant in Docket No. AC 39693 and cross appellee inDocket No. AC 42730 (defendant).

Brenden P. Leydon, with whom, on the brief, was *Mark Sank*, for the appellee in Docket No. AC 39693 and cross appellant in Docket No. AC 42730 (plaintiff).

Opinion

ELGO, J. In this landlord-tenant dispute, the defendant, George B. Yankwitt, appeals from the judgment of the trial court, rendered following a trial before an attorney trial referee, in favor of the plaintiff, Charles Carroll. On appeal, the defendant claims that the court improperly concluded that (1) he violated General Statutes (Rev. to 2013) § 47a-21, commonly known as the security deposit statute,[1] (2) he violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and (3) he was not entitled to certain damages under the lease agreements between the parties. The plaintiff cross appeals, claiming that the court abused its discretion by (1) declining to award him the full amount of attorney's fees he requested and (2)

[1] All references to § 47a-21 in this opinion are to the 2013 revision of that statute.

failing to rule on his request for punitive damages pursuant to CUTPA. With respect to the defendant's claims, we affirm in part and reverse in part the judgment of the trial court. With respect to the plaintiff's cross appeal, we vacate the order of the trial court regarding its award of attorney's fees and decline to address the plaintiff's claim regarding punitive damages.

The following relevant facts were found by the attorney trial referee and adopted by the court or otherwise are undisputed. At all relevant times, the defendant owned real property known as 209 Dolphin Cove Quay in Stamford (property) and had no prior experience as a landlord. In early 2011, the plaintiff entered into a written agreement to lease the property from the defendant for a period of approximately twelve months until May 31, 2012 (first lease).[2] The plaintiff commenced occupancy of the property on May 25, 2011. As the attorney trial referee expressly found, the parties subsequently communicated via e-mail correspondence "throughout and after the plaintiff's tenancy."

The parties executed a second lease agreement on March 1, 2012 (second lease). The term of that lease ran from June 1, 2012, to May 31, 2013. In accordance therewith, the plaintiff tendered payment of $8000 to the defendant as a security deposit. With respect to that payment, the second lease provides in relevant part: "[The defendant] will hold the [s]ecurity [d]eposit in accordance with the provisions of § 47a-21 . . . . If [the plaintiff] has carried out [his] promises under this

[2] The first lease specifies the "lease term" as follows: "The term of this [l]ease . . . shall commence on the date that [the plaintiff] commences occupancy of the [d]welling which date shall not be before May 15, 2011, and shall not be after May 31, 2011 . . . . [The lease] shall end May 31, 2012 . . . ." In his report, the attorney trial referee specifically found that the first lease "was for a term of between one year and one year and two weeks, depending upon an open-ended commencement date running from a date between May 15 and May 31, 2011, and May 31, 2012."

[l]ease, [the defendant] shall return the [s]ecurity [d]eposit to [the plaintiff] within thirty (30) days after the termination of [the plaintiff's] tenancy. . . . If [the plaintiff] does not carry out [his] promises under this [l]ease, [the defendant] may use the [s]ecurity [d]eposit to pay the [r]ent or to repay [the defendant] for any damages [the defendant] has [sustained] because of [the plaintiff's] broken promises. . . . If [the defendant] keeps all or any part of [the plaintiff's] [s]ecurity [d]eposit, [the defendant] will, within the time required by law, give [the plaintiff] a list itemizing the nature and amount of the damages [the defendant] has suffered because of [the plaintiff's] broken promises."

The plaintiff's tenancy concluded on May 31, 2013. On that date, the defendant conducted an inspection of the property with the plaintiff's brother-in-law, James Rumberger. Later that afternoon, the defendant sent the plaintiff an e-mail, in which he noted various "damage issues" that he had observed and asked the plaintiff to "[p]lease let me know by tomorrow . . . whether you are going to assume responsibility for repairing these [issues]." Although the plaintiff at trial acknowledged that he received that e-mail, there is no indication in the record that he ever responded to the defendant.[3]

On June 14, 2013, the defendant sent a detailed e-mail to the plaintiff regarding the plaintiff's alleged failure to comply with the terms of the lease agreements. In that correspondence, the defendant set forth seven specific items of damage to the property for which the plaintiff allegedly was responsible. The defendant also alleged that he had incurred $1422.86 in remediation

[3] At trial, the plaintiff admitted that the defendant continued to communicate with him via e-mail after the plaintiff had vacated the property and that he had "received several e-mails [from the defendant] making allegations about the condition of the [property] upon our departure . . . ." In his testimony, the defendant stated that the plaintiff had not responded to his e-mails that were sent following the termination of the plaintiff's tenancy.

expenses for the property and had sustained a loss of $10,000 due to his inability to rent the property for the month of June as a result of the damages caused by the plaintiff. The defendant further alleged that the plaintiff "never paid rent . . . for [his] occupancy of the [property] for the period commencing May 25, 2012, and ending May 31, 2012, or one week," which allegedly resulted in a $2000 loss to the defendant. At trial, the plaintiff acknowledged that he received the defendant's June 14, 2013 e-mail correspondence.

At the direction of his attorney, the plaintiff sent the defendant a letter via certified mail, return receipt requested, the next day, June 15, 2013. In that one sentence letter, the plaintiff provided his forwarding address to the defendant "for return of the $8000 security deposit under the [second] lease . . . ." That letter was addressed to 26 Homeside Lane in White Plains, New York, which was specified in the second lease as the defendant's address.[4] On July 28, 2013, the United States Postal Service returned that certified mailing to the plaintiff with the notation, "Return to Sender Unclaimed Unable to Forward," affixed thereon.

The plaintiff commenced this civil action four days later. His complaint contained three counts, all of which concerned the defendant's alleged failure to return his security deposit. In the first count, the plaintiff sought to recover his $8000 security deposit, along with interest and double damages pursuant to § 47a-21 (d) (2). In the second and third counts, the plaintiff alleged unjust enrichment and a CUTPA violation, respectively, stemming from the defendant's retention of the security deposit.[5]

[4] At trial, the defendant testified that 26 Homeside Lane in White Plains was his current address and that it was his address in June, 2013.

[5] After incorporating by reference the allegations of the first count, count three of the complaint states in full: "The action of the [d]efendant constitutes violations of [CUTPA], in that said action was immoral, oppressive and unscrupulous and caused substantial injury to the plaintiff."

In answering that complaint, the defendant admitted that the parties had entered into the second lease and that the plaintiff had provided the $8000 security deposit. The defendant nevertheless denied the substance of all three counts of the plaintiff's complaint, stating: "[The defendant] denies the allegations . . . and further responds by stating that: (a) [the defendant] did not neglect to return the security deposit; (b) prior to the expiration of the term of the [second] lease, [the defendant] gave [the plaintiff] written notice of [the plaintiff's] failure and refusal to abide by the [l]ease; (c) within thirty (30) days of the end of the term of the [l]ease and [the plaintiff] vacating the premises, [the defendant] gave written notice of [the plaintiff's] failure and refusal to abide by the provisions of the [l]ease and the damages sustained by [the defendant] as a result thereof; (d) [the plaintiff] has not responded to various writings sent by [the defendant] itemizing damages sustained by [the defendant] as a result of [the plaintiff's] failure and refusal to abide by the provisions of the [l]ease; and (e) the damages sustained by [the defendant] as a result of [the plaintiff's] failure and refusal to abide by the provisions of the [l]ease are greater than the amount of the security deposit." The defendant further alleged that the plaintiff "has not complied with . . . statutes relating to security deposits . . . ."

In addition, the defendant raised three special defenses, alleging that (1) the court lacked personal jurisdiction over him, (2) the plaintiff had failed to provide "notice of an address to which the security deposit purportedly ought to be sent," and (3) the defendant provided the plaintiff "notice of the damages sustained by [the defendant] as a result of [the plaintiff's] failure and refusal to abide by the terms of the [second lease]" within thirty days of the expiration of that lease. The defendant also asserted a six count counterclaim against

the plaintiff related to his alleged failure to abide by the terms of the second lease.[6]

A three day trial was held before the attorney trial referee in 2015, at which both parties testified.[7] The plaintiff presented documentary and testimonial evidence that he sent notice of his forwarding address to the defendant via certified mail. On that issue, the defendant testified that he "never received that letter, or any notice of a certified letter being sent to [him] by anyone" and that he never received notice that a certified letter "needed to be picked up."

The parties offered conflicting testimony on various damage to the property allegedly sustained during the plaintiff's tenancy. The defendant offered the testimony of Michael Curley, a licensed home improvement contractor, regarding repairs that he performed at the property in 2013. The plaintiff called Rumberger as a rebuttal witness, who had attended the inspection of the property with the defendant on May 31, 2013, and testified as to the alleged damage to the property. Rumberger also offered testimony regarding a video of the property that he filmed on that date, which was played at trial and admitted into evidence as an exhibit.

[6] In those counts, the defendant alleged that, pursuant to the terms of the second lease, he was entitled to retain the security deposit due to (1) "physical damage" to the property for which the plaintiff was responsible, (2) the plaintiff's failure to "pay charges of the [Stamford] Water Pollution Control Authority," (3) the plaintiff's allowance of water and mud in the crawl space of the property and his failure to repair or notify the defendant of that condition, (4) the plaintiff's refusal to allow the defendant to make necessary repairs to the property during the lease term, (5) the plaintiff's failure to "pay for the use and occupancy of the [property] for the period [commencing on] May 25, 2012 [and ending on] May 31, 2012," and (6) additional damages to the property caused by the plaintiff.

[7] In his report, the attorney trial referee found the testimony of both parties to be generally credible, stating: "On balance, while [the attorney trial referee] did not necessarily believe every utterance or agree with every conclusion asserted by any witness, each witness was found to be generally credible and appeared to be testifying to the best of their recollection and with the intent to testify honestly."

In his subsequent report, the attorney trial referee found that the plaintiff had proven that he sent notice of his forwarding address to the defendant and that the defendant "presented no evidence or reason excusing his failure to collect the [c]ertified [m]ail sent to him by the plaintiff." The attorney trial referee further found that, in light of the mailbox rule,[8] "it must be concluded that the properly addressed and mailed letter was received, and . . . the defendant's lack of collection was intentional."

The attorney trial referee also found that the defendant's June 14, 2013 e-mail to the plaintiff "did not constitute an accounting of [the] plaintiff's security deposit, as it failed to indicate the amount of the plaintiff's security deposit, failed to note the amount of the interest accrued thereon, failed to list all damages and failed to list the amount of security being withheld for each alleged item of damage or even for all damages in the aggregate." Accordingly, the attorney trial referee found that the plaintiff "proved that he did not receive the return of any [of] his security deposit, nor did he receive an accounting detailing the amounts retained or the itemizing of the damages for which the security was being retained." The attorney trial referee found that the interest due on the security deposit was $46.62, and therefore recommended that judgment should enter in favor of the plaintiff on the first count of his complaint and that double damages totaling $16,093.24 should be awarded pursuant to § 47a-21 (d) (2).[9]

[8] "The mailbox rule, a general principle of contract law, provides that a properly stamped and addressed letter that is placed into a mailbox or handed over to the United States Postal Service raises a rebuttable presumption that it will be received." (Internal quotation marks omitted.) *Butts* v. *Bysiewicz*, 298 Conn. 665, 677 n.8, 5 A.3d 932 (2010). For a thorough discussion of the mailbox rule in the context of certified mail, see *Aurora Loan Services, LLC* v. *Condron*, 181 Conn. App. 248, 262–73, 186 A.3d 708 (2018).

[9] In light of that conclusion, the attorney trial referee concluded that the plaintiff could not prevail on his unjust enrichment count. The trial court agreed and rendered judgment in favor of the defendant on that count. The plaintiff does not challenge the propriety of that determination in this appeal.

The attorney trial referee also concluded that the defendant had violated CUTPA, stating in relevant part: "Despite having such means available to account for the plaintiff's security deposit, the defendant failed to do so. . . . [B]y failing to recite the amount of [the] plaintiff's security or the interest accrued thereon, by failing to itemize the damages and their costs or even to include a total amount of purported damages, [the] defendant's [e-mail] to the plaintiff on June 14, 2013 . . . falls short of meeting [the] defendant's statutory obligations. Based upon the totality of the facts, it is found that the defendant was recklessly indifferent to the plaintiff's right to an accounting and engaged in wrongful conduct that offended public policy in violation of CUTPA." (Citation omitted.) The attorney trial referee thus recommended that judgment should enter in favor of the plaintiff on the third count of his complaint; he left to the court's discretion the question of whether to award attorney's fees or punitive damages on that count.

With respect to the defendant's counterclaim, the attorney trial referee found that the defendant had proven a total of $1506.45 in damages for which the plaintiff was responsible. The attorney trial referee expressly rejected the defendant's other property damage claims and further found that the defendant "did not prove that the plaintiff failed to pay for a week of occupancy" or that "the damages caused by the plaintiff [were] even a cause, much less the . . . proximate cause of his inability to rent the property immediately." The attorney trial referee therefore recommended that judgment should enter in favor of the defendant on his counterclaim in the amount of $1506.45.

The defendant subsequently filed an objection to the attorney trial referee's report with the trial court. In that objection, the defendant argued that the attorney trial referee improperly (1) concluded that the plaintiff

had provided proper notice of his forwarding address to the defendant, (2) concluded that the defendant had failed to provide an accounting of the alleged damage to the property, as required by § 47a-21 (d) (2), (3) concluded that he had violated CUTPA, (4) exceeded his proper role as fact finder by making legal conclusions that properly are the province of the trial court, and (5) rejected certain property damage claims alleged by the defendant. The court summarily overruled that objection by order dated September 22, 2016.

On that same date, the court issued notice of its judgment in favor of the plaintiff in the amount of $14,957.12. In so doing, the court failed to file a memorandum of decision, as required by Practice Book § 64-1. From that judgment, the defendant timely appealed to this court.

The plaintiff thereafter filed a motion for an award of attorney's fees with the trial court, to which the defendant objected. The plaintiff then filed a supplemental motion with the trial court, in which he requested an award of punitive damages pursuant to CUTPA.

On May 23, 2017, the defendant filed a motion with this court to secure a memorandum of decision from the trial court. This court granted that motion and ordered the trial court to file a memorandum of decision setting forth the factual and legal basis for its judgment in favor of the plaintiff. In response, the trial court issued an articulation on August 24, 2017, stating in relevant part: "The court finds that the attorney trial referee's report was . . . sufficiently detailed and [that he] clearly evaluated . . . all evidence presented at trial. The facts found by the attorney trial referee were based on the evidence presented and the reasonable inferences drawn therefrom. The court adopts all of the findings and recommendations contained in the

attorney trial referee's report." The court thus awarded the plaintiff "$14,586.79 plus cost[s]." In light of the defendant's pending appeal, the court indicated that it had taken no action on the plaintiff's request for attorney's fees and punitive damages pursuant to CUTPA.

Due to the pendency of his claims for attorney's fees and punitive damages, the plaintiff filed a motion to dismiss the defendant's appeal for lack of a final judgment. This court granted that motion and dismissed the defendant's appeal in part. Weeks later, the parties filed a joint motion to stay the appeal "to permit the [trial court] to rule on all issues relating to [the] plaintiff's claims and to permit the parties to join all issues in one appeal," which this court granted.

The trial court then held a hearing on the plaintiff's motions for attorney's fees and punitive damages on May 18, 2018. At that hearing, the plaintiff's counsel reiterated that his affidavit of attorney's fees sought a total of $26,862.50 plus $549.33 in costs. In response, the defendant renewed his argument that there was no basis or evidence to support a finding of a CUTPA violation. For that reason, the defendant argued, an award of attorney's fees or punitive damages was unwarranted.

On June 25, 2018, the court issued an order on the plaintiff's motions, stating in full: "The court finds that an hourly rate of $175 [for] an action that is not overly complicated to be reasonable. Therefore, after a hearing on this matter and based on the attorney fee affidavit file in the case, the court awards attorney fees in the amount of $13,434.25."[10] From that ruling, the defendant appealed.[11]

[10] In his affidavit of attorney's fees, the plaintiff's counsel had specified an hourly rate of $350.

[11] By order dated October 31, 2018, this court ordered that appeal to "be treated as an amended appeal . . . ."

On September 10, 2018, the defendant filed a motion for an articulation of the court's ruling on the plaintiff's request for attorney's fees, claiming that the court "did not address the issues raised by the [defendant] or explain the legal basis and grounds for an award of attorney's fees . . . ." On October 24, 2018, the plaintiff likewise requested an articulation of the court's decision "to include a ruling on the claim for CUTPA punitive damages." In response, the court issued an articulation on November 15, 2018, stating in relevant part: "The [attorney trial referee] found that the damages claimed by the [defendant] were either not suffered by the [defendant] or proven at trial as obligations of the [plaintiff] and, therefore, were not properly withheld by the [defendant] under § 47a-21 (d) (2). The language of the statute allows for landlords to deduct from a tenant's security deposit actual damages, not pretextual damages. . . . Based on the violations of [CUTPA] and the finding that the defendant's actions are a violation of CUTPA, and [§] 47a-21 (d) (2), the court finds an attorney fee's award in the amount of $13,434.28 to be appropriate in this matter under [General Statutes §] 42-110g."

Because that articulation was silent as to the plaintiff's motion for punitive damages, the plaintiff filed a motion for review with this court seeking an articulation on that issue. This court granted that motion and ordered the trial court to articulate "whether it has ruled on the CUTPA punitive damages claim, and, if so, to state the order and provide the factual and legal basis for its ruling." On February 26, 2019, the trial court issued an articulation, in which it reiterated that it had found the attorney trial referee's findings to be "legally and logically consistent with the evidence and the law. There is sufficient evidence to support a CUTPA claim in this case." The court further stated that it had found "an attorney's fee award . . . to be appropriate in this

matter'' under CUTPA. The court did not address in any manner the plaintiff's request for punitive damages.[12] In response, the plaintiff filed a cross appeal to challenge both the amount of attorney's fees awarded by the court and the court's "failure to address" his claim for punitive damages. This court thereafter granted the defendant's motion to consolidate the plaintiff's cross appeal with the defendant's pending appeal.

Before considering the specific claims advanced by the parties, we note what is not in dispute. Pursuant to § 47a-21 (g), the plaintiff was entitled to bring an action for money damages "to reclaim any part of his security deposit which may be due." See also General Statutes § 47a-21 (*l*) ("[n]othing in this section shall be construed as a limitation upon . . . the right of any tenant to bring a civil action permitted by the general statutes or at common law"). On appeal, the defendant concedes that the plaintiff was entitled to bring an action to recover that portion of the security deposit not offset by damages sustained by the defendant as a result of the plaintiff's noncompliance with his obligations as a tenant. Because the defendant allegedly sustained damages that exceeded the amount of the security deposit and related interest, he nonetheless maintains that he did not violate the security deposit statute in the present case.

We also note the standard that governs our review of decisions in which the trial court has adopted the report of an attorney trial referee. As our Supreme Court has explained, "[w]hile the reports of [attorney trial referees] . . . are essentially of an advisory nature, it

[12] The plaintiff filed an additional motion for review with this court, claiming that the trial court had provided "no further explanation either granting or denying punitive damages, let alone explaining why." For that reason, the plaintiff argued, further articulation of the court's decision was necessary. By order dated May 7, 2019, this court granted review but denied the relief requested.

has not been the practice to disturb their findings when they are properly based upon evidence, in the absence of errors of law, and the parties have no right to demand that the court shall determine the fact[s] thus found. . . . A reviewing authority may not substitute its findings for those of the trier of the facts. This principle applies no matter whether the reviewing authority is the Supreme Court . . . the Appellate Court . . . or the Superior Court reviewing the findings of . . . attorney trial referees. . . . This court has articulated that attorney trial referees and [fact finders] share the same function . . . whose determination of the facts is reviewable in accordance with well established procedures prior to the rendition of judgment by the court. . . .

"Although it is true that when the trial court reviews the attorney trial referee's report the trial court may not retry the case and pass on the credibility of the witnesses, the trial court must review the referee's entire report to determine whether the recommendations contained in it are supported by findings of fact in the report. . . .

"Finally, we note that, because the attorney trial referee does not have the powers of a court and is simply a fact finder, [a]ny legal conclusions reached by an attorney trial referee have no conclusive effect. . . . The reviewing court is the effective arbiter of the law and the legal opinions of [an attorney trial referee], like those of the parties, though they may be helpful, carry no weight not justified by their soundness as viewed by the court that renders judgment. . . . Where legal conclusions are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts found by the . . . referee." (Internal quotation marks omitted.) *Hees* v. *Burke Construction, Inc.*, 290 Conn. 1, 6–7, 961 A.2d 373 (2009).

I

THE DEFENDANT'S APPEAL

A

The defendant first claims that the court improperly concluded that he violated the security deposit statute and awarded the plaintiff double damages. He contends that both the attorney trial referee and the trial court construed the relevant provisions of § 47a-21 (d) (2) in an overly restrictive fashion, and submits that the written statement that he furnished to the plaintiff within thirty days of the termination of the plaintiff's tenancy satisfied those statutory requirements.[13] We agree.

At the outset, we note that our appellate courts "accord plenary review to the court's legal basis for its damages award. . . . The court's calculation under that legal basis is a question of fact, which we review under the clearly erroneous standard." (Citation omitted; internal quotation marks omitted.) *Carrillo* v. *Goldberg*, 141 Conn. App. 299, 307, 61 A.3d 1164 (2013). Moreover, to the extent that we must construe the salient provisions of the security deposit statute, our review is plenary. See *Scholastic Book Clubs, Inc.* v. *Commissioner of Revenue Services*, 304 Conn. 204, 213, 38 A.3d

[13] The defendant also claims that the court improperly concluded that he violated the security deposit statute because the plaintiff failed to establish that the defendant had received written notice of his forwarding address, which the defendant argues is a prerequisite to recovery under § 47a-21 (d) (2). See *Johnson* v. *Mazza*, 80 Conn. App. 155, 160, 834 A.2d 725 (2003) ("a tenant is first required to provide a forwarding address to a landlord to be afforded the opportunity to receive the double damages remedy under § 47a-21 (d) (2)"). The defendant maintains that, read together, subdivisions (2) and (4) of § 47a-21 (d) require actual receipt by the landlord of the tenant's forwarding address to trigger the time limitations contained therein. See footnote 15 of this opinion. In light of our conclusion that the defendant properly provided a written statement itemizing the nature and amount of the damages allegedly suffered as a result of the plaintiff's noncompliance with his obligations as a tenant, we do not consider that alternative contention.

1183 (statutory interpretation presents question of law subject to plenary review), cert. denied, 568 U.S. 940, 133 S. Ct. 425, 184 L. Ed. 2d 255 (2012).

At the time that the plaintiff commenced this action,[14] the double damages subdivision of the security deposit statute provided in relevant part: "Upon termination of a tenancy, any tenant may notify his landlord in writing of such tenant's forwarding address. Within thirty days after termination of a tenancy, each landlord other than a rent receiver shall deliver to the tenant or former tenant at such forwarding address either (A) the full amount of the security deposit paid by such tenant plus accrued interest as provided in subsection (i) of this section, or (B) the balance of the security deposit paid by such tenant plus accrued interest as provided in subsection (i) of this section *after deduction for any damages suffered by such landlord by reason of such tenant's failure to comply with such tenant's obligations, together with a written statement itemizing the nature and amount of such damages.* Any such landlord who violates any provision of this subsection shall be liable for twice the amount or value of any security deposit paid by such tenant . . . ." (Emphasis added.) General Statutes (Rev. to 2013) § 47a-21 (d) (2).

As this court has observed, § 47a-21 (d) (2) "imposes liability for twice the value of any security deposit on a landlord who violates the provisions of that subsection." *Kufferman* v. *Fairfield University*, 5 Conn. App. 118, 121–22, 497 A.2d 77 (1985). It is the "punitive damages" portion of the security deposit statute. See *Yorgensen* v. *Brophy Ahern Development Co.*, 66 Conn. App. 833, 834, 787 A.2d 1 (2001), cert. denied, 259 Conn. 930, 793 A.2d 1087 (2002); *Reich* v. *Langhorst*, 44 Conn. App. 381, 382, 689 A.2d 1134 (1997).

[14] Section 47a-21 (d) (2) subsequently was amended by Public Acts 2016, No. 16-65, § 37, in ways immaterial to the present appeal.

By its plain language, § 47a-21 (d) (2) obligates a landlord, within thirty days of the termination of the tenancy,[15] to deliver to the tenant either (a) the full amount of the security deposit or (b) any remaining balance on that security deposit "after deduction for any damages suffered by [the] landlord by reason of [the] tenant's failure to comply with [the] tenant's obligations . . . ." When the latter scenario is implicated, § 47a-21 (d) (2) requires the landlord to provide the tenant "with a written statement itemizing the nature and amount of such damages." It is undisputed that, in the present case, the defendant provided a written statement to the plaintiff within thirty days of the termination of the tenancy.[16] The question, then, is whether that written statement comports with the statutory requirements.

In his June 14, 2013 written statement, the defendant first noted that, under the terms of the 2012 lease, he was entitled to use the security deposit in question " 'to repay the [defendant] for any damages' " sustained as a result of the plaintiff's failure to comply with his obligations as a tenant. The defendant then noted that he had

[15] We recognize that the security deposit statute, as it existed at the time that the plaintiff commenced this action, contained an additional subdivision that concerned a landlord's receipt of written notice of the tenant's forwarding address. General Statutes (Rev. to 2013) § 47a-21 (d) (4) provides: "Any landlord who does not have written notice of his tenant's or former tenant's forwarding address shall deliver any written statement and security deposit due to the tenant, as required by subdivision (2) of this subsection, within the time required by subdivision (2) of this subsection or within fifteen days *after receiving written notice* of such tenant's forwarding address, whichever is later." (Emphasis added.) For purposes of the present analysis, which is focused on the propriety of the defendant's written statement of damages to the plaintiff, we assume, arguendo, that the court correctly determined that the plaintiff provided proper notice of his forwarding address in accordance with § 47a-21 (d) (2).

[16] The defendant's written statement came in the form of an e-mail sent to the plaintiff on June 14, 2013. At trial, the plaintiff acknowledged that he received the defendant's June 14, 2013 e-mail correspondence. Moreover, the plaintiff on appeal raises no claim regarding the manner in which the defendant furnished his written statement of damages.

sent the plaintiff an e-mail on the day that his tenancy terminated, in which he "gave [the plaintiff] notice of a variety of [items] that were damaged and for which [the plaintiff] was responsible," and reiterated that, "[w]ith respect to some of these items [he] was and continues to be prepared to allow [the plaintiff] to repair same . . . ."[17] The defendant then enumerated seven specific "items" of damage to the property for which the plaintiff allegedly was responsible, some of which the defendant offered the plaintiff an opportunity to repair.[18] The

[17] In his May 31, 2013 e-mail to the plaintiff, which was admitted into evidence at trial, the defendant stated in relevant part: "After [Rumberger] left [the property] this morning, I noticed three additional damage issues (i) that [I] did not observe before he left, (ii) which were not in the damaged condition when you moved in, and (iii) which are theoretically, at least, capable of being repaired:

"[1] The front storm door . . . was in an open position when . . . I arrived. As I suspect you are aware, the mechanism to open and close the door is broken.

"[2] There are two small chunks of the deck behind the family room which have been removed; they look like they were cut out.

"[3] There is water damage in the wall to the side of the shower in the third hall bathroom on the second level. . . .

"Please let me know . . . whether you are going to assume responsibility for repairing these additional items. . . . These items are in addition to the other items that we talked about this morning that are capable of being repaired such as the blinds in the family room . . . missing shelf in middle hall bathroom, screen door in master bedroom and shower door in the middle hall bathroom . . . . The subject matter of this [e-mail] is confined to the issues identified above—all of which you are capable of repairing if you elect to do so. This [e-mail] is not intended to deal with a variety of other matters which we will address within the next thirty days. Thank you."

[18] The defendant stated in relevant part: "These items, including the items which I am allowing you to repair, include the following:

"[1] The front storm door which I am allowing you to repair within one week of today;

"[2] Two small chunks of the deck behind the family room sliding glass doors which I have arranged to have repaired;

"[3] Water damage to the wall to the side of the shower in the third hall bedroom on the second level of the house which I have arranged to have repaired;

"[4] In the third hall bedroom on the second level of the house, the shower door was completely off the track and I will need to confirm whether or not it was satisfactorily repaired;

defendant also recited various obligations on the part of the tenant contained in the lease agreements between the parties,[19] and claimed that the plaintiff's "failure as the [t]enant to abide by the foregoing obligations" and his unreasonable withholding of consent for the defendant to make necessary repairs[20] resulted in a loss of "not less than $10,000" to the defendant. More specifically, the defendant alleged that he had incurred $1422.86 in remediation expenses "because [the plaintiff] allowed water and mud to accumulate in the crawl space of the [property] and did not advise [him] of that condition," and that "an individual who was prepared to lease the [property] commencing [in] June, 2013 refused to do so" due to that condition, which caused a loss of "not less than one month's rent, or $10,000." Last, the defendant alleged that the plaintiff had "never paid rent or compensated [the defendant] for [his] occupancy of the [property] for the period commencing May 25, 2012 and ending May 31, 2012, or one week. The rea-

"[5] Blinds in the family room (which your brother-in-law took with him to have repaired) and which I am allowing you to repair within one week of today;

"[6] Missing shelf in middle hall bathroom which I have replaced; and

"[7] Screen door in master bedroom which I will have replaced."

[19] The defendant stated: "Pursuant to Paragraph 4 of the Leases, [the plaintiff] was obligated:

"(a) to use the [property] in compliance with all building, housing and fire codes affecting health and safety . . . .

"(b) to keep the [property] clean, neat and safe,

"(c) to remove from the [property] all garbage, trash and other waste in a clean and safe manner. . . .

"(f) to not willfully or negligently destroy, deface, damage, impair or remove any part of the [property] or permit anyone else to do so. . . .

"(i) to keep the [property] in good condition, normal wear and tear excepted, and to pay the first $100 of any cost for each repair. . . . Tenant will pay the cost of any repair required because of Tenant's misuse or neglect."

[20] Paragraph 15 of the second lease provides in relevant part: "[The plaintiff] shall not unreasonably withhold consent to [the defendant] entering [the property]. . . . [The defendant or its] agents may, with [the plaintiff's consent, enter [the property] to . . . make necessary or agreed repairs and alterations . . . ."

sonable value of such occupancy, based on the rents . . . paid [by the plaintiff] pursuant to the [lease agreements] is $2000."

The total amount of the damages alleged in the defendant's written statement far exceeds the $8000 security deposit and $46.62 accrued interest.[21] It, therefore, is not surprising that the defendant did not identify any remaining balance of the security deposit in that written statement to the plaintiff.

As this court has explained, "[f]or purposes of determining whether to award double damages under [§ 47a-21 (d) (2)] a court need only determine whether a landlord complied with the statutory requirements, and need not determine whether the landlord's reason for withholding the security deposit was justified." *Pedrini* v. *Kiltonic*, 170 Conn. App. 343, 350–51, 154 A.3d 1037, cert. denied, 325 Conn. 903, 155 A.3d 1270 (2017). Because he was alleging damages caused by the plaintiff that exceeded the amount of the security deposit, § 47a-21 (d) (2) required the defendant to furnish the plaintiff with "a written statement itemizing the nature and amount" of those damages. We agree with the defendant that his June 14, 2013 written statement complied with that statutory imperative. That written statement was provided to the plaintiff within thirty days of the termination of his tenancy and detailed numerous "items" of damage allegedly caused by the plaintiff that, in total, exceeded the $8000 security deposit by thousands of dollars.

In concluding that the defendant violated § 47a-21 (d) (2), the attorney trial referee found that the defendant's June 14, 2013 written statement to the plaintiff "did not constitute an accounting of [the] plaintiff's security

[21] At trial, the parties stipulated that the interest on the $8000 security deposit was $46.62, and the attorney trial referee so found in his report.

deposit, as it failed to indicate the amount of the plaintiff's security deposit, failed to note the amount of the interest accrued thereon, failed to list all damages and failed to list the amount of security being withheld for each alleged item of damage or even for all damages in the aggregate." The attorney trial referee provided no legal authority for the imposition of those requirements, which are not set forth in § 47a-21 (d) (2). We reiterate that the plain language of that statute merely requires a landlord asserting damages stemming from noncompliance with the tenant's obligations to provide the tenant with "a written statement itemizing the nature and amount of such damages." General Statutes (Rev. to 2013) § 47a-21 (d) (2). When the amount of the alleged damages far exceeds the security deposit and interest, as is the case here, nothing more is statutorily required.

Although it may be preferable for a landlord in such instances to include an explicit statement indicating that no balance remains because the amount of the alleged damages exceeds the amount of the security deposit and interest, we decline to construe the written statement requirement of § 47a-21 (d) (2) in such a hypertechnical manner. Moreover, to the extent that there is any ambiguity in the written statement requirement, we are mindful that § 47a-21 (d) (2) is the punitive damages subdivision of the security deposit statute and therefore eschew a rigid construction against the party who would be subject to its punitive consequences.[22] See *Branford* v. *Santa Barbara*, 294 Conn. 803, 814–15, 988 A.2d 221 (2010). We therefore conclude that the written statement the defendant provided to the plaintiff complied with the requirements of § 47a-21 (d) (2), as it sufficiently apprised the plaintiff that the defendant was alleging damages caused by the plaintiff's failure

[22] Neither party to this appeal has argued that the statutory language in question is ambiguous.

to comply with his obligations as a tenant that exceeded the amount of his security deposit. For that reason, the attorney trial referee improperly recommended, and the court wrongly awarded, double damages pursuant to § 47a-21 (d) (2). See *Pedrini* v. *Kiltonic*, supra, 170 Conn. App. 352 (plaintiff tenant not entitled to double damages because defendant landlord "sent a written notification of damages to the plaintiff within the thirty day time limitation" and "the amount of claimed damages exceeded the amount of the security deposit, and, therefore, there was no balance to return to the plaintiff").

B

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

On appeal, the defendant contends that the attorney trial referee improperly predicated his CUTPA finding

on a basis that was not advanced by the plaintiff in this action—namely, the defendant's purported failure to provide a written statement of damages pursuant to § 47a-21 (d) (2). The defendant also claims that the trial court improperly concluded that CUTPA damages were warranted because the defendant's written statement was pretextual in nature, despite the fact that no such finding was made by the attorney trial referee. We address each claim in turn.

1

The defendant first argues that the attorney trial referee improperly predicated his CUTPA finding on a basis that was not asserted by the plaintiff. The following additional facts are relevant to that claim.

In count one of his complaint, the plaintiff alleged in relevant part that the defendant had violated the security deposit statute because he had "refused and neglected to return the security deposit." For that reason, the plaintiff alleged that he was entitled to interest and double damages pursuant to § 47a-21 (d) (2). In count three of his complaint, the plaintiff set forth a two paragraph CUTPA claim. After incorporating by reference the allegations of the first count, the plaintiff alleged: "The action of the defendant constitutes violations of [CUTPA], in that said action was immoral, oppressive and unscrupulous, and caused substantial injury to the plaintiff." No further factual allegations are contained in count three of the plaintiff's complaint.

After the plaintiff rested his case at trial, the defendant offered the testimony of Elaine Betzios, a real estate agent, regarding "the damages suffered by" the defendant and his inability to rent the property following the termination of the plaintiff's tenancy in particular. Early in her testimony, Betzios testified that she showed the property to a prospective tenant who was interested in renting the property in 2013. When she

then was asked why the tenant had not rented the property, the plaintiff objected on, inter alia, hearsay grounds. In response, the defendant's counsel reminded the attorney trial referee that the plaintiff had alleged a CUTPA violation and argued that Betzios' testimony "certainly goes to the mental state of the defendant as to whether or not he committed a CUTPA violation, what's going on in his mind, was he performing some kind of unscrupulous, immoral type of act under CUTPA." When the attorney trial referee inquired how a third-party statement of a prospective tenant affected the defendant's mental state, the defendant's counsel replied: "Because [the defendant] believes that he has a damage claim for failing to be able to relet the property and, therefore, he has a good faith legitimate basis to withhold the security deposit for those damages."

Soon thereafter, the following colloquy ensued:

"[The Attorney Trial Referee]: It's [an] out-of-court statement. How is [Betzios'] out-of-court statement not hearsay here?

"[The Defendant's Counsel]: Because it doesn't go to the truth of the matter asserted. It goes to the [defendant's] mental state, which, with CUTPA violations, we're going to get into what someone's mental state is. So, [the] out-of-court statement is not for the truth of the matter asserted. It is to show what [the defendant] was thinking and [what] information he had in his possession to justify keeping the security deposit.

"[The Attorney Trial Referee]: Okay. Hang on one second. I have a question. Is the genesis of the CUTPA violation *solely* the failure to return the security deposit under the statute so that the mens rea necessary for the CUTPA violation is a finding on the security deposit statute?

"[The Plaintiff's Counsel]: Exactly.

"[The Attorney Trial Referee]: Okay. So—

"[The Plaintiff's Counsel]: *It's a per se violation of CUTPA*.

"[The Attorney Trial Referee]: Okay. . . .

* * *

"[The Attorney Trial Referee]: . . . I don't think you need to go into the issues . . . of an independent CUTPA analysis in dealing with that evidence and trying to disprove it because if it's not a per se violation to violate the security deposit statute, if that's not a per se violation of CUTPA, the plaintiff is going to lose their CUTPA claim.

"[The Defendant's Counsel]: I understand.

"[The Attorney Trial Referee]: Because they haven't alleged or pleaded anything else—

"[The Defendant's Counsel]: Right.

"[The Plaintiff's Counsel]: Mm hmm.

"[The Attorney Trial Referee]: —other than that to show a CUTPA violation.

"[The Defendant's Counsel]: Right, right. So, the—

"[The Attorney Trial Referee]: So, it's either per se or it's not.

"[The Defendant's Counsel]: Right.

"[The Attorney Trial Referee]: Or it's [not] per se or they can't prevail.

"[The Plaintiff's Counsel]: *That's correct*." (Emphasis added.)

As the colloquy over Betzios' testimony wound down, the attorney trial referee further stated: "[I]t seems to me that . . . if a violation of . . . the security deposit statute does not create in and of itself the CUTPA viola-

tion, then the plaintiff can't prevail on the CUTPA violation because the plaintiff has elicited no other evidence of CUTPA. They have not elicited anything about unscrupulous, immoral, unethical conduct separate and apart from violating the security deposit statute if that is [in] and of itself sufficient to create a CUTPA violation, similar to violating the [Home Improvement Act, General Statutes § 20-418 et seq.]. If you don't comply with the Home Improvement Act, it's a per se violation of CUTPA. . . . I'm hearing the same argument being made [regarding the security deposit statute]. . . . If that's the case, then maybe it is [a violation of CUTPA]. If it's not the case, then the plaintiff [is] sunk on that count." At that time, the defendant's counsel stated that he had no further questions for Betzios "in light of the discussion and the objection," and Betzios' testimony concluded.

Although the attorney trial referee at trial explicitly stated, and the plaintiff's counsel confirmed, that the plaintiff's sole claim was that the failure to comply with § 47a-21 constituted a per se violation of CUTPA, the CUTPA finding in his report was predicated on an altogether different basis. In that report, the attorney trial referee stated in relevant part: "Even if one were to ignore the fact that [the] defendant must be considered to have 'received' the plaintiff's forwarding address, the defendant had the means, namely, a working [e-mail] address, to contact the plaintiff for purposes of accounting for his security deposit. . . . Despite having such means available to account for the plaintiff's security deposit, the defendant failed to do so. . . . [B]y failing to recite the amount of [the] plaintiff's security or the interest accrued thereon, by failing to itemize the damages and their costs or even to include a total amount of purported damages, the defendant's [e-mail] to the plaintiff on June 14, 2013 . . . falls short of meeting [his] statutory obligations. Based upon the totality of

the facts, it is found that the defendant was recklessly indifferent to the plaintiff's right to an accounting and engaged in wrongful conduct that offended public policy in violation of CUTPA." (Citations omitted.)

We conclude that the attorney trial referee's conclusion is flawed in two respects. First, it is predicated on a basis that was not raised by the plaintiff in his complaint. As our Supreme Court has explained, "[t]he principle that a plaintiff may rely only upon what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint." (Citations omitted; internal quotation marks omitted.) *Matthews* v. *F.M.C. Corp.*, 190 Conn. 700, 705, 462 A.2d 376 (1983). "More than one century ago, our Supreme Court held that [w]hen the facts upon which the court in any case founds its judgment are not averred in the pleadings, they cannot be made the basis for a recovery. . . . The vitality of that bedrock principle of Connecticut practice is unquestionable." (Citation omitted; internal quotation marks omitted.) *Michalski* v. *Hinz*, 100 Conn. App. 389, 393, 918 A.2d 964 (2007). Accordingly, "a plaintiff's theories of liability, and the issues to be tried, are limited to the allegations [in the] complaint." (Internal quotation marks omitted.) *Williams* v. *Housing Authority*, 327 Conn. 338, 397, 174 A.3d 137 (2017). Nowhere in his complaint or answer to the defendant's special defenses did the plaintiff challenge the adequacy of the written statement of damages provided by the defendant. Moreover, both the attorney trial referee and the plaintiff's counsel acknowledged at trial that the sole theory of recovery under CUTPA presented by the plaintiff was the per se violation theory. For that reason, the attorney trial referee improperly went beyond that theory in finding a CUTPA violation in the present case.

Second, on its merits, the conclusion reached by the attorney trial referee is untenable. Whether under a

per se violation theory or one predicated on the inadequacy of the written statement provided by the defendant, the plaintiff cannot prevail. This court previously has rejected a claim that a landlord's "failure to comply with § 42a-21 (d) (2) is a per se CUTPA violation"; *Pedrini* v. *Kiltonic*, supra, 170 Conn. App. 353; when the landlord had "complied with the statutory requirements" by sending "a written notification of damages to the plaintiff within the thirty day time limitation" and "the amount of claimed damages exceeded the amount of the security deposit [leaving] no balance to return to the plaintiff . . . ." Id., 352. That precedent compels a similar result here. Because we have concluded that the June 14, 2013 written statement of damages provided by the defendant to the plaintiff satisfied the statutory requirements of § 47a-21 (d) (2); see part I A of this opinion; the attorney trial referee improperly found a CUTPA violation on the basis of the inadequacy of that written statement.

2

The defendant also claims that the trial court improperly concluded that CUTPA damages were warranted because the defendant's written statement of damages was pretextual in nature, despite the fact that no such finding was made by the attorney trial referee. We agree.

As we have noted, the plaintiff's CUTPA pleadings are sparse, alleging merely that the defendant's neglect and refusal to return his security deposit constituted a CUTPA violation "in that said action was immoral, oppressive and unscrupulous, and caused substantial injury to the plaintiff." The plaintiff did not allege in his complaint that the damages claimed by the defendant in his written statement were pretextual.[23] More import-

[23] Despite his failure to raise a claim of pretext in his complaint, the plaintiff argues that he advanced such a claim in his February 1, 2016 posttrial brief and February 19, 2016 posttrial reply memorandum of law. In those filings, the plaintiff did not separately brief that claim. Rather, he merely asserted that the defendant's claim of damages was " 'fabricated' " and

antly, the attorney trial referee never made such a factual finding in his report. To be sure, the attorney trial referee found that several of the items of damage claimed by the defendant were not proven at trial.[24] At the same time, the attorney trial referee also found that

discussed *Carrillo* v. *Goldberg*, supra, 141 Conn. App. 299, stating: "The facts in *Carrillo* are eerily similar to those of the present case in that the landlord was found to have 'fabricated an accounting of damages in order to avoid the sanctions of § 47a-21 (d) (2)' . . . and that [the] 'defendants' claimed damages were pretextual.' "

As this court has observed, "[i]t is well settled that [o]ur case law and rules of practice generally limit this court's review to issues that are distinctly raised at trial. . . . [T]he reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court *or the opposing party* to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party. . . . After the close of evidence, the defendant raised its [claim] for the first time in a posttrial brief, effectively ambushing the plaintiff. . . . The defendant has provided no authority, nor are we aware of any, indicating that such strategy satisfies the preservation requirement . . . . [T]o permit the appellant first to raise posttrial an issue that arose during the course of the trial would circumvent the policy underlying the requirement of timely preservation of issues. . . . It therefore is not surprising that the trial court did not address the [claim raised for the first time in the posttrial brief] in any manner in its memorandum of decision. To afford review to a claim that the defendant did not raise during trial as a matter of strategy would contravene the purpose of the preservation requirement." (Citations omitted; emphasis in original; internal quotation marks omitted.) *AS Peleus, LLC* v. *Success, Inc.*, 162 Conn. App. 750, 758–60, 133 A.3d 503 (2016). Perhaps mindful of that precept, the attorney trial referee in the present case did not address the plaintiff's pretext argument in his report. See, e.g., *E & M Custom Homes, LLC* v. *Negron*, 140 Conn. App. 92, 98 n.4, 59 A.3d 262 (2013) ("[t]he court concluded that the defendants had raised this argument for the first time in their posttrial briefs and, therefore, declined to consider it as it would be highly prejudicial to the plaintiff"), appeal dismissed, 314 Conn. 519, 102 A.3d 707 (2014).

[24] In his report, the attorney trial referee found in relevant part: "The defendant did not prove what caused the clothe[s] [dryer] to fail or malfunction or that there was any nexus between [the] plaintiff['s] conduct and said failure or malfunction. . . .

"The defendant did not prove what caused the shower head and/or faucet in the bedroom bath to fail or malfunction or that there was any nexus between [the] plaintiff's conduct and said failure or malfunction. . . .

"The defendant did not prove what caused any of the claimed electrical outlet and/or . . . switch failures or malfunctions, nor did the defendant

the defendant *had* proven other damages for which the plaintiff was liable.[25]

Later in his report, the attorney trial referee stated that the defendant "met his burden of proof and proved by a preponderance of the evidence that the plaintiff

establish that there was any nexus between [the] plaintiff's conduct and said failure or malfunction. . . .

"The defendant did not prove what caused the shower doors in either bath to fail or malfunction or that there was any nexus between [the] plaintiff's conduct and said failures or malfunctions. . . .

"The defendant failed to prove that the plaintiff was even aware that mud or water accreted in the crawl space. . . .

"The defendant failed to prove that there was any nexus between the plaintiff's conduct and the accretion of mud and/or water in the crawl space. . . .

"The plaintiff did not unreasonably deny the defendant access to the property for the purpose of replacing windows. . . .

"The defendant did not prove that the replacement of the windows on the waterside of the premises, and which the evidence established were old and had been in poor repair for an extended time, were of any immediate necessity. . . .

"The defendant did not prove that the plaintiff failed to pay for a week of occupancy [in May, 2012]. . . .

"The defendant did not prove that the damages caused by the plaintiff [were] even a cause, much less the . . . proximate cause of his inability to rent the property immediately."

[25] The attorney trial referee found in relevant part: "The defendant proved that the plaintiff failed to pay the sum of $506.45 due to the Stamford Water Pollution Control Authority. . . .

"The defendant proved that a shelf was missing from [the second] bathroom in the upper hallway and that he was forced to replace the same at a cost of $110. . . .

"The defendant proved [that] the damages occurred to a screen door in the master bedroom during the plaintiff's possession of the premises and that the defendant expended the sum of $120 to repair the same. . . .

"The defendant proved that blinds, in addition to blinds repaired by the plaintiff, were damaged and/or missing in the master bedroom and living room and that the defendant expended the sum of $550 to replace the same. . . .

"The defendant proved that water damage had occurred to the wall adjacent to the shower in the third bathroom and that the defendant was forced to expend the sum of $220 to rectify the damage. . . .

"As a function of the foregoing damages proven by the defendant, the plaintiff owes the defendant the sum of $1506.45."

either caused or should be held liable for certain damages to the property." The attorney trial referee then emphasized that the defendant "did not meet his burden of proof and did not prove the balance of the physical damage claims set forth in his [counterclaim]."[26]

Pretext is a question of fact. See *State* v. *Holmes*, 334 Conn. 202, 226, 221 A.3d 407 (2019) (whether pretext exists is factual question subject to clearly erroneous review); see also *Murray* v. *Groose*, 106 F.3d 812, 814 (8th Cir.) ("[t]he existence of pretext is a question of fact"), cert. denied, 522 U.S. 851, 118 S. Ct. 141, 139 L. Ed. 2d 88 (1997); *Cornwell* v. *Robinson*, 23 F.3d 694, 706 (2d Cir. 1994) (claims of pretext are "pure questions of fact" governed by clearly erroneous standard of review (internal quotation marks omitted)). In his report, the attorney trial referee did not find the defendant's claimed damages to be pretexual; indeed, that word appears nowhere in his report. Instead, he found those damages unproven. Furthermore, the attorney trial referee did not predicate his finding that the defendant violated CUTPA on such a basis. That conclusion was based on the defendant's purported failure to provide an adequate written statement of damages pursuant to § 47a-21 (d) (2), not on any finding of pretext.

The record before us indicates that the report of the attorney trial referee is silent on the issue of pretext. So, too, is the trial court's September 22, 2016 notice of judgment. When this court subsequently ordered the trial court to articulate the factual and legal basis of

[26] In discussing those claims, the attorney trial referee noted that they suffered from "evidentiary deficiencies . . . ." The attorney trial referee found, as but one example, that, although "the defendant credibly established that mud was discovered in the crawl space [on the property], no evidence or testimony was submitted as to how or when this condition was created. . . . Without establishing when the condition was created or that the plaintiff did something to cause this condition to occur, or for that matter was even aware of the condition, this claim [of damages] cannot be credited."

its judgment, the court issued an articulation on August 24, 2017, that again made no mention of pretext.

It was only on November 15, 2018—more than two years after it had rendered judgment in the present case—that the court first raised the issue of pretext. In articulating the basis of its award of attorney's fees under CUTPA, the court stated in relevant part: "The [attorney trial referee] found that the damages claimed by the [defendant] were either not suffered by the [defendant] or proven at trial as obligations of the [plaintiff] and, therefore, were not properly withheld by the [defendant] under § 47a-21 (d) (2). The language of the statute allows for landlords to deduct from a tenant's security deposit actual damages, not pretextual damages. *Carrillo* v. *Goldberg*, [supra, 141 Conn. App. 310]."

The court's reference to "pretextual damages" is troubling for several reasons. First and foremost, the attorney trial referee never made such a finding. Although he found some of the defendant's claimed damages unproven, the attorney trial referee did not find them to be pretextual. Because those findings are supported by the evidence adduced at trial, the court was obligated to accept them and was not at liberty to substitute its own findings for those of the trier of fact. *Hees* v. *Burke Construction, Inc.*, supra, 290 Conn. 6–7. In making its own determination that the defendant's claim of damages was pretextual, the court disregarded that fundamental precept.

Second, the court's recitation of precisely what the attorney trial referee determined with respect to the defendant's damages is inaccurate. The attorney trial referee did *not* find "that the damages claimed by the [defendant] were either not suffered by the [defendant] or proven at trial as obligations of the [plaintiff]," as the court stated in its November 15, 2018 articulation. To the contrary, the attorney trial referee found that

the defendant had proven several of his claimed damages, for which the plaintiff was liable. See footnote 25 of this opinion. For that reason, the attorney trial referee recommended that judgment should enter in favor of the defendant on his counterclaims in the amount of $1506.45—a recommendation that the court expressly adopted in its judgment.

Third, in making its own determination that the defendant's claimed damages were pretextual, the court improperly invoked this court's decision in *Carrillo* v. *Goldberg*, supra, 141 Conn. App. 299. *Carrillo* was an extraordinary case, as the defendant landlords had mishandled the security deposit funds and, following the termination of the tenancy, had sent the plaintiff tenants a concededly fraudulent statement of damages. Id., 303–305. At trial, the defendants admitted that they "were not entitled to any of the sum claimed as damages in [the] accounting sent to the plaintiffs, except for $231.80 in fuel oil expenses." Id., 305. As a result, the trial court found that "the defendants' claimed damages were pretextual, that is, they were calculated to camouflage the defendants' mishandling of the plaintiffs' security deposit." Id., 310. In concluding that an award of double damages was warranted, this court stated: "[T]he damages claimed by the defendants were neither suffered by the defendants nor created by the plaintiffs' failure to comply with their obligations as tenants. Rather, they were simply fabricated by the defendants and, therefore, were not properly withheld by the defendants under § 47a-21 (d) (2). The language of the statute allows for landlords to deduct from a tenant's security deposit actual damages, not pretextual damages. While the defendants complied, in form only, with the requirement that a written accounting of damages be sent to the former tenant within the time frame prescribed by [the security deposit statute] . . . they did not satisfy the statutory requirements." Id., 310–11.

By contrast, it is undisputed that the defendant in the present case immediately alerted the plaintiff to the alleged damage to the property, both through verbal communication with the plaintiff's brother-in-law and via e-mail correspondence, on the very day that the tenancy terminated. The defendant then sent a written statement of damages that detailed various items of damage to the property, some of which the attorney trial referee found proven following trial. See footnote 25 of this opinion. Equally significant, the attorney trial referee did not find that the other damages claimed by the defendant were "pretextual" or "fabricated"; he simply found that the defendant had not satisfied his burden of proof with respect to those damages. For that reason, *Carrillo* is inapposite to the present case.

In light of the foregoing, the finding of a CUTPA violation cannot stand. We, therefore, conclude that the court improperly rendered judgment in favor of the plaintiff on the third count of his complaint.

C

The defendant also claims that the court improperly accepted the attorney trial referee's findings that he was not entitled to damages on his third and fifth counts of his counterclaim. We disagree.

"We accord plenary review to the court's legal basis for its damages award. . . . The court's calculation under that legal basis is a question of fact, which we review under the clearly erroneous standard." (Citation omitted; internal quotation marks omitted.) *Carrillo* v. *Goldberg*, supra, 141 Conn. App. 307. "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *McKay* v. *Longman*, 332 Conn. 394,

417, 211 A.3d 20 (2019). In addition, we note that, "[i]t is within the province of the [attorney trial referee], when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence." (Internal quotation marks omitted.) *Reid* v. *Landsberger*, 123 Conn. App. 260, 281, 1 A.3d 1149, cert. denied, 298 Conn. 933, 10 A.3d 517 (2010). "No one other than the attorney trial referee is authorized to assess the credibility of the witnesses who appear before him." *Johnson Electric Co.* v. *Salce Contracting Associates, Inc.*, 72 Conn. App. 342, 347, 805 A.2d 735, cert. denied, 262 Conn. 922, 812 A.2d 864 (2002). For these reasons, this court on appeal "cannot retry the facts or pass on the credibility of the witnesses." (Internal quotation marks omitted.) *McKay* v. *Longman*, supra, 417.

1

The defendant claims that the court improperly accepted the finding of the attorney trial referee that he was not entitled to $1422.86 in damages on the third count of his counterclaim. We disagree.

In his third count, the defendant alleged in relevant part that the plaintiff had breached the terms of the lease agreements by "allow[ing] water and mud to accumulate in the crawl space of the [property] and neither repaired same nor advised [the defendant] of the accumulation of water and mud in the crawl space. . . . As a consequence of the foregoing, [the defendant] sustained further damages in the amount of $1422.86 to repair the damage."

In his report, the attorney trial referee found that the defendant had "credibly established that mud was discovered in the crawl space" in question. He nonethe-less found that the defendant had not proven that this "condition occurred after the plaintiff [took] possession" of the property in May, 2011. As the attorney trial referee

stated: "[T]he question of how and when the condition occurred is critical, since the property fronts on the water and the plaintiff occupied the [property] during a period of time that included two major Atlantic hurricanes that severely impacted the Connecticut coastline. Without establishing when the condition was created or that the plaintiff did something to cause the condition to occur, or for that matter was even aware of the condition, this claim [of damages] cannot be credited." He further found that the defendant "failed to prove that there was any nexus between the plaintiff's conduct and the accretion of mud and/or water in the crawl space" and had "failed to prove that the plaintiff was even aware that mud or water accreted in the crawl space."

The evidence in the record before us supports that determination. The defendant offered no evidence at trial as to precisely when the accumulation of mud occurred. Moreover, the home improvement contractor hired by the defendant to perform repairs on the property in June, 2013, testified at trial that the mud in the crawl space "looked like it had been there for some time" and that he did not know when the mud came into the crawl space. Although the defendant claimed that "the crawl space was immaculate" at the time that the plaintiff's tenancy commenced, the attorney trial referee, as the sole arbiter of credibility, was free to reject that assertion. He likewise was free to credit the plaintiff's unequivocal testimony that he did not allow water and mud to accumulate in the crawl space. See *Johnson Electric Co.* v. *Salce Contracting Associates, Inc.*, supra, 72 Conn. App. 347.

We agree with the attorney trial referee that there is no evidence that the plaintiff was aware, never mind the cause, of the accumulation of mud in the crawl space. For that reason, his finding that the defendant was not

entitled to $1422.86 in damages on the third count of his counterclaim is not clearly erroneous.

2

The defendant also claims that the court improperly accepted the finding of the attorney trial referee that he was not entitled to $2000 in damages for an unpaid week of rent under the terms of the first lease. We do not agree.

The applicable standard that guides our review is well established. "The defendant's claim presents a question of contract interpretation because a lease is a contract, and, therefore, it is subject to the same rules of construction as other contracts. . . . Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary]. . . . In construing a written lease . . . three elementary principles must be [considered]: (1) The intention of the parties is controlling and must be gathered from the language of the lease in the light of the circumstances surrounding the parties at the execution of the instrument; (2) the language must be given its ordinary meaning unless a technical or special meaning is clearly intended; [and] (3) the lease must be construed as a whole and in such a manner as to give effect to every provision, if reasonably possible." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Bristol* v. *Ocean State Job Lot Stores of Connecticut, Inc.*, 284 Conn. 1, 7–8, 931 A.2d 837 (2007).

In the fifth count of his counterclaim, the defendant alleged in relevant part that the plaintiff had "failed and refused to pay for the use and occupancy of the [property] for the period [from] May 25, 2012, to May 31,

2012." His claim stems in large part from what the attorney trial referee aptly described as an "open-ended commencement date for the first lease." The first lease specifies the "lease term" as follows: "The term of this [l]ease . . . shall commence on the date that [the plaintiff] commences occupancy of the [d]welling which date shall not be before May 15, 2011, and shall not be after May 31, 2011 . . . . [The lease] shall end May 31, 2012 . . . ." The first lease further obligated the plaintiff to pay rent on a monthly basis, which payment was "due on the [c]ommencement [d]ate and on the same date of each month thereafter."

In concluding that no damages were warranted on the fifth count, the attorney trial referee rejected the defendant's claim that "some amount of pro rata rent is due," reasoning that the first lease "neither . . . indicates [nor] implies an agreement that pro rata rent would be due for the variable commencement window at the beginning of the first lease." The attorney trial referee emphasized that, under the plain terms of the first lease, "the commencement date [was] left open to fall anywhere between May 15 and May 31, depending on when the defendant could move out of the premises." He further found that "the parties were free to, and did, elect to negotiate a somewhat open-ended commencement date for the first lease. The parties did not, however, agree that additional rent would be due for the variable commencement date period of time. The defendant cannot now add such a term."

We agree with that determination. In addition, we note that the first lease expressly contemplated the scenario in which monthly rent is "apportioned to the number of days that [the plaintiff] occupies the [property]" in the event that either party exercised the right to early termination of the lease. The parties thus plainly

knew how to add a provision imposing a pro rata payment obligation in their lease agreement. They nevertheless declined to do so with respect to the open-ended commencement date of the first lease. We, therefore, conclude that the court properly adopted the attorney trial referee's determination that the defendant was not entitled to $2000 in damages on the fifth count of his counterclaim.

II

THE PLAINTIFF'S CROSS APPEAL

In his cross appeal, the plaintiff claims that the court improperly (1) declined to award him the full amount of attorney's fees requested and (2) failed to rule on his request for punitive damages pursuant to CUTPA. In light of our conclusion in part I B of this opinion that the court improperly rendered judgment in favor of the plaintiff on the CUTPA count of his complaint, there is no basis for the plaintiff's recovery of attorney's fees pursuant to § 42-110g. See *Winakor* v. *Savalle*, 198 Conn. App. 792, 811, 234 A.3d 1122, cert. granted on other grounds, 335 Conn. 958, 239 A.3d 319 (2020); *Gaynor* v. *Hi-Tech Homes*, 149 Conn. App. 267, 280, 89 A.3d 373 (2014). Accordingly, we vacate the order of the court awarding the plaintiff $13,434.28 in attorney's fees pursuant to CUTPA.

For similar reasons, we decline to address the plaintiff's challenge to the court's failure to rule on his request for punitive damages pursuant to CUTPA. As our Supreme Court has observed, because "the defendant did not violate CUTPA, we need not address whether the trial court abused its discretion by not awarding . . . punitive damages to the plaintiffs as part of the CUTPA award." *Lawson* v. *Whitey's Frame Shop*, 241 Conn. 678, 691 n.13, 697 A.2d 1137 (1997). Because there was no CUTPA violation in the present

case, no punitive damages can be awarded pursuant to CUTPA.

The judgment is reversed only with respect to the claim alleging a violation of CUTPA and as to the award of double damages pursuant to § 47a-21 (d) (2), and the case is remanded with direction to vacate the award of attorney's fees and to recalculate the damages award in accordance with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

RYAN K. BROWN, JR. *v.* DAVID CARTWRIGHT ET AL.
(AC 43415)

Lavine, Alvord and Cradle, Js.*

Syllabus

The plaintiff sought to recover damages from the defendants C, I Co., and H Co. pursuant to the Connecticut Product Liability Act (§ 52-572m et seq.) in connection with personal injuries he sustained in single car accident that occurred when the left front wheel of his vehicle fractured. The jury returned a verdict in favor of the defendants. The plaintiff thereafter filed a motion to set aside the verdict and for a new trial. The plaintiff claimed in his motion, inter alia, that, after the jury had retired to the deliberation room, the defendants' exhibits were timely delivered to the jury room but the plaintiff's exhibits were not, constituting evidentiary impropriety. The jury returned its verdict approximately ten minutes after it had received the plaintiff's exhibits. The trial court denied the motion and rendered judgment in favor of the defendants, from which the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on his claim that the trial court erred in refusing to set aside the verdict and order a new trial on the ground that court failed to ensure that the plaintiff's exhibits were with the jury when it commenced deliberations: the plaintiff presented no evidence that the jury began deliberations prior to the delivery of the exhibits, the jury was afforded a fair opportunity to deliberate with all the exhibits before it, and it was undisputed that the jury received all the exhibits

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

prior to returning its verdict; moreover, the fact that there was only a short period of time between when the jury received the plaintiff's exhibits and it reached a verdict, did not necessarily indicate a lack of diligence but, rather, may have attested to the weakness of the plaintiff's case.

2. This court concluded that the plaintiff waived his unpreserved claim that the trial court erred in refusing to set aside the verdict and order a new trial due to juror misconduct: although the plaintiff claimed that the jury may have begun deliberations prior to the delivery of his exhibits or failed to give adequate consideration to his case, an examination of the record indicated that the plaintiff did not bring the late delivery of his exhibits to the attention of the court on the record prior to the reading of the verdict, which would have given the court an opportunity to investigate and take any remedial measures that may have been required.

3. This court declined to review the plaintiff's claim that the trial court erred in denying his motion to set aside the verdict on the basis that the defendants' counsel unfairly prejudiced the jury by reading from documents not in evidence; the court granted the plaintiff's request for a curative instruction to the jury at the time of the alleged improper comments by counsel, an instruction which the court repeated in its charge to the jury, and the plaintiff did not object to the jury instructions as given by the court and, in doing so, waived any claim of error.

Argued December 1, 2020—officially released March 30, 2021

Procedural History

Action to recover damages for personal injuries sustained as a result of an allegedly defective product, and for other relief, brought to the Superior Court in the judicial district of New London and tried to the jury before *S. Murphy, J.*; verdict for the defendants; thereafter, the court denied the plaintiff's motion to set aside the verdict and for a new trial, and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Affirmed.*

Fredrik Thor Holth, for the appellant (plaintiff).

Robert W. Maxwell, pro hac vice, with whom was *David W. Case*, for the appellees (defendants).

Opinion

LAVINE, J. The plaintiff, Ryan K. Brown, Jr., appeals from the judgment of the trial court, following a trial

to a jury, rendered in favor of the defendants, David Cartwright, Ironhorse Auto, LLC, operating as Central Hyundai of Plainfield, and Hyundai Motor America, Inc.[1] On appeal, the plaintiff challenges the propriety of the verdict on three grounds: (1) the court's failure to timely deliver the plaintiff's exhibits to the jury deprived him of a fair verdict; (2) the jury did not follow the court's instructions to consider all the evidence; and (3) opposing counsel's statements during cross-examination unfairly prejudiced the jury. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The plaintiff purchased a 2013 Hyundai Elantra (Elantra) from the defendants on September 16, 2013. Early in the morning of September 29, 2013, the plaintiff was driving from Farmington to his home in Groton. The plaintiff alleged that while he was driving in the left lane of Interstate 95, the left front wheel of the Elantra fractured, resulting in a single car crash that caused the plaintiff serious injuries. The plaintiff filed a product liability action against the defendants pursuant to General Statutes § 52-240b and the Connecticut Product Liability Act, General Statutes § 52-572m et seq.[2] The plaintiff alleged that a manufacturing defect in the wheel was the proximate cause of the crash.

The case was tried to a jury from June 26 to July 3, 2019. At trial, the parties disputed the cause and nature

[1] In this opinion, we refer to these parties, who were united in interest, represented by the same counsel at trial, and treated by stipulation as a single party, collectively as the defendants.

[2] The defendants filed an answer and special defenses. In their special defenses, the defendants alleged that (1) the plaintiff's claims were "either completely or partially barred pursuant to . . . [General Statutes] § 52-572h (b), insofar as he did not exercise ordinary caution and prudence for his own safety, nor did he exercise the care and prudence that a reasonable person in the plaintiff's position would have exercised," (2) the plaintiff failed to mitigate his damages, and (3) the plaintiff failed to preserve the allegedly defective wheel in the condition it was in at the time of the accident.

of the wheel fracture, including how it occurred and whether the wheel fully detached from the Elantra, and the extent of the injuries the plaintiff suffered.

Following closing arguments, the court instructed the jury not to begin deliberations until they had received all of the exhibits, the verdict form, and the interrogatories. After the jury had retired to the deliberation room, the following exchange between the court and counsel transpired:

"The Court: All right. Counsel, have you had an opportunity to go through the exhibits and make sure that the only exhibits going to the jury for deliberation are full exhibits?

"[The Plaintiff's Counsel]: Yes, Your Honor.

"[The Defendants' Counsel]: Yes, Your Honor.

"The Court: All right. If you wouldn't mind approaching the bench? The only change that was made to the jury form was adding the jury foreperson and the date."

Following a brief conference with counsel, the court stated that the charge and exhibits "are going to go to the jury along with the exhibits, and our clerk will let the jury know that they may begin deliberations, and they need to pick a foreperson. . . . And then this court will stand in recess."

During its deliberations, the jury answered "no" to the following interrogatory: "Was the subject wheel defective because it did not comply with design specifications or performance standards?" The jury then notified the court that it had reached a verdict. The jury returned to the courtroom and the clerk read the jury's verdict finding in favor of the defendants. The court accepted the jury's verdict.

On July 9, 2019, the plaintiff filed a motion to set aside the verdict and for a new trial (motion to set aside) on the grounds that defendants' counsel had inflamed the jury by attempting to read from documents not in evidence and that the jury had failed to follow the court's instructions. With respect to his first ground, the plaintiff alleged in relevant part that "[the defendants' counsel] . . . read aloud from and described information to the jury derived from documents or sources not properly in evidence for the sole purpose of inflaming the emotions of the jury or creating undue partiality . . . and did so inflame the emotions of the jury or create partiality." With respect to the second claim in his motion to set aside, the plaintiff alleged in relevant part:

"6. The jury failed to follow the court's instructions and deliberated without reviewing, considering and/or having all of the evidence properly before it and therefore, resulted in a verdict based upon ignorance, partiality, speculation, mistake, conjecture, or a combination of two or more thereof.

"7. The jury failed to follow the court's instructions and deliberated without reviewing, considering and/or having all of the evidence properly before it and therefore, resulted in a verdict based upon misconduct, failure to follow the law, or both."

The defendants objected to the motion to set aside on the grounds that the statements of their counsel were not harmful and the jury verdict was fully consistent with the law and the weight of the evidence. The plaintiff replied to the objection, alleging that "due to an error, all of the plaintiff's trial exhibits remained in the courtroom until at least 4:30 p.m., although the jury had been excused a substantial amount of time earlier to deliberate. Because the plaintiff's exhibits had not been delivered to the jury in a timely manner, at 4:28

p.m., the undersigned contacted the clerk's office by telephone after searching the jury clerk and case flow coordinator's offices for available staff to alert the judge. At least several minutes passed following the conclusion of the call to the clerk's office and, thereafter, the plaintiff's exhibits were delivered to the jury at approximately 4:35 p.m. The verdict was reached and the [court] was back on the record for rendering and acceptance of the verdict at 4:47 p.m. Therefore, in order to have followed the court's instructions as described above, the jury must have elected a foreperson, reviewed thousands of pages of documents and deliberated, all within a span of ten minutes. This is not only unlikely, but impossible." (Footnotes omitted.)

The court heard the plaintiff's motion to set aside on August 13, 2019, at which time, counsel for the plaintiff testified that the defendants' exhibits were timely delivered to the jury, but the plaintiff's exhibits were not. According to the plaintiff's counsel, the jury retired to deliberate at "approximately four o'clock . . . ." On direct examination by his law partner, the plaintiff's counsel testified as follows:

"Q.: All right. And then what came to your attention relative to your exhibits—plaintiff's exhibits?

"[The Plaintiff's Counsel]: [We] were waiting in . . . the courtroom for approximately half an hour. The defendants' exhibits were taken into the jury room at about 4:28.[3]

[3] On May 18, 2020, more than nine months following the August 13, 2019 hearing, the plaintiff filed a motion to rectify the record. In that motion, he sought to correct the text "[We] were waiting in the . . . courtroom for approximately half an hour. The defendant's exhibits were taken into the jury room at about 4:28. I started to look for the jury clerk . . . ." The plaintiff contended that the transcript should state: "[We] were waiting in the . . . courtroom for approximately half an hour after the defendants' exhibits were taken into the jury room. At about 4:28, I started to look for the jury clerk . . . ." The court denied the motion to rectify on June 30, 2020.

"I started to look for the jury clerk, as well as the case flow coordinator because I could not find our clerk, and I did not want to walk into the back hall where the jurors were. I went to the jury clerk's office. I went to the case flow coordinator's office. Those offices were vacant and the lights were off.

"I came back to the courtroom. Our exhibits were still here, the plaintiff's exhibits. I called the clerk's office downstairs. . . . That call lasted about a minute, and then a clerk . . . came up within several minutes, took in two trips, our exhibits—the plaintiff's exhibits into the jury room to deliberate for its deliberations.

"The jury then returned with a verdict at approximately 4:40 to 4:45 p.m. And then we went back on the record at 4:47.

"Q.: So again, how many minutes from the time that the plaintiffs' exhibits were submitted to the jury and the decision was rendered?

"[The Plaintiff's Counsel]: Approximately ten, if that many."

The plaintiff's counsel also testified that his exhibits "in total were several thousand pages and the exhibits on the specifications in liability alone would have been hundreds of pages . . . ." On cross-examination by the defendants' counsel, the plaintiff's counsel testified that his exhibits were delivered to the jury at 4:35 p.m., and the court went back on the record twelve minutes later. He admitted that he did not have any direct evidence that the jury had reached a verdict before the delivery of his exhibits, "other than the inference itself."

The court denied the motion to set aside in a memorandum of decision on September 12, 2019. The court first stated that "counsel's questioning during cross-examination was not so prejudicial as to deny the plaintiff a fair trial and, further, curative instructions given

immediately following objections raised by [the] plaintiff's counsel were sufficient to cure any potential prejudice to the plaintiff." The court rejected the plaintiff's argument that the "rendering of a verdict in this case within ten minutes is impossible and in fact, indicative of juror misconduct in failing to consider all the evidence and/or indicative of undue prejudice induced during the cross-examination of the plaintiff." The court explained that it could not infer misconduct from the length of the jury's deliberation and that it could not set aside the verdict when there was evidence supporting the jury's finding.[4] With regard to the plaintiff's claim that the jury failed "to follow the court's instructions and/or deliberated without reviewing, considering and/or having all the evidence before it," the court explained that there was nothing before it to demonstrate that the jurors improperly discussed the case among themselves prior to deliberations, that there was no dispute that the jurors had all the exhibits before them prior to indicating that they had reached a verdict, and that the jury was allowed to credit the testimony of the defendants' expert witness. The court rendered judgment on the verdict at that time. This appeal followed.

We first set forth the well-known standard of review. "[T]he proper appellate standard of review when considering the action of a trial court granting or denying a motion to set aside a verdict . . . [is] the abuse of discretion standard. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling." (Internal quotation marks omitted.) *Sovereign Bank* v. *Licata*, 116 Conn. App. 483, 492, 977 A.2d 228 (2009), appeal dismissed, 303 Conn. 721, 36 A.3d 662 (2012).

[4] The court again noted that, during the presentation of evidence, it had issued a cautionary jury instruction as to what constituted evidence and gave a jury charge to the same effect. In the absence of a showing that the jury disregarded its instructions, the court presumed that the jury heeded them.

I

The plaintiff first claims that the trial court erred by refusing to set aside the verdict and order a new trial, because the delay in delivering his exhibits, while the defendants' exhibits were delivered promptly, constitutes a harmful "evidentiary impropriety" meriting reversal. We do not agree.

In support of his claim, the plaintiff points to Practice Book § 16-15 (a), which provides that "[t]he judicial authority shall submit to the jury all exhibits received in evidence." He states in his brief that "it necessarily follows that to effectuate this rule, the jury receive the entire record concurrently when it retires to deliberate," and that the "unintentional but unjust delay" was harmful, relying on *Kortner* v. *Martise*, 312 Conn. 1, 27–28, 91 A.3d 412 (2014), in which the submission of an exhibit to the jury that was not introduced at trial constituted harmful error.

The plaintiff characterizes the claimed error as a failure by the court to ensure that the plaintiff's exhibits were with the jury when it commenced its deliberations. It is undisputed, however, that the jury received all the exhibits prior to returning its verdict. The plaintiff represented in his reply to the motion to set aside, as well as in his testimony at the hearing on the motion to set aside, that the jury received all of the exhibits by 4:35 p.m., that the jury reached a verdict "at approximately 4:40 to 4:45 p.m.," and that the jury returned to the courtroom at approximately 4:47 p.m., at which time the verdict was read. He presented no evidence that the jury began deliberations prior to the delivery of all the exhibits. If a mistake occurred which resulted in the delayed delivery of exhibits, it was resolved and the jury was afforded a fair opportunity to deliberate with all of the exhibits before it. Thus, the plaintiff's claim that harm resulted is purely speculative. "[T]he

time a jury spends in deliberation cannot form the basis of a claim that its verdict was affected by improper influences." *Forrestt* v. *Koch*, 122 Conn. App. 99, 111, 996 A.2d 1236 (2010). "A short deliberation, rather than being indicative of a lack of diligence, may in fact attest to the [weakness] of the [nonprevailing party's] case.§ (Internal quotation marks omitted.) Id. The plaintiff's claim, therefore, fails.

II

The plaintiff's second claim is that the trial court erred by refusing to set aside the verdict and order a new trial due to juror misconduct. He claims that, in returning a verdict mere minutes after receiving the plaintiff's exhibits, the jury necessarily could not have followed the court's instructions in full.

The following additional facts are relevant to our disposition of this claim. The court instructed the jury in relevant part:

"The Court: The deliberations should not begin until you receive all the exhibits and you have first selected a jury foreperson. No one will hurry you. You may have as much time as you need to reach a verdict. . . .

* * *

"The Court: Again, do not select a foreperson or begin any deliberations until you have the exhibits, verdict form, and interrogatories, and the alternate jurors have left the jury room."

The jury thereafter retired to the jury deliberation room. After the jury notified the court that it had reached a verdict, the following colloquy occurred:

"The Court: All right. So counsel, it's my understanding that the jury has reached a verdict. That's what I've been told, so we're going to call the jurors in.

"The Court: Welcome back. Counsel, please stipulate?

"[The Plaintiff's Counsel]: Yes, Your Honor.

"[The Defendants' Counsel]: Yes, Your Honor.

"The Court: All right. Madam Clerk?"

The clerk then asked the jury if it had agreed on a verdict, to which the jury answered in the affirmative. The clerk read the verdict aloud, stating: "In the matter of Ryan K. Brown, Jr., versus [the defendants], defendants' verdict: We, the jury, find in favor of the defendants . . . against the plaintiff, Ryan K. Brown, Jr." The court accepted the verdict. The plaintiff objected to the verdict six days later when he filed a motion to set aside. The plaintiff alleged in his reply to the defendants' objection that the jury did not receive the plaintiff's exhibits until approximately 4:35 p.m., a "substantial amount of time" after it had been excused,[5] and that the jury notified the court that it had reached a verdict approximately ten minutes later.

The plaintiff's claim at its core is one of jury misconduct. He claims it was not possible for the jury to review his thousands of pages of exhibits, beyond a mere cursory look in the roughly ten minutes between when it received his exhibits and when it delivered its verdict. As a result, he claims, the trial court erred in failing to set aside the verdict because the jury must have failed to comply with the court's instruction to "consider all the evidence" in reaching a verdict. The plaintiff also argues that, if the jury began consideration of the defendants' exhibits while it was waiting for the plaintiff's exhibits, it violated the court's instruction to wait until it had received all the exhibits.

[5] In his brief, the plaintiff characterizes the delay in delivery as "approximately one-half hour" after the defendants' exhibits had been delivered.

In response, the defendants argue that it is not possible to infer solely from the length of deliberations that the jury did not consider the plaintiff's evidence. The defendants emphasize that there is no evidence, only speculation, that the jury began deliberations prematurely or failed to give adequate consideration to the plaintiff's case. They further argue that, even if there is error, we should not address it because the plaintiff failed to preserve the issue for review.

We agree with the defendants that the claim is not properly before this court for review. Our thorough examination of the record indicates that the plaintiff did not bring the late delivery of his exhibits to the attention of the court prior to the reading of the jury's verdict. The plaintiff argues that he alerted the court "several times prior to the entry of judgment: once by alerting the court clerk charged with delivering the exhibits to the jury room, thereafter by motion and memoranda filed with the court, and thereafter by testimony offered at the August 13, 2019 hearing." The defendants respond that the matter was not raised on the record as an objection to the verdict at a time when the court could have addressed it prior to the reading of the verdict.[6] The record clearly demonstrates that the defendants are correct. The plaintiff, therefore, failed to preserve his claim for review.

[6] The defendants also argue in their brief that under Practice Book § 16-35, the plaintiff failed to timely raise the issue in his motion to set aside the verdict. "Motions . . . to set aside a verdict . . . must be filed with the clerk within ten days after the day the verdict is accepted; provided that for good cause the judicial authority may extend this time. The clerk shall notify the trial judge of such filing. Such motions shall state the specific grounds upon which counsel relies." Practice Book § 16-35. The defendants argue that the allegations in §§ 6 and 7 of the plaintiff's motion failed to clearly state the specific grounds on which the plaintiff relied. Because we conclude that the plaintiff had an opportunity to raise the issue prior to the reading of the jury verdict and failed to do so, we do not address this argument.

It is well established that "[waiving] the objection and [taking] the chances of a favorable verdict, [precludes] . . . taking the exception after verdict." *State* v. *Worden*, 46 Conn. 349, 368 (1878). "We repeatedly have expressed our disfavor with the failure, whether because of a mistake of law, inattention or design, to object to errors occurring in the course of a trial until it is too late for them to be corrected, and thereafter, if the outcome of the trial proves unsatisfactory, with the assignment to such errors as grounds of appeal." (Internal quotation marks omitted.) *Antonucci* v. *Antonucci*, 164 Conn. App. 95, 127, 138 A.3d 297 (2016). Although the court addressed the plaintiff's motion to set aside after accepting the verdict, this court has stated, in the context of jury instructions, that if possible, a party must "object in a timely fashion to allow the trial court an opportunity to correct any claimed error in the procedure or the instruction. Raising that objection as an issue for the first time in a motion to set aside the verdict, obviously does not allow such a possibility because the jury has been excused. When we speak of correcting the claimed error, we mean when it is possible during that trial, not by ordering a new trial." *Powers* v. *Farricelli*, 43 Conn. App. 475, 478, 683 A.2d 740 (1996). Similarly, in *Misiurka* v. *Maple Hills Farms, Inc.*, 15 Conn. App. 381, 385, 544 A.2d 673, cert. denied, 209 Conn. 813, 550 A.2d 1083 (1988), this court stated that the failure to make a clear objection to a motion for apportionment "[denied] the trial court an opportunity to re-examine its ruling at a time when it could still be modified and any defect cured." Had the plaintiff brought his concern regarding the timely delivery of his exhibits to the attention of the court prior to the reading of the verdict, the court could have investigated and taken whatever remedial measures that may have been required, if any, before the jury's verdict was read in open court.[7] See also

[7] General Statutes § 52-223 provides: "The court may, if it judges the jury has mistaken the evidence in the action and has brought in a verdict contrary to the evidence, or has brought in a verdict contrary to the direction of the

State v. *Cosby*, 6 Conn. App. 164, 174, 504 A.2d 1071 (1986) (stating that parties "must take some modicum of responsibility for conserving scarce judicial resources").

In the alternative, the plaintiff argues that, even if his claim is unpreserved, "an error by court personnel in properly delivering the exhibits to the jury 'trumps the waiver by the plaintiff's counsel,' " citing *Kortner* v. *Martise*, supra, 312 Conn. 26 n.9. He argues that the process was "tainted" by the untimely delivery of his exhibits to the jury, citing *Kortner*. As we stated in part I of this opinion, the plaintiff has not demonstrated prejudice from the alleged error by court personnel. Moreover, *Kortner* is instructive in explaining why the plaintiff's claim fails. In that case, the jury submitted a question to the court clerk regarding a particular exhibit not in evidence that it had inadvertently received. Id., 18. The court clerk answered the question and stated that it would not be necessary to alert the judge. Id. After the court accepted the verdict and adjourned the proceeding, "one of the jurors . . . expressed confusion about the fact that he had not heard about [the plaintiff's exhibit] during trial." Id., 17. The court replied that it had been marked as a full exhibit and excused the jurors. Id. Upon learning of the error, the plaintiff filed a motion to set aside the verdict and for a new trial. Id., 19.

On appeal, this court concluded that the plaintiff had not waived the claim. The court clerk's failure to notify

court in a matter of law, return them to a second consideration, and for the same reason may return them to a third consideration. The jury shall not be returned for further consideration after a third consideration."

Practice Book § 16-17 similarly provides: "The judicial authority may, if it determines that the jury has mistaken the evidence in the cause and has brought in a verdict contrary to it, or has brought in a verdict contrary to the direction of the judicial authority in a matter of law, return the jury to a second consideration, and for like reason may return it to a third consideration, and no more."

the court of the jury's question "deprived the plaintiff and the trial court of the opportunity to rectify the inadvertent mistake of providing [the plaintiff's exhibit] to the jury for deliberation." Id., 26. "Instead, the trial court required the plaintiff to prove that [the exhibit] probably prejudiced the jury." Id., 45. *Kortner* thus highlights the seriousness of a jury deliberation error of which the court and the parties are *not* aware prior to the reading of the verdict. In the present matter, unlike in *Kortner*, the plaintiff was aware of the issue with the exhibits *prior* to the reading of the verdict and did not take advantage of his opportunity to bring it to the court's attention.[8] We conclude that the claim of jury misconduct is waived.

III

The plaintiff next claims that the court erred in denying his motion to set aside the verdict on the basis that the defendants' counsel unfairly prejudiced the jury on two occasions by reading from documents not in evidence during his cross-examination of the plaintiff and one of the plaintiff's expert witnesses. We do not agree.

The following additional facts are relevant to our resolution of this claim. The plaintiff testified at trial that, prior to the crash, he had attended an event in Farmington hosted by a chapter of his fraternity, Alpha Phi Alpha. He described the event as "a Miss Black and Gold Scholarship Pageant . . . . That entails a group of women submitting, like, their transcripts and presenting different talents. Whether that's singing, dancing, playing an instrument, whatever the case is, and ulti-

[8] The plaintiff contends in his reply brief that "what measures, if any, [he] could have further taken beyond alerting the clerk to the error while the jury was deliberating . . . is purely hypothetical." This attempt to shift responsibility onto the clerk is unavailing, as the plaintiff had ample opportunity to bring the matter to the court's attention and to put an objection on the record when court resumed, prior to the reading of the verdict.

mately a winner is crowned and they're given, you know, X number of scholarship moneys." He testified that no alcohol or disorderly conduct was involved. The plaintiff was returning home to Groton around 3 a.m. when the crash occurred.

On cross-examination, the defendants' counsel suggested that alcohol had been served at the event, citing general Alpha Phi Alpha event guidelines regarding alcohol and inquiring about charges of binge drinking that had been brought against other chapters of the fraternity. The plaintiff acknowledged that alcohol was allowed at certain fraternity functions but again denied its presence at the event he attended. The defendants' counsel then inquired about flyers that were generally distributed to advertise Alpha Phi Alpha events. The defendants' counsel attempted to impeach the plaintiff by asking him questions about the content of a flyer purportedly advertising the scholarship event the plaintiff had attended on September 28, 2013. The plaintiff denied recognizing the flyer. When the defendants' counsel asked the plaintiff about the content of the flyer, the plaintiff's counsel objected:

"[The Defendants' Counsel]: Is it fair to say, Mr. Brown, that the flyer advertis[ing] this event shows a scantily clad woman with—under the title of [Phorbidden Phruit]?

"[The Plaintiff's Counsel]: Objection.

"The Court: Grounds?

"[The Defendants' Counsel]: Is that what this document—

"[The Plaintiff's Counsel]: Relevance first, Your Honor, and second, he's testified that he's never seen that document.

"The Court: All right. [Counsel]?

"[The Plaintiff's Counsel]: So there's—

"[The Defendants' Counsel]: This is impeachment evidence, Your Honor.

"[The Plaintiff's Counsel]: There's no foundation laid.

"The Court: All right. There's no foundation laid with respect to the document. He's never seen the document. He doesn't recognize the document. I'll sustain the objection."

The defendants' counsel then asked the plaintiff to read from highlighted portions of the document. When the plaintiff again denied recognizing the document, the defendants' counsel asked the plaintiff, "You didn't receive a message saying that the—" The court interjected and instructed the defendants' counsel "not to read from a document that's not been admitted into evidence." The defendants' counsel then attempted to ask the plaintiff if he had seen the document on the Alpha Phi Alpha website, referencing it as "the forbidden fruit advertisement . . . ." The plaintiff's counsel again objected; the court sustained the objection. The defendants' counsel then stated that he wanted to ask the plaintiff a hypothetical question, spurring further objection from the plaintiff's counsel. The court asked the jury to step out and reminded the defendants' counsel of its earlier ruling, stating:

"The court's made its ruling with respect to this line of questioning. He doesn't remember. It's been asked and answered. He said he does not know. So if the hypothetical is going to deal with this forbidden fruit phrase, the court is going to sustain the objection."

The court allowed the defendants' counsel to lay a foundation outside the presence of the jury. The plaintiff's counsel objected to the defendants' counsel's proffer. The court sustained the objection, reiterating its

earlier ruling that the foundation laid for the document was insufficient. The court prohibited questions regarding information coming from the flyer. The plaintiff requested that the court give a curative instruction to the jury. After the jury re-entered the courtroom, the court instructed the jury: "I just would like to remind the jury, and I will tell you more about this in jury instructions, but an attorney's comments or questions are not evidence in this case."

On July 2, 2019, the plaintiff called Thomas Eagar as a rebuttal expert. The plaintiff proffered Eagar as an expert in the field of materials science and physics. Counsel for the defendants was permitted to conduct a voir dire of Eagar regarding his credentials. During the voir dire, the defendants' counsel inquired about instances in which the scope of Eagar's testimony had been limited by judges in other cases. The defendants' counsel attempted to place in evidence a Kentucky district court order limiting the scope of Eagar's testimony. The plaintiff's counsel objected on the grounds of hearsay and authentication. The court sustained the objection, declining the request from the defendants' counsel to take judicial notice of the case citation. The court stated: "I think the witness stated that you were mischaracterizing what happened, or the testimony in that case, and this court's not going to be bound by the ruling of an out of district case. So, I'm not sure how that affects what we're doing right here. I'm [going to] sustain the objection on the ground of relevance and lack of foundation." The defendants' counsel asked Eagar about other cases in which the scope of his testimony had been limited or contradicted. The plaintiff's counsel objected again, and the court heard argument outside the presence of the jury. The plaintiff's counsel contended that the defendants' counsel was presenting hearsay and reading from documents not properly before the court. The defendants' counsel responded

that he was attempting to impeach the witness for giving allegedly inaccurate testimony. The court ruled as follows:

The Court: "First of all, whether or not testimony has been limited is one thing. This court doesn't have the benefit of going into those particular cases and finding out the exact nature of the limitation and/or the reasons for the limitation. So what you're doing is, you are [reading][9] from documents that lack foundation at this point in time, and that could very well, and I'm not saying that you're doing this, counsel, but because I do not have the benefit of looking at that document, perhaps you could be putting some sort of, you know, a spin on the way the—the holding is being presented . . . and so, instead, you're just—you're summarizing these documents for the court in front of the jury, and your summaries are coming from documents that are not full exhibits. So by way of asking these questions, you're basically [arguing], quote, from the document." (Footnote added.)

The court instructed counsel as follows:

The Court: "So the court would instruct both counsel again . . . not to [read] from documents that are not entered into the court as full exhibits. This witness was asked, this witness did indicate that his testimony has been limited on occasions. I mean, I will allow questioning about it, but I will not allow you to pick up a document, hold it in front of your hand in front of a jury, and proceed to basically read from the document as part of your question."[10]

[9] The trial court characterized the actions of the defendants' counsel as "testifying" from documents not in evidence.

[10] The trial court's admonition echoes what this court has frequently reminded counsel, that "it is improper to read from a document not in evidence." *State* v. *Fisher*, 57 Conn. App. 371, 380, 748 A.2d 377, cert. denied, 253 Conn. 914, 754 A.2d 163 (2000).

The jury returned to the courtroom, and the defendants' counsel asked Eagar to read from a page of the order or opinion he was using to impeach the witness. The plaintiff's counsel objected. The court again had the jury step out and reminded the defendants' counsel to ensure he was not having the witness read from a document not in evidence, as opposed to merely refreshing his recollection. Thereafter the defendants' counsel asked Eagar to review the document to refresh his recollection, and then asked, per the court's ruling, if the scope of his testimony had been limited. The defendants' counsel then concluded his cross-examination.

When the court instructed the jury at the conclusion of evidence, it stated in part: "There are a number of things that may have been said or heard during the trial which are not evidence and which you cannot rely on as evidence in deciding whether a party has proven a claim or defense. For example, the statements made by lawyers . . . are not evidence. A question is not evidence. It is the answer, not the question or the assumption made in the question, that is evidence."

The plaintiff now claims, after the court granted his request for a curative instruction[11] and after the court issued an instruction on the evidentiary value of statements made by counsel as part of its charge to the jury, that the court's instructions were insufficient to remedy the alleged harm. He argues in his brief that the first curative instruction and the charge to the jury were "insufficient and failed to cure the harm caused by the defendants' conduct. The inquiry and resulting damage to the impartiality of the jury . . . had been done." The plaintiff analogizes this case to that of *Yeske* v. *Avon Old Farms School, Inc.*, 1 Conn. App. 195, 204, 470 A.2d

[11] We note also that the plaintiff requested that the court give a *brief* curative instruction.

705 (1984), in which this court held that comments made by counsel casting aspersions on opposing counsel, among other remarks, "went far beyond the boundaries of legitimate comments made during the heat of forensic warfare. . . . No curative instruction by the court could remedy their maliciousness." We do not agree. By requesting curative instructions and not objecting to the instructions given by the court, the plaintiff waived any claim of error.

"[T]he impact of . . . improper [questions and] arguments can usually be nullified by the court's curative instruction." *Fonck* v. *Stratford*, 24 Conn. App. 1, 4, 584 A.2d 1198 (1991). If a party objects to an instruction, "in order [t]o preserve [the] exception . . . a party must either submit a written request to charge or state distinctly the matter objected to and the ground of objection. . . . It is our long-standing position that [t]o review [a] claim, which has been articulated for the first time on appeal and not before the trial court, would result in a trial by ambuscade of the trial judge. . . . The purpose of the rule is to alert the court to any claims of error while there is still an opportunity for correction in order to avoid the economic waste and increased court congestion caused by unnecessary retrials." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Rendahl* v. *Peluso*, 173 Conn. App. 66, 106, 162 A.3d 1 (2017).

Our review of the record discloses that the plaintiff did not object following the curative instruction that the court issued concerning the event flyer. Moreover, the court repeated this instruction in its charge to the jury. Prior to issuing the charge, the court stated to counsel: "I just want to confirm that you've had an opportunity to look at the charge and the interrogatories, and you're satisfied that those requested changes were made." Both counsel replied in the affirmative and neither of them objected to the court's proposed

charge. The court then gave the charge that counsel had reviewed. After it excused the jurors to the deliberation room, the court asked both counsel if they wished to comment on the charge. Counsel for the plaintiff replied that "only if the changes reflect as you read it into the record, I have—I have no comments." The court discussed several unrelated revisions but, in the absence of any objection, did not modify the charge with respect to the evidentiary value of statements by counsel. The court offered both counsel the opportunity to review the revised charge, and the plaintiff's counsel responded that he would "waive that." This colloquy clearly demonstrates that the plaintiff had several opportunities to object to the jury charge given by the court but did not do so.

The court took ameliorative action to remedy the plaintiff's claim that counsel for the defendants prejudiced the jury with its instructions to the jury. As the plaintiff concedes in his brief, "a tailored and succinct instruction is the remedy short of a mistrial." "If curative action can obviate the prejudice, the drastic remedy of a mistrial should be avoided. . . . Indeed, the courts have always given great weight to [curative] instructions in assessing claimed errors." (Citation omitted, internal quotation marks omitted.) *Pin* v. *Kramer*, 119 Conn. App. 33, 43, 986 A.2d 1101 (2010), aff'd, 304 Conn. 674, 41 A.3d 657 (2012).

"Waiver is the voluntary relinquishment of a known right. . . . To determine whether a party has waived an issue, the court will look to the conduct of the parties. . . . [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.§ (Citations omitted; internal quotation marks omitted.) *State* v. *Miranda*, 327 Conn. 451, 461, 174 A.3d 770 (2018); id., 462 (objection to improper testimony waived

when "the defendant never requested earlier action from the trial court, affirmatively indicated that the court could remedy the issue through the final charge to the jury, and then ultimately approved of the court's proposed instructions"). In the present case, the plaintiff accepted the first curative instruction, which he himself had requested. The plaintiff then received and accepted, without objection, the benefit of a jury charge that addressed the conduct of the defendants' counsel with respect to both his reading from the flyer and his examination of Eagar. We, therefore, decline to review the plaintiff's claim that the court's instruction was improper.

The judgment is affirmed.

In this opinion the other judges concurred.

RICHARD LINDQUIST *v.* FREEDOM OF INFORMATION COMMISSION (AC 42496)

Bright, C. J., and Alvord and Cradle, Js.

Syllabus

Pursuant to statute (§ 1-210 (b) (1)), the Freedom of Information Act does not require the disclosure of preliminary drafts or notes provided the public agency has determined that the public interest in withholding them outweighs the public interest in disclosure.

Pursuant further to statute (§ 1-210 (e) (1)), notwithstanding § 1-210 (b) (1), disclosure is required of such documents as advisory opinions and recommendations comprising part of the process by which governmental decisions are formulated.

The plaintiff, L, a tenured professor at the defendant health center, C Co., appealed to this court from the judgment of the trial court dismissing his appeal from the final decision of the defendant Freedom of Information Commission. After the completion of his annual performance review, as required by C Co.'s bylaws, L requested certain documents and communications related to the review. C Co. disclosed records within which it made various redactions, including to comments and ratings made by individual committee members about L's evaluation. L appealed to the commission, which found that the redacted portions of the requested

records were permissibly exempt pursuant to § 1-210 (b) (1) and (e) (1). L then appealed to the trial court, which concluded that the commission correctly determined that C Co., pursuant to § 1-210 (b) (1), properly had resolved the balance between secrecy and disclosure of the preliminary drafts or notes in good faith and that § 1-210 (e) (1) did not require production of the committee members' final comments and ratings because they were "preliminary" to the committee's recommendation to the dean of C Co. regarding L's evaluation, and dismissed L's appeal. On L's appeal to this court, *held*:

1. The trial court properly concluded that the commission did not abuse its discretion in finding that the redacted records were exempt from disclosure under § 1-210 (b) (1), as those records were preliminary drafts or notes within the meaning of that statute: the redacted records at issue consisted of the individual comments and ratings of the committee members made during the deliberative process of the multistep committee process during which the committee members deliberated in the form of stated impressions in order to reach a finalized collective recommendation for the dean, and the stated individualized impressions, in and of themselves, preceded the formal and informed collective recommendation of the committee; moreover, the commission did not abuse its discretion when it determined that the benefit of withholding the records at issue outweighed the public interest in disclosure, as it found that C Co. determined that public disclosure of the records would have a chilling effect on the willingness of the committee members to provide the candid assessments that were necessary to ensure an objective evaluation process.
2. The trial court abused its discretion when it dismissed L's appeal, and improperly concluded that the commission had correctly applied § 1-210 (e) (1) to the final comments and ratings that were delivered to the dean because § 1-210 (e) (1) required the requested documents to be produced, even though disclosure would not otherwise be required under § 1-210 (b) (1); the final individual comments and ratings provided by the committee members were used in the dean's deliberative process and were part of a completed, not draft, document, and were precisely the type of documents that our Supreme Court stated in *Van Norstrand* v. *Freedom of Information Commission* (211 Conn. 339) should be produced pursuant to § 1-210 (e) (1); moreover, the record did not support the conclusion of the commission that the redacted records did not contain recommendations, as although the individual committee members' comments and ratings were initially submitted as recommendations for the purpose of the committee's deliberations, the final version of the comments and ratings served as recommendations for the purpose of the dean's review of the faculty member's rating, and the trial court and the commission misapplied the term "preliminary" as it is used in § 1-210 (e) (1).

Argued September 15, 2020—officially released March 30, 2021

Procedural History

Administrative appeal from the decision of the defendant dismissing the plaintiff's complaint regarding a records request submitted to the University of Connecticut Health Center, brought to the Superior Court in the judicial district of New Britain, where the court, *Hon. George Levine*, judge trial referee, granted a motion to intervene as a party defendant filed by the University of Connecticut Health Center; thereafter, the matter was tried to the court, *Hon. Henry S. Cohn*, judge trial referee; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Reversed*; *judgment directed.*

Richard Lindquist, self-represented, the appellant (plaintiff).

Paula Sobral Pearlman, commission counsel, with whom, on the brief, was *Colleen M. Murphy*, general counsel, for the appellee (defendant).

Lynn D. Wittenbrink, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (intervening defendant).

Opinion

BRIGHT, C. J. The self-represented plaintiff, Richard Lindquist, at all relevant times, a tenured professor at the defendant University of Connecticut Health Center (health center), appeals from the judgment of the trial court dismissing his appeal from the final decision of the defendant Freedom of Information Commission (commission), in which the trial court concluded that the commission correctly dismissed the plaintiff's request for certain documents of the health center relating to his annual performance review. On appeal, the plaintiff claims that (1) the trial court failed to consider whether the commission failed to apply various provisions of the Freedom of Information Act (act), General

Statutes § 1-200 et seq., including General Statutes §§ 1-200 (6), 1-210 (b) (2), 1-213 and 1-225, and General Statutes (Rev. to 2015) § 1-214, and chapters 563 and 563a of the General Statutes, (2) the trial court improperly concluded that the commission properly applied § 1-210 (b) (1) and (e) (1) of the act to the records at issue, (3) the trial court improperly rejected the due process claim raised by the plaintiff, and (4) the commission failed to comply with General Statutes §§ 1-210 (b) (2) and 10a-154a. We agree, in part, with the plaintiff's second claim, as it relates to § 1-210 (e) (1), that he is entitled to judgment in his favor requiring the disclosure of the final individual comments and ratings by the committee members that were delivered to the dean of the University of Connecticut School of Medicine (dean), and, accordingly, we reverse the judgment of the trial court and remand the case to that court with direction to render judgment for the plaintiff. In light of our resolution on the basis of the plaintiff's second claim, we need not reach the plaintiff's other claims.

The following background is relevant to this appeal. In May, 2016, the plaintiff was a tenured faculty member of the Department of Pathology and Lab Medicine at the health center. As a faculty member, the plaintiff was annually evaluated pursuant to the health center's bylaws. During the evaluation process, a faculty member meets with his or her department's chairperson. The faculty member and the chairperson discuss the past year's performance and arrive at ratings for five categories. In particular, the chairperson indicates whether the faculty member's performance is "not acceptable," "marginal," "acceptable," or "superior" for the categories of education, research, administrative, transition, and excellence. Each of the individual evaluations is weighted by the percent effort for the category. On that basis, the chairperson then assigns an aggregate

evaluation that corresponds to an overall evaluation of "superior," "acceptable," "marginal," or "not acceptable."

In the next step of the evaluation process, a file is prepared for the Merit Plan Executive Committee (committee) to review the chairperson's evaluation for consistency among all departments. An overall evaluation of "acceptable" does not require further action by the committee unless the faculty member contests the rating. In the event that a faculty member contests an overall evaluation of "acceptable," the chairperson's evaluation is subject to review by the committee.

Overall evaluations of "not acceptable," "marginal," or "superior" are reviewed by the committee. If the committee disagrees with the chairperson's evaluation after reviewing the file, it will recommend a different rating and refer the file to the dean for a final decision. The information provided to the dean includes a joint recommended rating by the committee and the final individual comments and ratings of the committee members regarding the person being evaluated. It is the committee members' final individual comments and ratings regarding the plaintiff that are at issue in this appeal.

With this background in mind, we turn to the specific facts and procedural history relevant to the plaintiff's claims on appeal. In May, 2016, after completion of his most recent annual review, the plaintiff, relying on the act, sent to the respondents[1] a request via e-mail for "[c]opies of all documents and communications, including but not limited to, electronic and written [records] related to my [annual] review."[2] In response to the plaintiff's request, the health center disclosed 908 pages of

[1] The named respondents before the commission were the Chief Executive Officer for Health Affairs of the health center and the health center.

[2] The plaintiff's request actually referred to a "post-tenure" review. The annual evaluative process may lead to a post-tenure review of a tenured faculty member if the faculty member receives at least two "marginal perfor-

records, within which it made various redactions. The redactions fell into two categories. First, the health center redacted any information that related to faculty members other than the plaintiff. Second, the health center redacted comments and ratings made by the individual committee members about the plaintiff's evaluation, their individual agreement or disagreement with the chairperson and with each other, and individual assessments of merit in each particular category and on an aggregate basis. The health center redacted the commentary on the basis that the disclosure of the redactions would have a potential substantial effect on the willingness of the individual members to participate in the evaluation process and that it otherwise was not required under the act.

On May 23, 2016, the plaintiff appealed to the commission, alleging that the respondents violated the act by failing to provide the plaintiff with the requested documents and communications. After the plaintiff appealed to the commission, the health center provided the plaintiff with approximately 200 additional pages of documents, some of which also contained redactions of the individual comments and ratings of the committee members regarding the plaintiff's evaluation. The additional records came primarily from the chairperson, the individual members of the committee, and the associate dean for faculty affairs. The redactions at issue before the commission were those that redacted the comments and ratings by the individual members of the committee about the plaintiff.

mance" ratings in a five year period that commences when tenure is awarded or it may lead to a post-tenure review if the faculty member receives one "not acceptable performance" rating. Although the health center originally indicated that the plaintiff had been subjected to a post-tenure review, during the hearings before the commission, the plaintiff affirmed that the health center's invocation of the post-tenure review process was a procedural error; the plaintiff was never subject to post-tenure review.

Three contested case hearings were held before the commission. At the hearings, the health center claimed that the redacted records were exempt from disclosure pursuant to § 1-210 (b) (1), which provides that nothing in the act should be construed to require the disclosure of preliminary drafts or notes provided that the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure. See General Statutes § 1-210 (b) (1). Scott Simpson, the freedom of information officer for the health center, testified that the final individual comments and ratings by the committee members regarding the plaintiff were not disclosed because they are made as part of the deliberative process prior to the final joint committee recommendation. According to Simpson, this information consists of deliberations about the plaintiff's ratings and the members' individual agreements or disagreements prior to providing a collective recommendation to the dean.

Simpson also provided the following testimony as to the purpose of the committee. The committee guards against bias and inconsistency in the ratings. The committee makes a generic or committee based recommendation that may reflect, generally, the individual comments made by the committee during the deliberative process. Simpson also testified that a single member cannot make a recommendation to the dean. Individual comments and ratings are maintained by Richard Simon, the nonvoting plan administrator of the annual review. After the committee arrives at a final joint recommendation, the committee recommendation and the printout of the final individual comments and ratings of the committee members are submitted to the dean, who makes the final decision. The dean sees the final comments and ratings by the committee members and the joint recommendation, the latter of which has been disclosed to the plaintiff.

At the second case hearing, Simon testified that a chairperson's evaluation will be reviewed by a three member committee in certain scenarios. If the majority of the three member committee agrees with the chairperson's evaluation, then Simon is authorized to approve the chairperson's evaluation without the dean's final review. During Simon's testimony, Simpson interjected that if the majority of the three member committee cannot agree with the chairperson's evaluation, then the full ten member committee reviews the evaluation. In the plaintiff's case, on at least one occasion, the three member committee did not agree with the chairperson's preliminary evaluation, so the full committee reviewed the evaluation.

Simon also described the committee's review process. The review process involves committee members submitting comments and proposed ratings to a database on a website. Members can reply to each other's comments. Furthermore, committee members can change their comments and proposed ratings throughout the process. They can also request changes by e-mailing Simon, who enters the changes into the database. Members can also request a change if certain items are flagged for discussion, where upon such a request, a meeting takes place where the committee members can change their votes. Any changes made to the comments or ratings during the deliberative process effectively write over the previous comments and ratings, deleting them from the database. After the committee members have completed their commenting process, the website has a box to check if committee members believe that deliberation beyond the comments is required. If the box is checked at the end of the commenting process, then as many meetings as necessary are conducted to discuss the items that have been earmarked for discussion. After all of the commenting and deliberations have concluded, Simon

prints out from the database the final individual ratings and final comments of the members and presents them to the dean with the committee's joint final recommended rating. Thus, the dean has access to the entire application with the supporting data, the chairperson's recommendation, the chairperson's justification, the joint rating of the committee, and the final comments and ratings of each member.

Simon went on to testify that the full committee begins the deliberative process with the assumption that the chairperson will prevail. If a simple majority of the eligible voting members of the full ten member committee[3] votes to overturn the chairperson's evaluation, then it will recommend a different rating and refer the plaintiff's evaluation to the dean for a final decision.

Simon and Simpson both testified that the joint recommendation to the dean is a number rating that represents the final joint recommendation of the committee. The number rating corresponds to the members' individual assessments of merit in each particular category, and then on an aggregate basis. This final number rating representing the joint collective recommendation of the committee is separate from the individual comments and ratings, which precede the collective number rating.[4]

Following the contested case hearings, the commission made the following findings and conclusions in its final decision. The commission found that the respondents' annual review is a yearly evaluation process.

[3] Although the full committee has ten voting members, a committee member can recuse himself or herself from voting on the faculty member's rating if they feel it is appropriate to do so. In the case of the plaintiff's evaluation process, Simpson testified that the plaintiff's chairperson would normally recuse herself because the plaintiff was in her department.

[4] The record is unclear as to how the individual assessments of merit in each particular category, and then on an aggregate basis, correspond to the final number rating representing the joint recommendation to the dean.

During the evaluation process, faculty members receive one of the following four performance ratings: superior, acceptable, marginal, and not acceptable. A faculty member's annual review can influence salary or trigger a post-tenure review. The committee, consisting of three members or ten voting members and one nonvoting plan administrator, reviews the evaluation of a department chairperson, and makes a recommendation to the dean. The dean reviews the recommendation of the committee and then makes a final and independent annual rating decision. The dean's final rating decision can be appealed to another administrative body.

The plaintiff's requested records were public records within the meaning of General Statutes §§ 1-200 (5), 1-210 (a), and 1-212 (a). Although the plaintiff requested all documents and communications related to his post-tenure review, Simpson determined, after speaking with the plaintiff about the request, that he was seeking documents and communications related to his annual process and any post-tenure review. Simpson limited the breadth of his search to the five years preceding the respondents' receipt of the request. The commission determined that the plaintiff found the parameters of the search were acceptable. The plaintiff received all of the committee's joint, unredacted recommendations from either a three member committee or a full committee to the dean along with the dean's unredacted final rating decision. Simpson reported that all responsive records, which included redactions, were disclosed to the plaintiff.

The commission found that the redactions at issue in the plaintiff's appeal were the deliberative comments made by members of the committee during the review process. The commission found that committee members, who are reviewing a department chairperson's annual evaluation or a post-tenure review matter, can

send their initial impressions on the matter to the nonvoting member of the committee, Simon, via e-mail. The committee members can also log into a database and record their impressions in that forum. The commission found that the redactions at issue concern the process by which committee members deliberate with each other in order to reach a recommendation for the dean. The plaintiff sought the committee members' comments among themselves, whether such comments occurred among a three member panel or among the full membership of the committee.

The commission concluded that the respondents did not violate the act as alleged in the complaint and further concluded that the redacted portions of the requested records are permissibly exempt pursuant to § 1-210 (b) (1). The commission found that the comments among the members of the committee precede a formal and informed recommendation to the dean, the committee members' comments are "notes," within the meaning of § 1-210 (b) (1), and the respondents properly determined that the public interest in withholding the notes clearly outweighed the public interest in disclosure on the basis that public disclosure of the records would have a chilling effect on the willingness of the members to provide the candid assessments necessary to ensure an objective evaluation process. The commission also found, without explanation, that the redacted portions of the requested records are not interagency or intra-agency memoranda, letters, advisory opinions, recommendations or reports within the meaning of § 1-210 (e) (1). On April 28, 2017, the plaintiff filed a petition for reconsideration of the final decision, which the commission denied.

On June 21, 2017, the plaintiff appealed to the Superior Court, pursuant to General Statutes § 4-183, from the commission's final decision. The plaintiff claimed that (1) the health center violated § 1-225 because the

committee members had not reduced their comments to writing, (2) the health center erred because the committee votes must be taken in public, (3) the health center violated provisions of the act relating to executive sessions, (4) his rights to due process will be violated because the commission's final decision precludes him from asserting his employment rights, (5) the redacted records at issue are not preliminary drafts or notes, (6) the commission improperly concluded that the health center had in good faith determined that the preliminary notes should be exempt pursuant to § 1-210 (b) (1) because the public interest in withholding the documents outweighs the public interest in disclosure, and (7) the commission erred in its application of § 1-210 (e) to the comments of the committee members. As relief, the plaintiff sought production of the redacted final comments and ratings from the committee members that were delivered to the dean for his final review.[5]

The trial court issued a memorandum of decision, in which it dismissed the plaintiff's appeal. The court declined to rule on the following issues raised by the plaintiff because the claims were not asserted before the commission: (1) the health center violated § 1-225 because the committee members had not reduced their comments to writing, (2) the health center erred because the committee votes must be taken in public, and (3) the health center violated provisions of the act relating to executive sessions. The court also held that the plaintiff's due process claim could not be raised in

[5] Although the plaintiff's prayer for relief in his complaint provides that the health center "should promptly provide the redacted performance evaluation" to the plaintiff, his complaint makes clear that he is seeking the final comments and ratings provided to the dean. He similarly confirmed at oral argument before this court that he is seeking only the final committee member comments and ratings that were provided to the dean. In addition, the complaint concedes that it is appropriate for the health center to maintain the anonymity of the authors of the comments.

an administrative appeal before the trial court. As to the remaining claims, the court concluded that the individual comments and ratings that the committee members made during the deliberative process constituted preliminary drafts or notes that were exempt from disclosure under § 1-210 (b) (1). It concluded further that the commission correctly determined that the health center, pursuant to § 1-210 (b) (1), properly had resolved the balance between secrecy and disclosure of the preliminary drafts or notes in good faith. The court further concluded that § 1-210 (e) (1) did not require production of the committee members' final comments and ratings because they were "preliminary" to the committee's recommendation to the dean. This appeal followed.

The plaintiff claims that the trial court improperly concluded that the commission properly determined that the redacted records at issue, the final versions of the comments and ratings of the members of the committee that were delivered to the dean with the committee's joint recommended rating, were exempt from disclosure under the act pursuant to § 1-210 (b) (1) and (e) (1). The plaintiff argues that the redacted records he seeks are the final result of the committee's administrative function. The health center argues, to the contrary, that the redacted records constitute exempt preliminary drafts or notes because they consist of the individual comments and ratings of the committee members, which preceded both the committee's joint recommendation and the dean's final decision. We agree with the defendants that the trial court properly concluded that the commission correctly determined that the redacted records at issue were exempt pursuant to § 1-210 (b) (1). However, for the reasons set forth in part II of this opinion, we disagree with the defendants that the trial court properly concluded that the commission correctly determined that the redacted records were exempt pursuant to § 1-210 (e) (1).

"The scope of our review of the merits of the plaintiffs' argument is governed by a provision of the [act], General Statutes § 1-206 (d), and complementary rules of the Uniform Administrative Procedure Act . . . General Statutes § 4-166 et seq. [W]e must decide, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily or illegally, or abused its discretion. . . . Even as to questions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . Although the interpretation of statutes is ultimately a question of law . . . it is the well established practice of this court to accord great deference to the construction given [a] statute by the agency charged with its enforcement." (Footnote omitted; internal quotation marks omitted.) *Coalition to Save Horsebarn Hill* v. *Freedom of Information Commission*, 73 Conn. App. 89, 92–93, 806 A.2d 1130 (2002), cert. denied, 262 Conn. 932, 815 A.2d 132 (2003). Where, as in this case, the application of the statute to the documents at issue is fact bound, the abuse of discretion standard governs the appeal. Id.

By way of background, we discuss briefly the policy of the act. "[T]he overarching legislative policy of [the act] is one that favors the open conduct of government and free public access to government records. . . . [I]t is well established that the general rule under the [act] is disclosure, and any exception to that rule will be narrowly construed in light of the general policy of openness expressed in the [act]. . . . [Thus] [t]he burden of

proving the applicability of an exception [to disclosure under the act] rests upon the party claiming it." (Citation omitted; internal quotation marks omitted.) *Lieberman* v. *Aronow*, 319 Conn. 748, 754–55, 127 A.3d 970 (2015).

I

We first address the plaintiff's claim that the trial court improperly concluded that the commission properly determined that the redacted records at issue were exempt pursuant to § 1-210 (b) (1). Section § 1-210 (b) (1) provides: "Nothing in the Freedom of Information Act shall be construed to require disclosure of: . . . Preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure . . . ." Consequently, a party claiming that records are exempt from disclosure under § 1-210 (b) (1) must prove, first, that the records are preliminary drafts or notes and, second, that the public interest in withholding the documents clearly outweighs the public interest in disclosure. See *Lewin* v. *Freedom of Information Commission*, 91 Conn. App. 521, 526, 881 A.2d 519, cert. denied, 276 Conn. 921, 888 A.2d 88 (2005).

With respect to § 1-210 (b) (1), "*Wilson* v. *Freedom of Information Commission*, 181 Conn. 324, 332–33, 435 A.2d 353 (1980), defined preliminary drafts in a manner that our courts subsequently have uniformly applied. [T]he term preliminary drafts or notes relates to advisory opinions, recommendations and deliberations comprising part of the process by which government decisions and policies are formulated. . . . Such notes are predecisional. They do not in and of themselves affect agency policy, structure or function. They do not require particular conduct or forbearance on the part of the public. Instead, preliminary drafts or notes reflect

that aspect of the agency's function that precedes formal and informed [decision-making]." (Internal quotation marks omitted.) *Coalition to Save Horsebarn Hill* v. *Freedom of Information Commission*, supra, 73 Conn. App. 95.

"Preliminary is defined as something that precedes or is introductory or preparatory. As an adjective it describes something that is preceding the main discourse or business. A draft is defined as a preliminary outline of a plan, document or drawing . . . . By using the nearly synonymous words preliminary and draft, the legislation makes it very evident that preparatory materials are not required to be disclosed." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Van Norstrand* v. *Freedom of Information Commission*, 211 Conn. 339, 343, 559 A.2d 200 (1989).

"[T]he concept of preliminary [within the meaning of § 1-210 (b) (1)], as opposed to final, should [not] depend upon . . . whether the actual documents are subject to further alteration. . . . [P]reliminary drafts or notes reflect that aspect of the agency's function that precedes formal and informed [decision-making]. . . . It is records of this preliminary, deliberative and predecisional process that we conclude the exemption was meant to encompass." (Citation omitted; internal quotation marks omitted.) *Shew* v. *Freedom of Information Commission*, 245 Conn. 149, 165, 714 A.2d 664 (1998).

Applying these principles to the present case, we conclude that the commission correctly determined that the redacted records are preliminary drafts or notes within the meaning of § 1-210 (b) (1). The redacted records at issue consist of the individual comments and ratings of the committee members made during the deliberative process of the multistep committee process during which the committee members deliberate in the

form of stated impressions in order to reach a finalized, collective recommendation for the dean. The stated individualized impressions, in and of themselves, precede the formal and informed collective recommendation of the committee.

The plaintiff argues that, even if the commission properly determined that the redacted records are preliminary drafts or notes within the meaning of § 1-210 (b) (1), the commission improperly determined that the benefit of withholding the records at issue outweighs the public interest in disclosure. The plaintiff contends that withholding the records hinders the ability to justify the use of public funds to support a state employee's salary. The health center argues that it provided sufficient reasoning establishing that the chilling effect on candid, uninhibited discussion met the statutory requirements of § 1-210 (b) (1). We disagree with the plaintiff and conclude that the commission did not abuse its discretion when it determined that the benefit of withholding the records at issue outweighs the public interest in disclosure.

"The responsibility for balancing those public interests rests specifically with the public agency involved. . . . However, the statute's language strongly suggests that the agency may not abuse its discretion in making the decision to withhold disclosure. The agency must, therefore, indicate the reasons for its determination to withhold disclosure and those reasons must not be frivolous or patently unfounded." (Citation omitted; internal quotation marks omitted.) *Lewin* v. *Freedom of Information Commission*, supra, 91 Conn. App. 526.

In its final decision, the commission found that the respondents determined that public disclosure of the records would have a chilling effect on the willingness of the committee members to provide the candid assessments that are necessary to ensure an objective evaluation process. At the December 8, 2016 hearing before the

commission, Simon testified that allowing disclosure would have a chilling effect on the deliberative process. In addition to his testimony at the hearing, Simon testified in an affidavit that he is able to solicit honest and candid assessments from the committee members because of an assurance that their honest and candid assessments will be confidential. Simon testified further that, without the assurance of confidentiality, he is certain that there would be a chilling effect on the willingness of the committee members to provide the candid assessments that are necessary to ensure a fair, objective, and unbiased evaluation process and, therefore, allowing disclosure would cause committee members to quit. Our review of the reasons set forth by the health center persuades us that the commission did not abuse its discretion in finding that the notes were exempt from disclosure under § 1-210 (b) (1).

II

The plaintiff next claims that, even if the notes were exempt from disclosure pursuant to § 1-210 (b) (1), the commission abused its discretion in its application of § 1-210 (e) (1) to the records at issue. We agree with the plaintiff.

Section 1-210 (e) (1) provides: "Notwithstanding the provisions of subdivisions (1) and (16) of subsection (b) of this section, disclosure shall be required of: . . . Interagency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, except disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency." "Documents that qualify for the [§ 1-210 (b) (1)] exemption nonetheless may be disclosable under [§ 1-210 (e) (1)]

if they constitute interagency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated . . . . The disclosure provisions of [§ 1-210 (e) (1)] are qualified, however, in that disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency . . . .'' (Citation omitted; internal quotation marks omitted.) *Shew* v. *Freedom of Information Commission*, supra, 245 Conn. 165–66.[6]

The issue to be resolved in the present case is whether the final comments and ratings of the committee members, which are delivered to the dean, fall under the preliminary draft subject to revision exemption within § 1-210 (e) (1). Thus, we begin by determining the meaning of the exemption. ''When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other

[6] Although both the commission and health center cite to *Shew* in their appellate briefs, they do so only as to the definition of ''preliminary'' under § 1-210 (b) (1). They do not discuss or rely on the court's analysis in that case of the applicability of § 1-210 (e) (1) to the documents requested. Although neither appellee relies on *Shew* to argue that the individual committee recommendations delivered to the dean were preliminary drafts subject to revision, we have considered the applicability of *Shew* to our analysis and conclude that its facts are distinguishable as they relate to the application of § 1-210 (e) (1). At issue in *Shew* were the summaries of interviews conducted by an outside attorney retained by the town of Rocky Hill. See *Shew* v. *Freedom of Information Commission*, supra, 245 Conn. 151. The court held that the attorney was a member of the staff of the town for purposes of the predecessor to § 1-210 (e) (1), and her summaries that later were incorporated into a report prepared by the town constituted preliminary drafts subject to revision. See id., 165–67. Unlike the attorney's summaries in *Shew*, the final comments and ratings of the committee members in the present case were not subject to revision for inclusion in a final report. Instead, they constituted the final recommendations of the members, which the dean used in determining the final rating to give the plaintiff.

words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *McCall* v. *Sopneski*, 202 Conn. App. 616, 622, A.3d (2021). "The intent of the legislature, as [our Supreme 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." (Internal quotation marks omitted.) *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission*, 330 Conn. 372, 393, 194 A.3d 759 (2018).

"In analyzing [§ 1-210 (e) (1)], we must . . . construe the words used according to their commonly approved usage. . . . While the language initially removes many kinds of material from the exempt status, this additional requirement for disclosure is immediately qualified in two important respects. First, the material to be disclosed must [comprise] part of the process by which governmental decisions and policies are formulated. Second, disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Van Norstrand* v. *Freedom of Information Commission*, supra, 211 Conn. 347.

The commission, here, found that the "redacted portions of the requested records are not interagency or intra-agency memoranda, letters, advisory opinions, recommendations or reports, within the meaning of § 1-210 (e) (1) . . . ." It provided no rationale for this conclusion. Similarly, the health center's appellate brief provides no analysis of this issue other than to state that the commission's finding was appropriate and not an abuse of discretion. In its appellate brief, the commission argues that § 1-210 (e) (1) does not apply to the redacted member comments because "[t]he records at issue, as identified at the [commission], are comprised of the [committee] members' individual thoughts and impressions, which preceded a formal and informed recommendation to the [d]ean," and that "[t]he fact that the comments and ratings may be printed out onto one document (from the database) does not transform such information into memoranda, letters, advisory opinions, recommendations, nor reports." (Internal quotation marks omitted.) The trial court apparently adopted this reasoning because it held that § 1-210 (e) (1) did not apply because the members' stated impressions and the individual scores the committee members gave during the process were "preliminary."

The plaintiff argues that the committee members' final comments and ratings are memoranda, reports, or recommendations, and that they were not preliminary, as that term is used in § 1-210 (e) (1), because they were available to and relied on by the dean in making his final performance rating of the plaintiff.[7] We agree

[7] The plaintiff does not claim that the committee members' commentary constitutes a letter and merely references "advisory opinions" in a bare assertion that the redacted records must be disclosed to the plaintiff. See *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 444, 35 A.3d 188 (2012) ("It is well established that [w]e are not obligated to consider issues that are not adequately briefed. . . . Whe[n] an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived." (Internal quotation marks omitted.)).

with the plaintiff that the final comments and ratings of the committee members constitute recommendations.

"In the absence of a statutory definition, words and phrases in a particular statute are to be construed according to their common usage. . . . To ascertain that usage, we look to the dictionary definition of the term." (Internal quotation marks omitted.) *Picco* v. *Voluntown*, 295 Conn. 141, 148, 989 A.2d 593 (2010). A "recommendation" is defined as "[t]he act of recommending" and "[s]omething that recommends; specifically a favorable statement concerning character or qualifications" of someone. The American Heritage Dictionary of the English Language (5th Ed. 2011) p. 1469. The term "recommend" is defined as "[t]o praise or commend to another as being worthy or desirable; endorse," "[t]o make attractive or acceptable," and "[t]o advise or counsel [that something be done]." Id.

The record, here, does not support the conclusion of the commission that the redacted records do not contain recommendations. According to the testimony provided at the case hearings, the individual comments and ratings are evaluations by the committee members of the work of their peers. The evidence in the record and the testimony provided at the case hearings describe the committee members' commentary as agreements or disagreements with the chairperson's evaluation. The committee members, in general, also provide a rationale for their comments. The dean is presented with the final commentary of the committee members, observes why the committee members voted in a certain manner, and reviews the individual comments and ratings when arriving at a final decision. The final comments and ratings provided by the committee members are no less of a recommendation as to how the plaintiff should be reviewed than is the chairperson's evaluation. Furthermore, the record is clear that the dean reviews these

final comments and ratings when deciding how to rate the plaintiff. Thus, although the individual committee members' comments and ratings are initially submitted as recommendations for the purpose of the committee's deliberations, the final version of the comments and ratings serve as recommendations for the purpose of the dean's review of the faculty member's rating. As mentioned earlier in this opinion, the comments and ratings include the committee members' individual agreement or disagreement with the chairperson and with each other, and individual assessments of merit in each particular category and on an aggregate basis. These comments and ratings in effect "counsel or advise" the dean in determining whether to approve the faculty rating provided by the joint committee or by the chairperson, especially in light of the "generic" recommendation provided by the joint committee. Therefore, the individual committee members' comments and ratings are recommendations for the purpose of the dean's determination, and, thus, they constitute "recommendations . . . comprising part of the process by which governmental decisions and policies are formulated . . . ." General Statutes § 1-210 (e) (1). Section 1-210 (e) (1) therefore requires that they be disclosed unless they fall under that section's exemption for "preliminary draft[s] of a memorandum . . . ." We conclude that they do not fall under the exemption. Accordingly, we conclude that the trial court and the commission misapplied the term "preliminary," as it is used in § 1-210 (e) (1).

Section 1-210 (e) (1) exempts from disclosure "preliminary draft[s] of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among members of such agency." Both the court and the commission concluded that the comments of the committee members were "preliminary" because they preceded the dean's final recommendation. Although that is a

proper interpretation of how the word is used in § 1-210 (b) (1), it is clear that "preliminary" has a more limited meaning in § 1-210 (e) (1). Under that section, a memorandum is preliminary if it is "subject to revision prior to submission . . . ." General Statutes § 1-210 (e) (1). Applying this definition to the facts of this case, the preliminary comments and ratings by the committee members that were subject to revision after discussion among the committee members were preliminary and not subject to disclosure. However, the final comments and ratings by each committee member that were delivered to the dean were no longer subject to revision, and the individual comments and ratings by each committee member were utilized by the dean to review why the committee members voted in a certain manner. Accordingly, those comments and ratings were not "preliminary" under the definition provided in § 1-210 (e) (1). Significantly, the plaintiff only seeks disclosure of the final comments and ratings provided by the committee members and not their preliminary comments and ratings that may have been revised, to the extent that those documents still exist.

We conclude that this is the only logical conclusion that can be reached by reading § 1-210 (b) (1) and (e) (1) together, particularly given that § 1-210 (e) (1) specifically was adopted, at least in part, to require disclosure of preliminary notes and drafts that otherwise would be protected from disclosure under § 1-210 (b) (1).

Our Supreme Court's decision in *Wilson* v. *Freedom of Information Commission*, supra, 181 Conn. 324, provides helpful context to the interplay of § 1-210 (b) (1) and (e) (1). In *Wilson*, our Supreme Court addressed whether recommendations from members of a program review committee (PRC) established by the University of Connecticut that were made to the plaintiff, the vice

president of academic affairs, were required to be disclosed under what is now § 1-210 (b) (1) of the act. "The function of the PRC was to review the operations of the various academic departments of the university and to make recommendations to [the plaintiff] aimed at improving efficiency in those departments. The recommendations, which took the form of periodic memoranda directed to [the plaintiff], included changes in the existing administrative structure and programs within the university." Id., 326. The issue before the court in *Wilson* was whether the memoranda provided to the plaintiff constituted preliminary notes or drafts that were exempt from disclosure. See id., 327. "Both the commission and the trial court concluded that the PRC documents were not preliminary drafts or notes. They based this conclusion on the fact that the documents in question are final drafts as far as the PRC is concerned, not subject to alteration; they are separate, distinct and completed documents in and of themselves." (Footnote omitted; internal quotation marks omitted.) Id., 330–31.

Our Supreme Court disagreed and held that "the term preliminary drafts or notes relates to advisory opinions, recommendations and deliberations comprising part of the process by which government decisions and policies are formulated. . . . Such notes are predecisional. They do not in and of themselves affect agency policy, structure or function. They do not require particular conduct or forbearance on the part of the public. Instead, preliminary drafts or notes reflect that aspect of the agency's function that precedes formal and informed [decision-making]. We believe that the legislature sought to protect the free and candid exchange of ideas, the uninhibited proposition and criticism of options that often precedes, and usually improves the quality of, governmental decisions. It is records of this preliminary, deliberative and predecisional process that

we conclude the exemption was meant to encompass." (Citations omitted; internal quotation marks omitted.) Id., 332–33.

Wilson predated the adoption of § 1-210 (e) (1). In fact, our Supreme Court, in *Van Norstrand* v. *Freedom of Information Commission*, supra, 211 Conn. 346 n.3, noted that the legislative history of No. 81-431 of the 1981 Public Acts demonstrates that the enactment of what is now § 1-210 (e) (1) was motivated in part by the Supreme Court's decision in *Wilson*.[8] Thus, in *Wilson*, our Supreme Court held that comments and recommendations, very similar to those at issue in the present

[8] During the Senate proceedings discussing the bill, its proponent, Senator Wayne A. Baker made the following remarks: "[T]his bill originated in the Government Administration and Elections Committee and its purpose was to overturn the Supreme Court's holding in a case of [*Wilson* v. *Freedom of Information Commission*, supra, 181 Conn. 324]. . . . And so this bill would require the disclosure of all interagency and intra-agency documents which are part of the process of governmental decision-making and this would include letters, advisory opinions, recommendations or any record of agency deliberations by which governmental decisions and policies are formulated or when a record does constitute a preliminary draft or [note], unless the public interest in nondisclosure clearly outweighs the public interest in disclosure. . . .

"And finally, House Amendment D broadened the exemption from disclosure for preliminary drafts of memos by striking a requirement in House Amendment A that any subsequent revision would be by the author of the memo. The effect is to exempt preliminary drafts of memos by agency staff, memos which are subject to revision by anyone. . . .

"The Act creates broad rights of public access to the records of meetings of all public agencies. It also contains a limited number of exceptions to the general rule of disclosure and openness. All of this is consistent with the Freedom of Information laws intent that the people have the fundamental right to know in a timely fashion not only what governmental decisions are but what considerations go into those decisions. Unfortunately, our Supreme Court has said in the case of [*Wilson* v. *Freedom of Information Commission*, supra, 181 Conn. 324] that the [act] should be interpreted as having the same meaning as the federal act even where their language and legislative policy are dissimilar. Mr. President, this bill basically reaffirms and clarifies the original intent and purpose in light of that case. It makes clear, hopefully once and for all, that the deliberative process of government agencies shall be open to the public except where the legislature alone determines a superior public interest in confidentiality." 24 S. Proc., Pt. 17, 1981 Sess., pp. 5418–23, remarks of Senator Wayne A. Baker.

In addition to Senator Baker's statement, Senator Clifton A. Leonhardt remarked: "I think that if the [*Wilson*] decision had been allowed to stand,

case, were protected from disclosure because they were preliminary notes or drafts under § 1-210 (b) (1). *Wilson* v. *Freedom of Information Commission*, supra, 181 Conn. 332–33. In response, our legislature added § 1-210 (e) (1) to the act to require the production of such records unless they were subject to further revision before being transmitted interagency or intra-agency. Reading "preliminary" to cover any document that precedes the final decision of an agency, as the court and the commission did in this case, essentially renders § 1-210 (e) (1) meaningless.

Our conclusion also is consistent with our Supreme Court's analysis in *Van Norstrand* v. *Freedom of Information Commission*, supra, 211 Conn. 339. In *Van Norstrand*, the Journal Inquirer newspaper sought disclosure from the speaker of the House of Representatives

there really would have been such a large gap or loophole in the Freedom of Information's statutes for interagency and intra-agency memorandas that it really would have, in effect gutted the Freedom of Information statutes." Id., pp. 5423–24, remarks of Senator Clifton A. Leonhardt. Senator Leonhardt further remarked: "As I listen to this colloquy, Mr. President, I think Senator Baker is correct that there will certainly be some cases that are somewhat close and that will require interpretation by the [c]ommission, but I do think that there is a clear and fundamental distinction between the types of documents that this bill will make open to public inspection. [Intra-agency], excuse me, interagency or [intra-agency] memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, that on the one hand implies a finished government document which is having an impact on decision-making is a decision-making document. I think that is quite a clear thing, as compared to the long-standing exception under the Freedom of Information law in the file copy in lines 50 to 53, preliminary drafts and notes provided the public agency is determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure. So, I think on the one hand one is talking about a finished document and on the other hand, one is talking about preliminary drafts or notes and so I think that again, the [government administration and elections] committee is to be commended on drawing a clear and proper distinction here and one that will not allow the preliminary drafts and notes exception to be so much expanded that it eventually swallows the rule of disclosure." Id., pp. 5428–29.

"of the data he had obtained as the result of a survey of members of the Connecticut Bar Association evaluating various characteristics of the judges of the Superior Court. . . . The qualities of the individual judges evaluated included judicial integrity, demeanor, diligence, caseflow management, familiarity with current law, soundness of written rulings and worthiness for retention. Fifteen hundred completed questionnaires were returned. The questionnaires included evaluations of judges who were not scheduled for reappointment in 1986, as well as those of judges who were [scheduled for reappointment].

"The data thus acquired were thereafter compiled in a numerical format for all of the judges. Those with the least favorable ratings were reviewed by the plaintiff to determine which of them were scheduled for reappointment in 1986. After this, the information concerning judges not due for reappointment was excised from the final survey results. The plaintiff testified that the only purpose in gathering information about those judges whose terms were not expiring in 1986 was to ensure general statistical reliability. The excised data were not presented to the legislature or to any legislative committee nor were they used in any way in the legislative [decision-making] process." Id., 340–41.

The issue in *Van Norstrand* was whether the survey information related to judges not scheduled for reappointment in 1986 had to be disclosed. The court determined that the information did not have to be disclosed because it was included in a preliminary draft as defined in § 1-210 (e) (1). Id., 343–48. Critical to the court's analysis were "the fact that the data concerning judges not scheduled for reappointment were obtained solely to establish the statistical validity of the survey; and . . . the fact that the requested information was there-

after excised as irrelevant from the summary before it was circulated or used in the deliberative process." Id., 343. Significantly, the court further explained: "Had the purpose of the survey been to compile data with respect to all judges in the state which would thereafter be used in connection with their respective reappointments, whenever they might be, then the [commission] would be correct in asserting that the survey was not a *draft* document but rather a *completed* document." (Emphasis in original.) Id.

In this case, the final individual comments and ratings provided by the committee members to the dean were used in the dean's deliberative process and were part of a completed, not draft, document. Consequently, they are distinguishable from the draft information withheld in *Van Norstrand*. Instead, they are precisely the type of documents that our Supreme Court in *Van Norstrand* stated should be produced pursuant to § 1-210 (e) (1). Accordingly, we conclude that the trial court improperly concluded that the commission had correctly applied § 1-210 (e) (1) to the final comments and ratings at issue in the present case.

Because § 1-210 (e) (1) requires the requested documents to be produced, even though disclosure would not otherwise be required under § 1-210 (b) (1), the trial court abused its discretion when it dismissed the plaintiff's appeal.[9] The plaintiff is entitled to judgment

[9] To the extent we consider the health center's policy argument that requiring disclosure of the final comments and ratings by committee members will chill the discussion that is a necessary part of the peer review process and discourage faculty members from serving on the committee, we are not persuaded. The health center can protect from disclosure the comments and ratings by the committee members by choosing not to disclose them to the dean, and, instead, by providing the dean with just the joint final recommendation of the committee. If the health center did so, the committee members could discuss freely their views of the person they are evaluating, without worry that their comments and ratings would be made public.

in his favor requiring the disclosure of the final comments and ratings by the committee members that were delivered to the dean. In light of this conclusion we need not address the plaintiff's other claims that the trial court failed to consider whether the commission failed to apply certain statutes of the act and chapters 563 and 563a of the General Statutes, his due process rights have been or will be violated as a result of the commission's decisions, and other statutes mandate disclosure of the documents.

The judgment is reversed and the case is remanded with direction to render judgment for the plaintiff.

In this opinion the other judges concurred.

ELIZABETH MECCA *v.* WILLIAM F. MECCA, JR. (AC 43293)

Moll, Alexander and DiPentima, Js.

Syllabus

The defendant, whose marriage to the defendant had previously been dissolved, appealed from the decision of the trial court denying his motion to open the judgment of dissolution. Prior to the commencement of the dissolution action, the plaintiff forwarded to the defendant an e-mail, which he did not read, which contained information relating to certain pending litigation involving the estate of the plaintiff's uncle. The dissolution judgment incorporated the parties' separation agreement, in which the defendant expressly waived any right to proceeds to be received by the plaintiff in the future as a result of the estate litigation. More than four months later, the defendant filed a motion to open the judgment, claiming that the judgment was obtained as a result of fraudulent misrepresentations by the plaintiff and that the plaintiff failed to disclose her receipt of an inheritance related to a settlement of the estate litigation. The court denied the motion, finding that the defendant chose not to read the documents regarding the litigation, which were disclosed by the plaintiff, and that there was no fraud on the part of the plaintiff. On the defendant's appeal, *held*:

1. The defendant could not prevail on his claim that the trial court abused its discretion when it applied an incorrect legal standard in denying his motion to open: contrary to the defendant's claim, the court did not

improperly assign him a duty of due diligence; the court simply acknowledged that a party to a dissolution action cannot ignore documents that were appropriately delivered to him, only to later claim that the disclosed potential asset was fraudulently withheld from him, which was particularly true in the present case, where the defendant had ample time and opportunity to review the disclosures, the plaintiff informed the defendant of the potential asset, the defendant signed a separation agreement wherein he waived any right to the potential asset, and the separation agreement was incorporated into the judgment of dissolution; moreover, the court correctly applied the elements of fraud in addressing the defendant's claim and found that there was no fraud on the part of the plaintiff because the plaintiff clearly disclosed her intangible, potential interest in the estate to the defendant with ample time for him to review the disclosure, and, by focusing on whether the plaintiff disclosed and characterized the asset in the documents provided to the defendant, it was clear that the court applied the appropriate legal standard.

2. The defendant's claim that the trial court abused its discretion by failing to consider a pattern of fraudulent conduct on the part of the plaintiff was without merit; the court found that the plaintiff made appropriate disclosures to the defendant, expressly stating that there was no fraud, and this court's review of the record supported that court's conclusion because the plaintiff's potential asset, which was known to the defendant, involved a contested estate in Canada, and the final settlement of the litigation related to the estate occurred almost one year after the judgment of dissolution was rendered.

Argued December 1, 2020—officially released March 30, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Truglia*, *J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Rodriguez*, *J.*, denied the defendant's motion to open the judgment, from which the defendant appealed to this court. *Affirmed.*

Sheila S. Charmoy, for the appellant (defendant).

Jonathan E. Von Kohorn, with whom, on the brief, was *Tara L. Von Kohorn*, for the appellee (plaintiff).

Opinion

ALEXANDER, J. The defendant, William F. Mecca, Jr., appeals from the decision of the trial court denying his motion to open the judgment of dissolution. On appeal, he argues that the court abused its discretion by (1) applying an incorrect legal standard with respect to his motion to open and (2) failing to consider a pattern of fraudulent conduct on the part of the plaintiff, Elizabeth Mecca. We disagree and affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. The parties were married on June 18, 2000, in Portland. On June 4, 2015, the plaintiff's uncle, Bernard "Birdie" Marcus (Birdie Marcus), died. On December 21, 2015, the plaintiff forwarded an e-mail to the defendant, which he received but did not read. The e-mail contained details of a complaint filed in Canada by the plaintiff and other members of the Marcus family alleging that Birdie Marcus had been manipulated by his caretakers into executing a will that excluded his family members. This e-mail also contained a statement from the Canada Trust Company, dated November 5, 2015, that listed the gross value of the Estate of Birdie Marcus at C$5,809,294.15. Because the will of Birdie Marcus was contested and benefited a large number of third parties, the final settlement of the estate required extensive litigation that took place over a period of nearly four years.

In June, 2017, the plaintiff instituted the underlying dissolution action. On February 20, 2018, the marriage of the parties was dissolved by the court and the dissolution judgment incorporated the parties' separation agreement. Under the terms of the separation agreement, the defendant expressly "waive[d] any right, title or interest in and any proceeds to be received by the

[plaintiff] in the future as a result of [the pending] litigation in [Canada] involving the . . . [Estate of] Birdie Marcus . . . .”[1]

On December 14, 2018, the defendant filed a motion to open the judgment of dissolution, alleging that the judgment was obtained as a result of fraudulent misrepresentations made by the plaintiff.[2] Specifically, the defendant asserted that the plaintiff “made material misrepresentations on her [f]inancial [a]ffidavit inasmuch as she failed to disclose her receipt of an inheritance, that had already happened or was imminent, because she had entered into a settlement agreement as the result of a will contest . . . [that] ha[d] been pending in the Superior Court of Quebec . . . [in] the Estate of Birdie Marcus . . . .” (Internal quotation marks omitted.) The defendant further argued that the plaintiff “failed to list her interest in [the Estate of Birdie Marcus and the related] action during the entire pendency of the dissolution action . . . [and] made material misrepresentation[s] at her deposition on January 23, 2018 . . . .”

The court, *Rodriguez*, *J.*, held a hearing on the defendant’s motion to open on June 4 and 14, 2019. In denying the motion, the court found the following: “[T]he plaintiff disclosed a possible interest . . . in [the Estate of Birdie Marcus] . . . . [T]he plaintiff did not conceal anything . . . [and] disclosed what she knew of the existence of the claims in Canada. . . . [The defendant] chose not to read the documents and to not make

[1] The ultimate resolution of the litigation involving the Estate of Birdie Marcus did not occur until February 9, 2019, when a settlement agreement was finalized by the court in Canada.

[2] Although a motion to open a judgment generally must be filed within four months of the date on which the judgment was rendered, “[General Statutes §] 52-212a does not abrogate the court’s common-law authority to open a judgment beyond the four month limitation upon a showing that the judgment was obtained by fraud . . . .” *Bruno* v. *Bruno*, 146 Conn. App. 214, 230, 76 A.3d 725 (2013).

a claim, waiving it in the separation agreement. Therefore . . . there is no fraud in this case . . . .'' This appeal followed.[3]

I

The defendant first claims that the court abused its discretion by applying an incorrect legal standard in denying the motion to open. He argues that the court improperly (1) assigned to him a duty of due diligence and (2) failed to consider the proper elements of fraud in a marital dissolution action. We disagree.

A

The defendant first argues that the court improperly assigned to him a duty of diligence. Specifically, he claims that, with regard to the Estate of Birdie Marcus, ''[the plaintiff] was required to make an investigation of her assets using any readily available information, and clearly disclose the results of that investigation on her affidavit.'' The defendant argues that the court ''incorrectly placed a duty of diligence on the . . . [d]efendant'' and that his ''waiver was not an intentional relinquishment of a known right.'' The plaintiff counters that ''[t]he defendant's argument . . . ignores the fact that [the plaintiff's interest in the Estate of Birdie Marcus] was an intangible asset properly disclosed in advance of the judgment and separately negotiated as an express provision of the separation agreement.'' We agree with the plaintiff.

[3] We note that the defendant also raised an evidentiary claim in his reply brief that ''[t]he trial court committed reversible error when it excluded excerpts of the transcript of the plaintiff's deposition.'' We decline to address this claim because it was not properly raised by the defendant. See, e.g., *Bovat* v. *Waterbury*, 258 Conn. 574, 585 n.11, 783 A.2d 1001 (2001). ''Claims of error by an appellant must be raised in his original brief . . . so that the issue as framed by him can be fully responded to by the appellee in its brief, and so that [an appellate court] can have the full benefit of that written argument.'' (Internal quotation marks omitted.) *State* v. *Floyd*, 253 Conn. 700, 713 n.12, 756 A.2d 799 (2000).

Our standard of review is well established: "In an appeal from a denial of a motion to open a judgment, our review is limited to the issue of whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Reville* v. *Reville*, 312 Conn. 428, 440, 93 A.3d 1076 (2014).

The defendant claims that the court applied an incorrect legal standard by erroneously assigning him a duty of due diligence. In making this claim, however, the defendant mischaracterizes the applicable law, which requires "a continuing duty to disclose pertinent financial information until the judgment of dissolution is final." (Internal quotation marks omitted.) *Lederle* v. *Spivey*, 151 Conn. App. 813, 819, 96 A.3d 1259, cert. denied, 314 Conn. 932, 102 A.3d 84 (2014). In denying the plaintiff's motion, the court made the following finding: "[T]he plaintiff . . . disclosed what she knew of the existence of the claims in Canada . . . informing [the defendant] of the existence of the claims. With that knowledge, [the defendant] chose not to read the documents and to not make a claim, waiving it in the separation agreement." The court did not place a "duty of due diligence" on the defendant, as he attempts to characterize its determination. Rather, the court simply acknowledged that a party to a dissolution action cannot simply *ignore* documents that were appropriately delivered to him, only to later claim that the disclosed potential asset was fraudulently withheld from him. This is particularly true in the present case, where the defendant had ample time and opportunity to review

the plaintiff's disclosures. The trial court heard testimony that the initial disclosure by the plaintiff of the Estate of Birdie Marcus occurred via e-mail on December 21, 2015, and that an additional, related disclosure was made on January 18, 2017. The court credited this evidence and found that the plaintiff had informed the defendant of the potential asset. On February 16, 2018, the defendant signed a separation agreement, wherein he waived any right to the potential asset from the estate. The parties agreed to incorporate the terms of their separation agreement, which included the defendant's waiver of any right to the potential asset from the estate, into the court's final judgment of dissolution rendered on February 20, 2018.

It is also notable that the potential asset at issue was subject to a degree of uncertainty, as to both its availability and value. The defendant claims that the plaintiff failed "to make an investigation of her assets using any readily available information, and [to] clearly disclose the results of that investigation," but in making this claim he fails to account for the circumstances surrounding the potential asset. The trial court clearly addressed the uncertainty of this asset: "The court is mindful . . . of the lengthy process involved when claims against estates are made. No one really knows what if any assets will result at the end of the litigation. Therefore, the court finds that the plaintiff did not have any knowledge of what her benefits would be nor if she would receive any from the [Estate of Birdie Marcus] at the time of her dissolution." The record clearly supports the court's finding because the potential asset was timely disclosed by the plaintiff and was appropriately classified as an intangible asset. The plaintiff met her "continuing duty to disclose pertinent financial information"; (internal quotation marks omitted) *Lederle* v. *Spivey*, supra, 151 Conn. App. 819; and the defendant's

waiver in the separation agreement and in the final judgmentof dissolution was not the result of fraud. We conclude, therefore, that the court applied the proper legal standard and was within its discretion in denying the defendant's motion to open the judgment of dissolution.

B

The defendant next argues that the court abused its discretion by failing to consider the proper elements of fraud in a marital dissolution action. The defendant claims that the plaintiff made false factual representations at her deposition on January 23, 2018, and "committed fraud by failing to disclose the existence and value of the Birdie Marcus case on her financial affidavits . . . ." Additionally, the defendant argues that the plaintiff "deprived the . . . [c]ourt of being able to find that the separation agreement was fair and equitable," and that he relied on the plaintiff's false statement and failure to disclose to his detriment. The defendant further claims that "[t]here was no laches or unreasonable delay . . . after he discovered the fraud," and "[t]he evidence demonstrated that there [was] a substantial likelihood that the result of [a] new trial [would] be different." Finally, the defendant claims that the plaintiff's counsel made false representations of fact. In response, the plaintiff argues that the defendant failed to establish the elements of fraud necessary to support the opening of a final judgment. We agree with the plaintiff.

As stated previously, "our review is limited to the issue of whether the trial court has acted unreasonably and in clear abuse of its discretion." (Internal quotation marks omitted.) *Reville* v. *Reville*, supra, 312 Conn. 440. Accordingly, we will overturn the judgment of the trial court only if it could not reasonably have concluded as it did. Id.

"There are three limitations on a court's ability to grant relief from a dissolution judgment secured by fraud: (1) there must have been no laches or unreasonable delay by the injured party after the fraud was discovered; (2) there must be clear proof of the fraud; and (3) there is a substantial likelihood that the result of the new trial will be different." (Internal quotation marks omitted.) *Weinstein* v. *Weinstein*, 275 Conn. 671, 685, 882 A.2d 53 (2005); see also *Mattson* v. *Mattson*, 74 Conn. App. 242, 245–46, 811 A.2d 256 (2002). The elements of fraud have been defined by our Supreme Court: "(1) a false representation was made as a statement of fact; (2) the statement was untrue and known to be so by its maker; (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment." *Billington* v. *Billington*, 220 Conn. 212, 217, 595 A.2d 1377 (1991).

In the present case, in denying the defendant's motion to open, the court found the following: "[T]he plaintiff did not conceal anything, as she disclosed what she knew of the existence of the claims in Canada. [The defendant] knew about the estate; telling is [the] plaintiff's . . . e-mail . . . with [thirty-three] pages of documents informing [him] of the existence of the claims. With that knowledge, [the defendant] chose to not . . . read the documents and to not make a claim, waiving it in the separation agreement. Therefore, the court finds that there is no fraud in this case . . . ." On the basis of our review of the record, the court was well within its discretion in finding that there was no fraud on the part of the plaintiff. As the court detailed, the plaintiff clearly disclosed her intangible, potential interest to the defendant, with ample time for the defendant to review it. The defendant simply failed to review this disclosure. By focusing on whether the plaintiff disclosed and characterized the asset in the documents

provided to the defendant, it is clear that the court applied the appropriate legal standard in addressing the defendant's claim of fraud. Accordingly, we conclude that the court correctly applied the elements of fraud in this case and correctly found that there was no fraud by the plaintiff. On the basis of our review of the record, the court did not abuse its discretion in denying the defendant's motion to open.

II

The defendant's final claim is that the court abused its discretion by failing to consider as relevant a pattern of fraudulent conduct on the part of the plaintiff. In response, the plaintiff argues that "[t]he defendant failed to establish any pattern of fraud, including during the pendente lite period." We agree with the plaintiff.

As stated previously, the applicable standard of review for this claim is abuse of discretion, meaning that we will not disturb the judgment of the trial court unless it could not reasonably have concluded as it did. *Reville* v. *Reville*, supra, 312 Conn. 440.

Given our discussion in part I B of this opinion regarding the defendant's allegations of fraud, it is clear that the defendant's claim is without merit. As we previously noted, the court found that the plaintiff made appropriate disclosures to the defendant, and expressly stated that "there is no fraud in this case . . . ." Our review of the record supports the court's conclusion that there was no fraud, based on either a single act or on a pattern of behavior. The plaintiff's potential asset, which was known to the defendant, involved a contested estate in Canada. The plaintiff signed an agreement to settle the Estate of Birdie Marcus litigation on December 28, 2018, and the final settlement of that litigation occurred on February 9, 2019, almost one year *after* the judgment of dissolution was rendered.

Accordingly, the court was well within its discretion in denying the defendant's motion to open.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* GAVIN LYONS

STATE OF CONNECTICUT *v.* DAVID GORDON

STATE OF CONNECTICUT *v.* PRINCE GORDON

STATE OF CONNECTICUT *v.* ZIPPORAH GREENE-WALTERS

(AC 42807)

Bright, C. J., and Lavine and Cradle, Js.*

Syllabus

Following the search of a home located at 351 Noble Avenue in Bridgeport, the defendants, who all claimed to be residents of that address, were charged with various drug and weapons offenses. The warrant that supposedly authorized the search described the premises to be searched as "349 Noble Avenue." 349 Noble Avenue and 351 Noble Avenue are separate units within the same duplex. Each unit has its own driveway, front entrance, mailbox, electric meter, and gas meter, and neither unit can be accessed from inside of the other unit. Prior to trial, the defendants filed motions to suppress the evidence seized during the search, claiming that, because the warrant authorized a search of the property identified as "349 Noble Avenue," the search of 351 Noble Avenue was conducted without a warrant and that the seizure of the items could not be justified pursuant to any exception to the warrant requirement. Following a hearing, the trial court granted the defendants' motions and, on the state's motion, rendered judgment dismissing each information. The state, on the granting of permission, appealed to this court, claiming, inter alia, that the defendant in the first case, L, who was the only defendant who did not testify at the hearing, failed to meet his burden of proving an expectation of privacy in the area searched and, therefore, did not have standing to proceed with his motion. *Held:*

1. The trial court did not err in determining that L met his burden of proving an expectation of privacy in the area searched by law enforcement

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

officers and had standing to proceed with a motion to suppress: it is well established that owners, tenants, and even overnight guests of a dwelling have a reasonable expectation of privacy in that dwelling and, therefore, have standing to contest the legality of a search of the dwelling; moreover, the state's claims that the court relied on inadmissible hearsay and improperly took judicial notice of facts not testified to at the hearing in determining that L had a reasonable expectation of privacy are unavailing because the state failed to include an adequate analysis of how it was harmed by the court's evidentiary rulings in its brief; furthermore, the court's finding that L had a reasonable expectation of privacy in the area searched was not clearly erroneous when the executing officers found personal items, including men's clothing and important documents such as a passport and other identifications containing L's name or photograph, in the room he alleged was his own and when he was wearing a bathrobe and slippers at the time of the search, which commenced at 6 a.m., evidence that was sufficient to prove that L was, at a minimum, an overnight guest at the premises.

2. The trial court did not err in granting the defendants' motions to suppress: the search was conducted pursuant to a warrant that authorized the search of a different address, the only description of the premises in the warrant was the address, which clearly and unambiguously identified the place to be searched as "349 Noble Avenue," and the warrant did not contain any information indicating that the issuing magistrate instead intended 351 Noble Avenue to be searched or that the officers executing the warrant otherwise had knowledge of that intent; moreover, the mistake in the warrant was not cured by the affidavit filed in support of the warrant application because the warrant did not incorporate the contents of the affidavit, as it did not reference the affidavit, there was no evidence that the affidavit was attached to the warrant, and the affidavit was under seal and was not available to the executing officers, so it could not have been used to inform the officers that the warrant was actually intended to authorize a search of 351 Noble Avenue; furthermore, there are no facts in evidence to uphold the search in the face of the claim that the warrant lacked particularity because there was no evidence that the executing officers prepared the warrant or participated in the surveillance of the premises prior to the search and, therefore, understood the intended reach of the warrant and executed it accordingly; additionally, none of the factors that may justify a search with a technical error in the warrant was present in this case, as there was nothing on the face of the warrant to eliminate the possibility that another premises might be mistakenly searched, such as a physical description of the property, and there was no evidence that the executing officers conducted the presearch investigation or prepared the warrant application; accordingly, the search was a warrantless search that was presumptively unlawful and the state, relying entirely on the warrant

as legal authorization for the search, did not claim any exception to the warrant requirement.

Argued October 7, 2020—officially released March 30, 2021

Procedural History

Information charging the defendant in the first case with the crimes of theft of a firearm and possession of a controlled substance, and information charging the defendant in the second case with the crimes of sale of a controlled substance, operation of a drug factory, possession of a controlled substance, negligent storage of a firearm, possession of a controlled substance within 1500 feet of a school and possession of drug paraphernalia within 1500 feet of a school, and information charging the defendant in the third case with the crimes of sale of a controlled substance, possession of a controlled substance and possession of drug paraphernalia, and information charging the defendant in the fourth case with the crimes of sale of a controlled substance and possession of a controlled substance, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, where the trial court, *Hon. William Holden*, judge trial referee, granted the defendants' motions to suppress certain evidence and, on the state's motion, rendered judgment dismissing each information; thereafter, the state, on the granting of permission, appealed to this court. *Affirmed.*

Ronald G. Weller, senior assistant state's attorney, with whom were *C. Robert Satti, Jr.*, supervisory assistant state's attorney, and, on the brief, *John C. Smriga*, state's attorney, for the appellant (state).

Adele V. Patterson, senior assistant public defender, for the appellee (defendant Gavin Lyons).

Naomi T. Fetterman, for the appellees (defendant David Gordon et al.).

Opinion

BRIGHT, C. J. The state of Connecticut appeals from the judgments of the trial court dismissing informations brought against the defendants, Gavin Lyons, David Gordon, Prince Gordon and Zipporah Greene-Walters, following its granting of motions to suppress filed by the defendants.[1] On appeal, the state claims that the court improperly (1) determined that Lyons met his burden of proving an expectation of privacy in the areas searched by law enforcement agents and, thus, allowed Lyons to proceed with his motion to suppress,[2] and (2) granted the defendants' motions to suppress items seized during a search of a residence located at 351 Noble Avenue in Bridgeport. We affirm the judgments of the trial court.

The following factual and procedural history is relevant to our resolution of the claims on appeal. On January 31, 2017, a United States magistrate signed a federal search and seizure warrant that authorized the search of 349 Noble Avenue, in Bridgeport, which is one half of a multifamily residence. Specifically, the building at the premises is a duplex, with 349 being designated as the premises on the left when facing it from the street and 351 being the premises on the right. On February 1, 2017, state and federal law enforcement agents executed the search warrant at approximately 6 a.m. and entered through the rear of 351 Noble Avenue instead of 349 Noble Avenue, which was the address authorized by the warrant. The search of 351 Noble Avenue revealed the presence of controlled substances and weapons, for which the defendants, who were inside 351 Noble Avenue at the time of the search and claim

[1] Pursuant to General Statutes § 54-96, the state requested, and the trial court granted, permission to appeal from the judgments of dismissal.

[2] The state has not challenged the standing of the remaining defendants to file and pursue motions to suppress the search of the premises.

to be residents of that premises, were arrested and charged with various offenses.[3]

Thereafter, the defendants filed motions to suppress the evidence seized from 351 Noble Avenue. They claimed, inter alia, that because the search warrant issued by the federal magistrate authorized a search of the property identified as 349 Noble Avenue, the search of 351 Noble Avenue was conducted without a warrant and the seizure of items therein could not be justified pursuant to any exception to the warrant requirement. A hearing was held on the motions to suppress on July 23, 2018.

In its memorandum of decision granting the motions to suppress, the court found "the following facts based upon testimonial and documentary evidence. During the suppression hearing, the court received the testimony of Detective Ryan Slaiby, David Gordon, Prince Gordon, Zipporah Greene-Walters and Lieutenant [John] Cummings of the Bridgeport Police Department. . . . Lyons offered evidence through the cross-examination of Detective Slaiby. The court received a document in evidence as a full exhibit for purposes of the

[3] By way of information in docket number CR-17-0294700-S, Lyons was charged with theft of a firearm in violation of General Statutes § 53a-212 and possession of a controlled substance in violation of General Statutes § 21a-279 (a) (1). In docket number CR-17-0294868-S, David Gordon was charged by way of information with sale of a controlled substance in violation of General Statutes § 21a-277 (b), operation of a drug factory in violation of § 21a-277 (c), possession of a controlled substance in violation of § 21a-279 (a) (1), negligent storage of a firearm in violation of General Statutes § 53a-217a, possession of a controlled substance within 1500 feet of a school in violation of General Statutes § 21a-278a (b), and possession of drug paraphernalia within 1500 feet of a school in violation of General Statutes § 21a-267 (c). In docket number CR-17-0294869-S, Prince Gordon was charged by way of information with sale of a controlled substance in violation of § 21a-277 (b), possession of a controlled substance in violation of § 21a-279 (a) (1), and possession of drug paraphernalia in violation of § 21a-267 (a). Finally, in docket number CR-17-294870-S, Greene-Walters was charged by way of information with sale of a controlled substance in violation of § 21a-277 (b) and possession of a controlled substance in violation of § 21a-279 (a) (1).

hearing and marked state's exhibit number [1]. On January 31, 2017, a federal magistrate signed a federal search warrant for 349 Noble Avenue [in Bridgeport]." The court quoted a description of the property that was set forth in an affidavit in support of the warrant, which described the property as "a multifamily, wood-framed, Victorian style residence. . . . The residence has tan siding, light grey asphalt shingles and white trim around the windows and roof line. There are two entrances located on opposite sides of the front of the residence. The entrance on the left side has bright red painted steps. The entrance on the right has . . . dark red, almost maroon color painted steps. The porch area on the right side has green colored columns and green trim around the red colored door. There is a driveway and parking area to the left of the left entrance and a driveway and parking area to the right of the right entrance. The number 349 is clearly visible from the street and is affixed to one of the green columns at the left entrance."

The court further stated: "Detective Slaiby testified he was a part of a task force team numbering some twenty law enforcement officers from various state and federal agencies, including [the Department of] Homeland Security, that executed the search warrant intended for [the] address . . . 349 Noble Avenue. That task force at 6 a.m. on February 1, 2017, executed the search warrant signed by the [federal] magistrate authorizing the search of 349 Noble Avenue, not 351 Noble Avenue. Testimony revealed that 351 Noble Avenue is a separate and unconnected [unit].

"Detective Slaiby testified he never saw a warrant before entering the 351 [Noble Avenue] address; that he was aware there was a federal search warrant, however, he had not reviewed the search warrant prior to its execution; but [that] he had surveyed the area from the front of 349 Noble Avenue. Other law enforcement

agents had already entered the residence prior to Detective Slaiby. He testified the residence entered was a large structure with multiple floors and multiple rooms on each floor. A gun and two bags of raw marijuana were found in the third floor bedroom by another police officer. The gun was on top of the bed when Detective Slaiby went into the room. An identification card with the name 'Sean Brown' was also found in the room. There was no address listed on the identification card; the photo on the identification card was identified by Detective Slaiby in court as Lyons. The police did not find identification for 'Sean Brown' anywhere else in the house. Other identifications were found in the room with Lyons' name. There was a sign hanging in the room that read 'I do not give consent to search.' Inside the officers found pants and shirts and other men's clothing. In Lyons' room the task force located and seized passports and ID cards. . . . One identification card with a picture of . . . Lyons bore the name 'Sean Brown'; the others with his picture bore the name 'Gavin Augustus Lyons.' One identification card was found in a wallet, which was, in turn, inside the pocket of a pair of pants. During the search, officers found a Metro PCS receipt or bill for Sean Brown. Also seized [were] two small amounts of marijuana and a gun.

"Although Lyons was on the first floor of the building when Detective Slaiby first encountered him, federal agents informed Detective Slaiby that Lyons was found in the third floor bedroom when the SWAT team entered the 351 [Noble Avenue] residence. Lyons was later brought up to the third floor bedroom to confirm that it was his room. Detective Slaiby identified . . . Lyons at the suppression hearing. Detective Slaiby also testified that a large amount of contraband was found in a closet in a bucket in the room that Greene-Walters was found in.

"David Gordon testified that, at the time of the search, he had resided at 351 Noble Avenue for ten years [and] [t]hat he has an identification card that states that his address is 351 Noble Avenue. David Gordon further testified that the police broke in the door when they executed the warrant because the door was locked. Moreover, David Gordon testified that all the rooms in the house have locks on them. David Gordon testified that he rented 351 Noble Avenue as a whole house and collected money from individuals to whom he subsequently rented rooms. He stated that he would give out the keys to people for their room and replace any lost keys. David Gordon testified that 349 and 351 Noble Avenue have separate driveways, separate front porches and the addresses for each are displayed on the front porches. Other persons reside at 349 Noble [Avenue] and you cannot enter 349 [Noble Avenue] from the inside of 351 [Noble Avenue], and . . . the reverse is true. [Moreover] 349 Noble Avenue and 351 Noble Avenue do not share a living room, kitchen or basement. The building is a duplex. The gas and electric meters are separate.

"Greene-Walters testified that, at the time of the search, she [had] resided at 351 Noble Avenue for almost a year. She testified that when the police entered her residence, she was in bed and that they had to knock in the door because it was locked. She further testified that she had some mail in her room, which the police confiscated. The mail was addressed to her at 351 Noble Avenue. She further testified that the building has two driveways [and] separate electric and gas meters . . . [t]hat you cannot gain access . . . [to] 349 Noble [Avenue] from inside 351 Noble Avenue . . . [and] [t]hat the address numbers 349 and 351 are displayed on the front porch.

"Prince Gordon testified that, at the time of the search, he had been resid[ing] at 351 Noble Avenue for nine years.

His bedroom was on the first floor and . . . his door had a lock. When the police executed the warrant, he was sleeping in his room with the door locked. As a result, the police knocked in the door when they searched his room. The police seized his passport, his pistol permit, his birth certificate, and his driver's license. The driver's license was in his wallet, which was on the dresser in the room. The address listed on his license was 351 Noble Avenue. He testified that 349 Noble Avenue and 351 Noble Avenue have separate driveways, separate front entrances, separate mailboxes, separate electric meters located in the front of the [duplex] and separate gas meters located on the side [of] the [duplex]. Once inside 351 Noble Avenue you cannot enter 349 Noble Avenue. Each [unit] has a separate living room and kitchen.

"Bridgeport Lieutenant . . . Cummings testified that based upon his investigation . . . the building on Noble Avenue is a multifamily addressed as 349 and 351 Noble Avenue. He has been inside 351 Noble Avenue and testified that 349 and 351 Noble Avenue are separate units. . . . The court credits the testimony of each witness testifying and has applied appropriate weight to exhibit [1]."

On the basis of the testimony and documentary evidence, the court first determined that Lyons and the other defendants had met their burden of establishing an expectation of privacy necessary to challenge "the warrantless search and seizure of their person and property, which occurred [on] February 1, 2017, at their respective premises located at 351 Noble Avenue" in Bridgeport. Next, the court addressed the state's claim that the search was authorized by the contents of the affidavit that was executed in support of the search warrant. The court explained that "[t]he state's claim that, despite being executed at the wrong address, the warrant was executed at the place described in the

warrant depends entirely on its premise that the affidavit is part of the warrant." The court, however, concluded that the warrant did not incorporate the contents of the affidavit, that the affidavit was not available to the executing officers, that there was no evidence that the officers executing the warrant had prepared the warrant or participated in the surveillance of 351 Noble Avenue, that the warrant "clearly and unambiguously identifie[d] the place to be searched as 349 Noble Avenue," "with no further description," and, thus, that the search of a different place constituted a warrantless search that was "presumptively unlawful . . . ." Because the state did not claim any exception to the warrant requirement, the court granted the defendants' motions to suppress. After the informations against the defendants were dismissed, the court granted the state's request for permission to appeal, and this appeal followed. Additional facts will be set forth as necessary.

We first set forth our standard of review of a trial court's findings and conclusions related to a motion to suppress, which is well defined. See *State* v. *Jones*, 113 Conn. App. 250, 255–56, 966 A.2d 277, cert. denied, 292 Conn. 901, 971 A.2d 40 (2009). "When reviewing a trial court's [ruling on] a motion to suppress, [a] finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [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. . . . [When] 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 [trial court's] memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Houghtaling*, 326Conn. 330, 339–40, 163 A.3d 563 (2017), cert. denied, U.S. , 138 S. Ct. 1593, 200 L. Ed. 2d 776 (2018); see also *State* v. *Boyd*, 295 Conn. 707, 717, 992 A.2d 1071 (2010), cert. denied, 562 U.S. 1224, 131 S. Ct. 1474, 179 L. Ed. 2d 314 (2011).

I

The state's first claim is that the trial court erred when it determined that Lyons had met his burden of proving an expectation of privacy in the areas searched and, therefore, concluded that he had standing to proceed with his motion to suppress.[4] We disagree.

The following additional facts are necessary for a resolution of this claim. At the hearing on the motions to suppress, Lyons did not testify. Instead, he called Slaiby as his sole witness. Slaiby testified that, although he was part of a team that had executed the warrant, he waited for the SWAT team to clear the residence before taking any action after entering the house. After the SWAT team completed its sweep of the residence, Slaiby went to the third floor. At that time, Lyons was already on the first floor, as all of the residents had been brought to the first floor and were gathered near a bathroom. Slaiby testified further that there was a door to the room on the third floor, although he could not remember if there was a lock on the door. In that room, Slaiby found paperwork, including a passport and identification card, as well as an identification card in a wallet that was in a pair of jeans. Slaiby testified that members of the SWAT team had related to him that Lyons was located in the third floor room at the time they entered the residence and that Lyons had told

[4] On January 6, 2020, this court granted Lyons' motion for permission to file a separate appellate brief and appendix.

him that it was Lyons' bedroom.[5] After reviewing an inventory of Lyons' clothing taken at the time of his arrest to refresh his recollection, Slaiby indicated that Lyons was wearing a bathrobe and slippers when he was arrested. On cross-examination of Slaiby, the state challenged that testimony on the ground that the document used to refresh Slaiby's recollection was for a man named "Sean Brown." Slaiby further testified on redirect that other identifications found contained the name "Gavin Augustus Lyons," along with photographs of Lyons.

The court, in determining that Lyons met his burden of establishing a reasonable expectation of privacy sufficient to contest the search of 351 Noble Avenue, noted that Lyons kept important documents in his room, including his passport, birth certificate and other documents issued by the governments of Jamaica and the United States. The court further stated: "Detective Slaiby recognized that only . . . Lyons resided in his third floor bedroom. . . . Although Detective Slaiby could not say if [Lyons'] door had a lock on it, the three residents of 351 Noble Avenue who testified explained that each of the bedrooms in the house had a door with a lock installed on it. David Gordon paid rent to the owner of the building and he, in turn, charged other people to live there. Each room was rented separately and each had its own key and lock for the tenant to use, which he could replace if the renter lost it. . . . The search of [Lyons'] separately keyed room in which he alone resided constitutes an intrusion into a place he had manifested an intention to keep private." (Citations omitted.)

In reaching its conclusion, the court rejected the state's claim that residents of a multiunit dwelling have

[5] The state objected to this testimony on hearsay grounds, claiming that it could be admitted only through the testimony of Lyons. The court overruled the objection.

less protection under the fourth amendment. The court, citing *State* v. *Kono*, 324 Conn. 80, 121, 152 A.3d 1 (2016), noted that our Supreme Court has rejected the "distinction between the societally recognized privacy expectations of those able to afford to live in a single-family home and those less well-off who live in multiunit condominium[s] or public housing developments." The court also cited *State* v. *Benton*, 206 Conn. 90, 95, 536 A.2d 572, cert. denied, 486 U.S. 1056, 108 S. Ct. 2823, 100 L. Ed. 2d 924 (1988), for the proposition that persons "residing in an apartment, or persons staying in a hotel or motel have the same fourth amendment rights to protection from unreasonable searches and seizures and the same reasonable expectation of privacy as do the residents of any dwelling." (Emphasis omitted; internal quotation marks omitted.) Finally, the court noted that, although the evidence demonstrated that "Lyons was a rent paying resident of 351 Noble Avenue who slept in his own bed the night before [the] search, even an overnight guest has an expectation of privacy protected by the fourth amendment in his or her host's home . . . . Even though no witness could say how long the man in his robe and slippers had been in the house, the inference is inescapable that he slept in the house overnight by himself in a bed where he had such garments." (Citations omitted.)

On appeal, the state bases its challenge to the court's determination that Lyons met his burden of establishing a reasonable expectation of privacy on three grounds. First, the state claims that the court relied on inadmissible hearsay when it found that "federal agents informed Detective Slaiby that Lyons was found in the third floor bedroom when the SWAT team entered . . . . Lyons was later brought up to the third floor bedroom to confirm that it was his room." Second, the state claims that the court improperly took judicial notice of facts not testified to at the hearing when it noted that "Slaiby

filed an inventory of seized property in the Superior Court, listing as seized property . . . two passports, a birth certificate, social security card and Jamaican Ministry of Foreign Affairs document for Gavin Augustus Lyons." Third, the state alleges that the court made factual determinations that are not supported by the record when it found that Lyons had "met his burden to prove by a preponderance of the evidence that he had an expectation of privacy in the place at issue. . . . Additional evidence that this was a place . . . Lyons expected to be secure from intrusion comes from his keeping the most sensitive and important documents in that place: his passport, birth certificate and other documents issued by the governments of Jamaica and the United States. Detective Slaiby recognized that only . . . Lyons resided in his third floor bedroom." (Citations omitted.)

Before we address each of those claims, we set forth the general principles governing our review of the state's claim that Lyons lacked a reasonable expectation of privacy in the premises searched that deprived him of standing to pursue his motion to suppress. "To determine whether a person has a reasonable expectation of privacy in an invaded place or seized effect, that person must satisfy the *Katz* test. See *Katz* v. *United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring). The *Katz* test has both a subjective and an objective prong: (1) whether the [person contesting the search] manifested a subjective expectation of privacy with respect to [the invaded premises or seized property]; and (2) whether that expectation [is] one that society would consider reasonable. . . . This determination is made on a case-by-case basis. . . . The burden of proving the existence of a reasonable expectation of privacy rests [with] the defendant. . . . *State* v. *Jackson*, 304 Conn. 383, 395, 40 A.3d 290 (2012)." (Internal quotation marks omitted.)

State v. *Houghtaling*, supra, 326 Conn. 341; see also *Simmons* v. *United States*, 390 U.S. 377, 389, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968) ("rights assured by the [f]ourth [a]mendment are personal rights, and . . . they may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure"). "Whether a defendant's actual expectation of privacy . . . is one that society is prepared to recognize as reasonable involves a fact-specific inquiry into all the relevant circumstances." (Internal quotation marks omitted.) *State* v. *Boyd*, supra, 295 Conn. 718. "[T]he trial court's finding [on the question of standing] will not be overturned unless it is legally or logically inconsistent with the facts found or involves an erroneous rule of law." (Internal quotation marks omitted.) *State* v. *Jones*, supra, 113 Conn. App. 266. Nevertheless, "although we must defer to the trial court's factual findings, determining whether those findings establish standing is a question of law, over which we exercise plenary review." *State* v. *Houghtaling*, supra, 340.

"It is well established that the owner or tenant of a dwelling has standing to contest the legality of a search of that premises. . . . However, [t]he capacity to claim the protection of the fourth amendment does not depend upon a proprietary interest, permanency of residence, or payment of rent but upon whether the person who claims fourth amendment protection has a reasonable expectation of privacy in the invaded area. . . . Further, the fact that a person does not have the exclusive use of an area does not bar his having a reasonable expectation of privacy that furnishes standing to object to a government seizure. . . . Accordingly, a person who makes a telephone call from a public telephone booth may challenge the state's warrantless interception of the call . . . and an overnight guest has the right to contest a warrantless entry into his or her host's

home. . . . Thus, a person may have a sufficient interest in a place other than his home to enable him to be free in that place from unreasonable searches and seizures . . . so long as the place is one in which society is prepared, because of its code of values and its notions of custom and civility, to give deference to a manifested expectation of privacy." (Internal quotation marks omitted.) *State* v. *Jones*, supra, 113 Conn. App. 267.

In *Minnesota* v. *Olson*, 495 U.S. 91, 96–97, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990), the United States Supreme Court held that a person's status as an overnight guest, alone, is sufficient to establish an expectation of privacy in the home that society would recognize as reasonable. In reaching that conclusion, the court explained: "We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings. It is for this reason that, although we may spend all day in public places, when we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend. . . . That the guest has a host who has ultimate control of the house is not inconsistent with the guest having a legitimate expectation of privacy." (Citation omitted.) Id., 99; see also *State* v. *Aviles*, 277 Conn. 281, 292 n.8, 891 A.2d 935 (recognizing that overnight guest has expectation of privacy), cert. denied, 549 U.S. 840, 127 S. Ct. 108, 166 L. Ed. 2d 69 (2006); cf. *Rakas* v. *Illinois*, 439 U.S. 128, 142, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978) ("casual visitor who walks into a house one minute before a search of the house commences and leaves one minute after the search ends . . . [has] absolutely no interest or legitimate expectation of privacy in the [house]"); *State* v. *Hill*, 237 Conn. 81, 96–97, 675 A.2d 866 (1996) (momentary stop by defendant at apartment that he allegedly entered with consent of tenants was not sufficient to establish stand-

ing to contest search of apartment); *State* v. *Callari*, 194 Conn. 18, 23–24, 478 A.2d 592 (1984) (transient social guest lacked reasonable expectation of privacy to contest search of house), cert. denied, 469 U.S. 1210, 105 S. Ct. 1178, 84 L. Ed. 2d 327 (1985).

A

The state first claims that the trial court improperly determined that Lyons had a reasonable expectation of privacy on the basis of hearsay statements, specifically, the statement of SWAT team members to Slaiby that Lyons was located in the third floor bedroom and Lyons' statement to Slaiby that the third floor room was his bedroom. Lyons counters that the state cannot show any harm resulting from the trial court's evidentiary rulings. Specifically, Lyons claims that this court "need not reach any of the challenges raised to the trial court's finding that Lyons had standing to contest the search because the evidence that was admitted without objection from the state and the unchallenged findings of the trial court based on Slaiby's testimony of what he personally observed or knew, soundly support the trial court's determination that [the third floor bedroom] was Lyons' bedroom in which he had manifested an expectation of privacy." In support of his claim, Lyons points to certain evidence not challenged by the state. That evidence includes men's clothing that was found in the third floor bedroom; personal items found in the third floor bedroom such as passports and identification cards, one of which was found in the pocket of a pair of pants found in the bedroom and had the name "Sean Brown" but contained a photograph of Lyons, and another of which had Lyons' name and photograph on it; and the facts that the police did not find identification for Lyons or Sean Brown in other locations in the house, that no other person's identification was found in the third floor bedroom, and that Slaiby took a bathrobe

and slippers from Lyons after he arrested him. We agree with Lyons.

We set forth our standard of review applicable to the state's evidentiary claim. "It is well settled that, absent structural error, the mere fact that a trial court rendered an improper ruling does not entitle the party challenging that ruling to obtain a new trial. An improper ruling must also be harmful to justify such relief. . . . The harmfulness of an improper ruling is material irrespective of whether the ruling is subject to review under an abuse of discretion standard or a plenary review standard. . . . When the ruling at issue is not of constitutional dimensions, the party challenging the ruling bears the burden of proving harm. . . . It is a fundamental rule of appellate review of evidentiary rulings that if [the] error is not of constitutional dimensions, an appellant has the burden of establishing that there has been an erroneous ruling which was probably harmful to him. . . . *State* v. *Gonzalez*, 272 Conn. 515, 527, 864 A.2d 847 (2005); see also *State* v. *Kirsch*, 263 Conn. 390, 412, 820 A.2d 236 (2003) (in order to establish reversible error on an evidentiary impropriety, the defendant must prove both an abuse of discretion and a harm that resulted from such abuse). We do not reach the merits of [a] claim [where] the [appellant] has not briefed how he was harmed by the allegedly improper evidentiary ruling." (Citations omitted; internal quotation marks omitted.) *State* v. *Toro*, 172 Conn. App. 810, 816–17, 162 A.3d 63, cert. denied, 327 Conn. 905, 170 A.3d 2 (2017). "[W]ith regard to evidentiary rulings, this court, on multiple occasions, has declined to review claims where the appellant fails to analyze harmful error in his or her principal brief." *State* v. *Myers*, 178 Conn. App. 102, 107, 174 A.3d 197 (2017).

The state's brief is devoid of any analysis of how it was harmed by the trial court's admission of the challenged testimony. The state's bare assertion that "the court

abused its discretion and committed error by allowing the testimony and then using [the] inadmissible testimony to find that Lyons met his burden of proving an expectation of privacy" fails to explain adequately the harm caused by the alleged improper admission of the testimony. In the absence of any analysis concerning how the state was harmed by the admission of the testimony, we are unable to conclude that the evidence had any bearing on the outcome of the suppression hearing. See *State* v. *Njoku*, 163 Conn. App. 134, 145–46, 133 A.3d 906, cert. denied, 321 Conn. 912, 136 A.3d 644 (2016). Therefore, in light of the state's failure to brief how it was harmed by the court's evidentiary ruling, we decline to consider whether the court's ruling was an abuse of discretion.[6] See *State* v. *Myers*, supra, 178 Conn. App. 108.

[6] The state's failure to brief the issue of harm is particularly damning to its evidentiary claim in this case because there was sufficient other evidence to support the court's conclusion that Lyons had standing to contest the search of the third floor bedroom. Specifically, Slaiby testified that the third floor room was a bedroom with a door and that inside the room he found personal items such as a passport and an identification card, as well as men's clothing, including a pair of pants that contained a wallet with an identification card. Although one of the identification cards found contained the name "Sean Brown," it had a photograph of Lyons on it. Slaiby also found other identifications that contained Lyons' name and photograph. Moreover, Slaiby responded "no" when asked whether he found identification cards for either Sean Brown or Lyons while searching other portions of the building, and he stated that he did not find identification for anyone else in the third floor bedroom. He also indicated that, when searching the third floor bedroom, a "Metro PCS mail or receipt" was found with the name "Sean Brown" on it, and that there was a sign on the wall in that bedroom that stated, "I do not give consent to search." When Slaiby was asked whether he encountered Lyons on the third floor, he responded in the negative, stating that Lyons "was already on the first floor from the SWAT team escorting him down," to which the state did not object. Finally, when Lyons was arrested, he was wearing a bathrobe and slippers, which supported a conclusion that, at a minimum, he had slept overnight at the 351 Noble Avenue residence the night before the search. Given that, at the time Slaiby entered 351 Noble Avenue, all of the residents had been gathered downstairs near a first floor bathroom and that men's clothing with a wallet and identification card, along with other identifications bearing either Lyons' name or photograph or both were found in the third floor bedroom, it

B

The state next claims that the court improperly took judicial notice of facts not presented at the hearing when it noted that "Slaiby filed an inventory of seized property in the Superior Court, listing as seized property . . . two passports, a birth certificate, social security card and Jamaican Ministry of Foreign Affairs document for Gavin Augustus Lyons." We disagree.

The following additional facts are necessary to this claim. In its memorandum of decision, the court set forth the items found in the third floor bedroom of 351 Noble Avenue. The court stated, in part, that in Lyons' room, "the task force located and seized passports and ID cards." Following that sentence the court cited the trial court file, with the docket number CR-17-294868-S, which pertains to the charges against Lyons, and it referenced a "part B inventory number 28247 WW, items listed under number 4," followed by a footnote reference. In the footnote, the court stated: "The court notes that Slaiby filed an inventory of seized property in the Superior Court, listing as seized property item [number] 4 two passports, a birth certificate, social security card and Jamaican Ministry of Foreign Affairs document for Gavin Augustus Lyons. Conn. Code Evid. §§ 2-1 and 2-2 (a). See T1 15 (defendant's request to take notice). The inventory bears the first of four sequential docket numbers assigned to the cases arising from this search."

The trial court file includes a uniform arrest report filed by Slaiby, along with an investigation report,[7] in

logically follows that, at the time of the search, Lyons was sleeping in that bedroom as either a resident or, at a minimum, an overnight guest. This evidence, separate and apart from Slaiby's statements as to what he was told by Lyons and the SWAT team, sufficiently supports the court's factual finding that Lyons at least spent the night sleeping in the third floor bedroom at 351 Noble Avenue and the court's conclusion that Lyons had an expectation of privacy in the contents of that bedroom that society would consider reasonable.

[7] The investigation report was referenced at the hearing on the motions to suppress when the prosecutor asked Slaiby if he recalled "completing

which Slaiby stated: "During the search of Lyons' bedroom, I located a wallet inside a black pair of jeans. I located a photographic ID card that had Lyons' face on it with the name 'Sean Brown.' [A sergeant] also located two Jamaican passports in a closet that had Lyons' face on it with the name 'Gavin Augustus Lyons.' . . . Investigators asked Lyons where his ID card was and he stated inside a wallet in black jeans. This was the same pair of jeans where I located the ID card with the name Sean Brown. I also located numerous pieces of mail with the name Sean Brown inside Lyons' bedroom. Investigators at this time did not know for sure what identity Lyons was attempting to utilize, as investigators found two passports with the name Gavin Lyons and one ID card with the name Sean Brown, which Lyons said was his proper ID card." The file also includes a "Prisoner Property Receipt"[8] for Lyons, which indicates

an investigation report, a police report, of [his] tasks during the course of this search and seizure warrant," to which Slaiby responded, "yes."

[8] This inventory was also referenced at the hearing during direct examination of Slaiby by Lyons' counsel, Attorney Mary Haselkamp, when the following colloquy transpired:

"[Attorney Haselkamp]: And in terms of when you arrested . . . Lyons, do you remember what he was wearing?

"[Slaiby]: I do not.

"[Attorney Haselkamp]: And when you arrest somebody, you take an inventory of their clothing. Is that correct?

"[Slaiby]: Yes.

"[Attorney Haselkamp]: And you were part of the—you in fact arrested . . . Lyons.

"[Slaiby]: Yes.

"[Attorney Haselkamp]: And part of that inventory is the clothes they wore.

"[Slaiby]: I'm sorry.

"[Attorney Haselkamp]: Part of the inventory would be clothes that they had on their person, correct?

"[Slaiby]: It depends if we're taking the clothes away from them—

"[Attorney Haselkamp]: Okay.

"[Slaiby]: —to be stored in a locker.

"[Attorney Haselkamp]: So, if you had taken clothes from him you would have put that down in an inventory.

"[Slaiby]: Yes.

"[Attorney Haselkamp]: And do you remember what clothes you took from him?

that a bathrobe and slippers had been taken from Lyons upon his arrest, as well as an "Inventory of Property Seized" bearing the docket number pertaining to Lyons' case, which references the two Jamaican passports, a birth certificate, a social security card and a document

"[Slaiby]: I do not.

"[Attorney Haselkamp]: Would it refresh your recollection to look at the inventory sheet?

"[Slaiby]: It might, yes.

"[The Prosecutor]: This again, I've had occasion to view this. This should be marked [as an] exhibit for identification. This would be the third one, Your Honor, please.

"The Court: Refresh his recollection as to the clothes seized from . . . Lyons.

"[Attorney Haselkamp]: Yes, Your Honor.

"[The Prosecutor]: I believe—

"The Court: He's refreshing his recollection and has your recollection been refreshed?

"[Slaiby]: Yes.

"The Court: Are you able to testify independent of the document? Yes, counsel.

"[Attorney Haselkamp]: Thank you, Your Honor. . . . [Mr. Slaiby], [d]o you remember what items of clothing you seized from . . . Lyons?

"[The Prosecutor]: I have an objection. This is clothing that this witness took from . . . Lyons. Is that the question?

"[Attorney Haselkamp]: Yes.

"[The Prosecutor]: And I have an objection if he can answer that. I think that the document—this is a different document than what's been represented. This is after the booking.

"[Attorney Haselkamp]: That's correct.

"[The Prosecutor]: If he participated in booking that's fine but we haven't gotten to that point yet. I don't think he [can] refresh his recollection to a document he has not seen until this point. He was not part of that particular activity and he had no original memory.

"The Court: Any document can be used to refresh recollection. He indicates the document refreshed his recollection.

"[The Prosecutor]: I agree.

"The Court: The objection is overruled. You may answer the question.

"[The Prosecutor]: But if he's relying upon—my objection is he's relying upon what is in the document—

"The Court: I'm [not] relying upon anything other than [him] telling the court that his recollection is refreshed.

"[The Prosecutor]: Thank you, Your Honor.

"The Court: That's all the reliance we need. Go right ahead.

"[Slaiby]: Bathrobe and slippers."

from the Jamaican Ministry of Foreign Affairs for "Gavin Augustus Lyons." Finally, the trial court file also contains a motion for return of seized property that was filed by Lyons, in which he sought the return of his birth certificate, social security card and passport, which had been seized at the time of his arrest on January 31, 2017.

During the hearing, the inventory of the seized property filed by Slaiby was referenced. When Slaiby was asked what kind of paperwork was found in the third floor bedroom, he responded, "it was paperwork such as a passport and an . . . ID card." After Slaiby stated that he could not recall whether the passport had been seized, he was asked if it would refresh his "recollection [to look] at the inventory that was seized?" After reviewing the inventory, he stated that his recollection had been refreshed and that the passport had been seized. The prosecutor asked that the document be marked "for exhibit for identification,"[9] and Lyons' attorney noted that the document *was in the clerk's file*.

We first set forth our standard of review. "A trial court's determination as to whether to take judicial notice is essentially an evidentiary ruling, subject to an abuse of discretion standard of review. . . . In order to establish reversible error, the [party challenging the ruling] must prove both an abuse of discretion *and a harm that resulted from such abuse*. . . . In reviewing a trial court's evidentiary ruling, the question is not whether any one of us, had we been sitting as the trial judge, would have exercised our discretion differently . . . . Rather, our inquiry is limited to whether the trial court's ruling was arbitrary or unreasonable. . . .

"The doctrine of judicial notice excuses the party having the burden of establishing a fact from introducing formal proof of the fact. Judicial notice takes the

[9] On the basis of our review of the record, the document was never actually marked for identification.

place of proof. . . . There are two types of facts considered suitable for the taking of judicial notice: those [that] are common knowledge and those [that] are capable of accurate and ready demonstration. . . . Courts must have some discretion in determining what facts fit into these categories. It may be appropriate to save time by judicially noticing borderline facts, so long as the parties are given an opportunity to be heard. . . . Notice to the parties [however] is not always required when a court takes judicial notice. Our own cases have attempted to draw a line between matters susceptible of explanation or contradiction, of which notice should not be taken without giving the affected party an opportunity to be heard . . . and matters of established fact, the accuracy of which cannot be questioned, such as court files, which may be judicially noticed without affording a hearing." (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *Scalora* v. *Scalora*, 189 Conn. App. 703, 713–14, 209 A.3d 1 (2019); see also Conn. Code Evid. § 2-1; *In re Natalie J.*, 148 Conn. App. 193, 206–207, 83 A.3d 1278, cert. denied, 311 Conn. 930, 86 A.3d 1056 (2014). It is well established that the trial court "may take judicial notice of the files of the Superior Court in the same or other cases." (Internal quotation marks omitted.) *Larmel* v. *Metro North Commuter Railroad Co.*, 200 Conn. App. 660, 662 n.2, 240 A.3d 1056, cert. granted on other grounds, 335 Conn. 972, 240 A.3d 676 (2020); see also *Echeverria* v. *Commissioner of Correction*, 193 Conn. App. 1, 3 n.1, 218 A.3d 1116 (appellate court took judicial notice of file in underlying criminal case), cert. denied, 333 Conn. 947, 219 A.3d 376 (2019); *Wasson* v. *Wasson*, 91 Conn. App. 149, 151 n.1, 881 A.2d 356 ("[a]ppellate [c]ourt, like the trial court, may take judicial notice of files of the Superior Court in the same or other cases" (internal quotation marks omitted)), cert. denied, 276 Conn. 932, 890 A.2d 574 (2005).

In the present case, the court took judicial notice of only the contents of the court file. Thus, it was not required to give the parties notice and an opportunity to be heard before it did so. In any event, the state can hardly claim surprise that the court referenced the inventory of seized property that was located in the court file. The document was discussed at the hearing and specifically referred to by the state. Furthermore, the state's argument that it was not proper for the court to take judicial notice of the inventory of seized property because its contents were "controverted facts" is without merit. First, the state has not identified any dispute over the contents of the inventory document. Second, the court relied on what was in the court file simply to identify the items seized by the police during the search, not to conclude whether the information in the items was true. For example, the fact that the court noted that the court file contained a purported birth certificate, social security card and passport for Lyons does not mean that the court accepted that the documents were genuine. What was important to the court was the nature of the documents kept by Lyons in the third floor bedroom, and there is no dispute as to the nature of those documents.

In addition, the state, again, has failed to brief how it was harmed by the court's evidentiary ruling. In the absence of such an analysis, we cannot conclude that the court abused its discretion in taking judicial notice of the inventory of seized property filed by Slaiby. See *State* v. *Gonzalez*, 106 Conn. App. 238, 249, 941 A.2d 989, cert. denied, 287 Conn. 903, 947 A.2d 343 (2008). Moreover, because the state must show both an abuse of discretion and harm resulting from the court's evidentiary ruling, even if we assume, without deciding, that the court abused its discretion, we would be hard pressed to find any harm resulting from the court's taking judicial notice of the inventory of seized property

when the record contains properly admitted testimony and numerous other references concerning the specific documents that were listed in that inventory. In particular, there were multiple instances in which Slaiby testified regarding certain of the documents found in the third floor bedroom, including the passport and identification card. Accordingly, any possible error in the trial court's ruling was harmless.

C

The state's third claim with respect to the trial court's finding that Lyons possessed a reasonable expectation of privacy in the third floor bedroom challenges the court's factual determinations. Specifically, the state alleges that the court made factual determinations that are not supported by the record when it found that Lyons had "met his burden to prove by a preponderance of the evidence that he had an expectation of privacy in the place at issue. . . . Additional evidence that this was a place . . . Lyons expected to be secure from intrusion comes from his keeping the most sensitive and important documents in that place: his passport, birth certificate and other documents issued by the governments of Jamaica and the United States. Detective Slaiby recognized that only . . . Lyons resided in his third floor bedroom." (Citations omitted.) We are not persuaded by the state's claim.

Our resolution of this claim requires little discussion in light of our determination regarding the state's other claims. See parts I A and B of this opinion. The record demonstrates that, inside the third floor bedroom, Slaiby found personal items such as a passport and an identification card, as well as men's clothing, including a pair of pants that contained a wallet with an identification card. Although one of the identification cards found contained the name "Sean Brown," it had a photograph of Lyons on it, and other identifications that contained

Lyons' name and photograph were also found in that bedroom. Moreover, identification cards for either Sean Brown or Lyons were not found in other portions of 351 Noble Avenue, nor was an identification for anyone else found in the third floor bedroom. There was testimony showing that a passport and other personal documents for either Sean Brown or Lyons were found in the third floor bedroom, and Lyons filed a motion seeking the return of his passport, social security card and birth certificate, which had been seized during the search and which the trial court granted with respect to the social security card and birth certificate. Accordingly, the trial court's finding that Lyons had a reasonable expectation of privacy was not clearly erroneous and was supported by sufficient evidence in the record.

Moreover, when Lyons was arrested, he was wearing a bathrobe and slippers, which, as we already determined, supported a conclusion that, at a minimum, he was an overnight guest at the 351 Noble Avenue residence. Given that the search of 351 Noble Avenue commenced around 6 a.m., that, at the time Slaiby entered 351 Noble Avenue, all of the residents had been gathered downstairs near a first floor bathroom, and that men's clothing with a wallet and identification card, along with other identifications bearing either Lyons' name or photograph or both were found in the third floor bedroom, the court reasonably could infer that, at the time of the search, Lyons was sleeping in that bedroom as either a resident or, at a minimum, an overnight guest. Our Supreme Court has made clear that an overnight guest has an expectation of privacy. See *State* v. *Aviles*, supra, 277 Conn. 292 n.8. Therefore, we agree with the trial court that, at a minimum, the evidence was sufficient to prove that Lyons was an overnight guest and, therefore, was sufficient to support the court's conclusion that Lyons met his burden of establishing, by a preponderance of the evidence, that

he had a reasonable expectation of privacy in the place searched.

II

The state next claims that the court improperly granted the defendants' motions to suppress the items seized from the search of 351 Noble Avenue. We disagree.

The following additional facts are necessary for our resolution of this claim. On January 31, 2017, a United States magistrate signed a search and seizure warrant that authorized the search of 349 Noble Avenue in Bridgeport, which is one half of a multifamily residence. Specifically, the building at the premises is a duplex, with 349 being designated as the property on the left when facing it from the street and 351 being the property on the right. In the space on the warrant designated for identifying the person or describing the property to be searched, the warrant merely stated "349 Noble Avenue, Bridgeport, Connecticut." Just below that address, the warrant included preprinted language stating: "I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property described above, and that such search will reveal (identify the person or describe the property to be seized)," which was followed by the reference: "See Attachment A." Attachment A to the warrant was a detailed list of the items to be seized.

The magistrate also had before him an application for the search warrant that had been executed by Brendan P. Lundt, a special agent of Homeland Security Investigations, New Haven, as well as an affidavit executed by Lundt in support of the application for the search warrant. The application also referenced 349 Noble Avenue in Bridgeport as the property to be searched and, for the facts on which the application was based, the application stated: "See Affidavit of . . .

Special Agent, Brendan P. Lundt, attached hereto." The affidavit stated that the property to be searched was located at 349 Noble Avenue and described that property as "a multifamily, wood-framed, Victorian style residence. . . . The residence has tan siding, light grey asphalt shingles and white trim around the windows and roof line. There are two entrances located on opposite sides of the front of the residence. The entrance on the left side has bright red painted steps. The entrance on the right has . . . dark red, almost maroon color painted steps. The porch area on the right side has green colored columns and green trim around the red colored door. There is a driveway and parking area to the left of the left entrance and a driveway and parking area to the right of the right entrance. The number 349 is clearly visible from the street and is affixed to one of the green columns at the left entrance." In his affidavit, Lundt stated that he was "directing the investigation into members and associates of a narcotics trafficking organization that operates in . . . Bridgeport," which included physical surveillance of 349 Noble Avenue, the use of information by confidential informants and controlled purchases of narcotics. On the basis of information gathered, Lundt attested that the premises located at 349 Noble Avenue was a stash location run by a black male of Jamaican descent, that a confidential informant stated that marijuana and cocaine are sold from the premises and that the seller "occupies the third floor apartment located on the right side of the residence when facing it from the street." Because Lundt believed that public disclosure of the information in the affidavit would compromise the ongoing investigation, he requested that the affidavit and accompanying warrant be sealed.[10]

In granting the defendants' motions to suppress, the court found that the warrant does not "reference or

[10] The trial court, in ruling on the motions to suppress, had before it the full, unredacted and unsealed affidavit.

incorporate the contents of the affidavit" and that the only description of the place to be searched was the address given, which "clearly and unambiguously identifie[d] the place to be searched as 349 Noble Avenue" and left "no room for interpretation." The court further found that there was no evidence to support the state's assertion that the affidavit was attached to the warrant and that the state's "factual premise that the affidavit was part of the warrant . . . [was] contrary to the evidence," given that the warrant and affidavit were under seal in federal court. After finding that the warrant did not incorporate the contents of the affidavit, the court explained that the structure to be searched was "easily identified as a duplex with two separate addresses (two driveways, parking areas, walkways from [the] sidewalk with separate gates, porches, mailboxes and street-fronting doors, [and] multiple utility meters for gas and electric). The warrant issued to search 349 Noble Avenue with no further description. The SWAT [team] executed the warrant on the right . . . side of the house where the hearing evidence shows the number 351 is affixed to the siding by the front door.

"A search conducted under the purported authority of a warrant that actually was issued to search a different place is, under law, a warrantless search. The search of 351 Noble Avenue . . . was then presumptively unlawful under the fourth amendment [to the United States constitution] . . . ." Because the state relied "entirely on the warrant as legal authorization for the search . . . [and did] not claim any exception to the warrant requirement," the court granted the motions to suppress.

We begin with an examination of the law governing searches and seizures under the fourth amendment and the warrant requirements of the federal constitution. The fourth amendment to the United States constitution protects the "right of the people to be secure in their

persons, houses, papers, and effects, against unreasonable searches and seizures . . . .'' U.S. Const., amend. IV. It is well established in fourth amendment jurisprudence that ''physical entry of the home is the chief evil against which the wording of the [f]ourth [a]mendment is directed.'' (Internal quotation marks omitted.) *Payton* v. *New York*, 445 U.S. 573, 585, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Therefore, ''[i]t is a basic principle of [f]ourth [a]mendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.'' (Internal quotation marks omitted.) Id., 586. As the United States Supreme Court has explained, ''[t]he [f]ourth [a]mendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: The right of the people to be secure in their . . . houses . . . shall not be violated. That language unequivocally establishes the proposition that [a]t the very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'' (Internal quotation marks omitted.) Id., 589–90. Accordingly, ''[i]t is axiomatic that the police may not enter the home without a warrant or consent, unless one of the established exceptions to the warrant requirement is met.''[11] *State* v. *Aviles*, supra, 277 Conn. 292; see also *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) (''[i]t is well settled under the [f]ourth and [f]ourteenth [a]mendments that a search conducted without a warrant issued upon probable cause is per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions'' (internal quotation marks omitted)).

[11] In the present case, the state claims that the entry into 351 Noble Avenue by the police was made pursuant to a valid warrant and does not assert the applicability of any exceptions to the warrant requirement. See footnote 14 of this opinion.

"The [f]ourth [a]mendment's requirements regarding search warrants are not 'formalities.' *McDonald* v. *Unites States*, 335 U.S. 451, 455, 69 S. Ct. 191, 93 L. Ed. 153 (1948). By requiring police officers first to obtain a warrant before they search a person's home, unless some exception applies that permits a warrantless search, 'the [f]ourth [a]mendment has interposed a magistrate between the citizen and the police,' 'not to shield criminals nor to make the home a safe haven for illegal activities,' but rather to ensure 'that an objective mind might weigh the need to invade that privacy in order to enforce the law.' Id.

"Indeed, the [f]ourth [a]mendment's demand that search warrants 'particularly describ[e] the place to be searched' . . . provides a 'limitation curtailing the officers' discretion when executing the warrant,' so that 'the safeguard of having a magistrate determine the scope of the search is [not] lost.' *United States* v. *George*, 975 F.2d 72, 76 (2d Cir. 1992); *Maryland* v. *Garrison*, 480 U.S. 79, 84, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987) (noting that the [f]ourth [a]mendment's particularity 'requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the [f]ramers intended to prohibit')." *United States* v. *Voustianiouk*, 685 F.3d 206, 210–11 (2d Cir. 2012). "The test for whether a sufficient description of the premises to be searched is given in a search warrant was stated in *Steele* v. *United States*, [267 U.S. 498, 503, 45 S. Ct. 414, 69 L. Ed. 757 (1925)], as follows: It is enough if the description is such that the officer with a search warrant can, with reasonable effort ascertain and identify the place intended." (Internal quotation marks omitted.) *United States* v. *Prout*, 526 F.2d 380, 387 (5th Cir.), cert. denied, 429 U.S. 840, 97 S. Ct. 114, 50 L. Ed. 2d 109 (1976). "In determining the permissible

scope of a search that has been authorized by a search warrant . . . we must look to the place that the magistrate judge who issued the warrant intended to be searched [and] *not to the place that the police intended to search when they applied for the warrant*." (Emphasis added; internal quotation marks omitted.) *United States* v. *Bershchansky*, 788 F.3d 102, 111 (2d Cir. 2015).

Thus, we must look to the text of the warrant itself to determine the permissible scope of the search that was authorized by the warrant. See id. In the present case, the warrant described the place to be searched as "349 Noble Avenue" in Bridgeport and included no other description of the property; accordingly, the warrant limited the scope of the search to 349 Noble Avenue.

The circumstances of the present case are analogous to those in *United States* v. *Bershchansky*, supra, 788 F.3d 102, and *United States* v. *Voustianiouk*, supra, 685 F.3d 206, in which the United States Court of Appeals for the Second Circuit found that both searches were conducted without a valid warrant. In *Voustianiouk*, federal agents went to a two-story building in New York City armed with a warrant to search an apartment on the first floor. *United States* v. *Voustianiouk*, supra, 208. Although the warrant did not refer to the name of the person who lived in the first floor apartment and authorized a search of that residence only, agents discovered on the morning of the search that the suspect they were investigating lived on the second floor of the building. Id., 209–10. Because he was home, they decided to search his second floor apartment, instead of the one listed in the warrant. Id., 210.

The court in *Voustianiouk* found that "[t]he officials in this case did not stray far from their search warrant. They merely ventured up a flight of stairs. But the [f]ourth

[a]mendment does not permit the police to search one apartment simply because they have a warrant to search another that is nearby." Id., 208. Accordingly, the court found that the agents conducted a warrantless search that violated the fourth amendment. Id. In reaching that conclusion, the court emphasized that, in determining the permissible scope of the search, it had to "look to the place that the magistrate judge who issued the warrant intended to be searched, not to the place that the police intended to search when they applied for the warrant." Id., 211. The court further stated: "We note that when officers search a location other than the one that the magistrate judge intended to be searched, as was the case here, there is no need to inquire into whether the warrant's description was sufficiently particular to satisfy the [f]ourth [a]mendment in order to determine if the search violated the [c]onstitution, because the search was conducted without the authorization of a warrant. Such a warrantless search, absent some exception, violates the [f]ourth [a]mendment not because the description in the warrant was insufficient or inaccurate, but rather because the agents executing the search exceeded the authority that they had been granted by the magistrate judge." (Footnote omitted.) Id., 212. Although the government in that case correctly pointed out that inaccuracies or ambiguities in a warrant do not necessarily invalidate a warrant, the court found that the warrant did not inaccurately describe the place to be searched but, rather, very clearly authorized a search of the first floor apartment. Id., 212–13. Finally, the court stated: "We are unable to conclude that the officers in this case reasonably relied on the warrant in their possession—which on its face explicitly authorized the search of the first-floor apartment—to conduct a search of the apartment on the second floor. Indeed, there can be no doubt that a search warrant for one apartment in a building does not permit the

police to enter apartments other than the one specified in their warrant." Id., 215. Even though the court found that the officers were well-meaning, that did not "mean that they reasonably concluded that the warrant in their possession authorized the search they conducted"; id., 216–17; and there was no question that they could have called the magistrate that morning to obtain a new warrant for the second floor apartment. Id., 216.

Similarly, in *Bershchansky*, agents from the Department of Homeland Security had obtained a warrant to search an apartment in Brooklyn, New York, where they believed a computer contained child pornography. *United States* v. *Bershchansky*, supra, 788 F.3d 105. Although the warrant authorized the agents to search apartment 2 at the location where Yuri Bershchansky lived, they executed the warrant, instead, at apartment 1. Id. The government appealed from the decision of the United States District Court for the Eastern District of New York granting Bershchansky's motion to suppress evidence seized during the search. Id. The United States Court of Appeals for the Second Circuit affirmed, concluding that the agents conducted a warrantless search in violation of the fourth amendment when, instead of searching apartment 2, they searched apartment 1, an apartment that the magistrate had not authorized them to search. Id., 111. The court in *Bershchansky* distinguished that case from those in which "courts have held warrants valid despite erroneous address numbers" on the ground that, in those cases, "other information in the warrant (or the executing officers' knowledge) strongly indicated a particular location other than the misidentified address." Id.

In the present case, the search of 351 Noble Avenue was conducted pursuant to a warrant that authorized the search of a different address. The search, therefore, constituted a warrantless search unless the warrant contained information indicating that the magistrate

intended that 351 Noble Avenue be searched or the officers executing the warrant otherwise had knowledge of such an intent.

The state claims on appeal that "[t]his is a case where the officers thought that the building to be searched as a single unit and there was a factual mistake, learned after the execution of the warrant, regarding the actual address '351' [Noble Avenue]."[12] The state further claims that the court improperly failed to take into account the facts that "Lundt's affidavit was sworn to and subscribed by the same magistrate on the same day . . . it was signed [on] the same day as the application for a search and seizure warrant by the same magistrate . . . all of the court documents bore the same date and exact time of filing . . . and . . . all bore the same case number . . . ." The state refers to the error in the description of the place to be searched as a scrivener's error and claims that "Connecticut cases have routinely looked at all of the documents to determine if there was an error that can be corrected regarding the particularity requirement in a warrant application . . . ." According to the state, a warrant that contains a technically wrong address should not be invalidated if "it otherwise describes the premises with sufficient particularity so that the police can ascertain and identify the place to be searched." (Internal quotation marks omitted.) Specifically, the state relies on case law upholding warrants with technical errors when there is other information, either in the warrant itself or in an appended affidavit, that eliminates the possibility of actual error.

According to the state, although there was a mistake in the address listed on the warrant, that mistake is cured by reference to the Lundt affidavit that was filed in support of the application for the search warrant,

[12] We note that this claim is belied by the fact that the affidavit in support of the warrant described the property as a multifamily residence.

which, according to the state, clearly demonstrates that the officers always intended to search the right side of the duplex—351 Noble Avenue—and did, in fact, search the place that the warrant was intended to cover. Thus, the state alleges that, because the warrant incorporated the affidavit by reference and was clearly available to the magistrate when the warrant was issued, the court improperly concluded that "the warrant does not incorporate the contents of the affidavit and may be understood to not have been present since it remains under seal in the federal court." We disagree.

The state misunderstands the court's analysis. The court's conclusion was not based on whether the magistrate had access to Lundt's affidavit. Instead, the court's focus was on whether the *officers executing the warrant* knew of Lundt's affidavit or otherwise had reason to know that the warrant was intended to reach beyond 349 Noble Avenue. As the court noted: "Courts are disinclined to rule . . . a warrant as incorporating [an] affidavit when it does not expressly do so and *when the affidavit was not available to the executing officers*." (Emphasis added.) Thus, the court's statement that the Lundt affidavit was not present because it was under seal refers not to the fact that it was not present before the magistrate but to the fact that it was not available to the officers when the warrant was executed. Put another way, the existence of the Lundt affidavit, which was not appended to the warrant when it was executed, could not have informed the executing officers that the warrant was intended to authorize a search of 351 Noble Avenue. Therefore, even if we accept the state's claim that the affidavit was explicitly incorporated by reference into the warrant, that would not affect the court's analysis or change the result in this case, as it would not change the fact that, under the circumstances here, the mere existence of the affidavit and the warrant's reference to it did not give the executing officers any

reason to believe that they were authorized to search 351 Noble Avenue.

The court, in its memorandum of decision, further noted that "in many cases upholding a search in the face of a claim that a warrant lack[s] particularity . . . the same law enforcement officers conducted the investigation, *prepared* the warrant application and led or participated in the execution, which was sufficient to prevent general rummaging, the evil against which the particularity clause of the fourth amendment is designed to protect." (Emphasis in original.) After noting that Slaiby, the only executing officer to testify at the suppression hearing, never conducted surveillance at the property, the court concluded that there was no evidence of facts that other courts have relied on to save an otherwise facially insufficient warrant. Thus, relying on *Bershchansky* and *Voustianiouk*, the court concluded that the officers executing the warrant exceeded the authority that had been granted to them by the magistrate. We agree with the court's analysis and conclusion.

The United States Supreme Court has stated that the particularity requirements of the fourth amendment must be satisfied "in the warrant, not in the supporting documents." *Groh* v. *Ramirez*, 540 U.S. 551, 557, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004); see also *Simon* v. *New York*, 893 F.3d 83, 94 (2d Cir. 2018) (Courts must "look directly to the text of a warrant to evaluate the scope of authority that it grants. . . . Searches and seizures that exceed the scope of the warrant are considered warrantless; they must be justified, if at all, by some exception to the warrant requirement." (Citation omitted; internal quotation marks omitted.)); *State* v. *Lucas*, 63 Conn. App. 263, 271, 775 A.2d 338 (courts must first examine description in warrant itself in determining

whether description of place to be searchedwas sufficiently detailed), cert. denied, 256 Conn. 930, 776 A.2d 1148 (2001). Nevertheless, "a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." *Groh* v. *Ramirez*, supra, 557–58; see also *State* v. *Santiago*, 8 Conn. App. 290, 304–305, 513 A.2d 710 (1986) (Courts have recognized "a well established exception to the general rule that the warrant itself must describe with sufficient particularity the place to be searched and the property to be seized. In determining whether the description given the executing officer was sufficiently detailed, it is of course important initially to examine the description [that] appears in the warrant itself. If that description is inadequate, however, it is appropriate to look to the description appearing in the warrant application or affidavit *if* it is clear that the executing officers were in a position to be aided by these documents, as where they were attached to the warrant at the time of execution and incorporated therein by reference." (Emphasis in original; internal quotation marks omitted.)).

In *State* v. *Browne*, 291 Conn. 720, 734, 970 A.2d 81 (2009), our Supreme Court distinguished *Groh* and clarified that, in some circumstances, the affidavit need not accompany the warrant when executed to satisfy the fourth amendment. In *Browne*, the defendant moved to suppress marijuana seized during a search because the search warrant referenced cocaine and crack cocaine and not marijuana. Id., 726–27. The defendant argued that the seizure of the marijuana exceeded the scope of the warrant. Id. The state claimed that the warrant was sufficient because it incorporated the application and affidavit supporting the application, both of which consistently and continuously referenced marijuana. Id., 732. The defendant claimed that the state

could not rely on the application and affidavit because they did not accompany the warrant when it was executed. Id., 723. Our Supreme Court rejected the defendant's claim. Id., 737. In particular, the court in *Browne* noted that accompaniment may not be required where, as in the present case, "the warrant application and affidavit are placed under seal to protect the identity and safety of a confidential informant . . . ." Id.

Relying on *Browne*, the state in the present case claims that because the Lundt affidavit was incorporated into the warrant, it did not have to accompany the warrant when it was executed. We disagree with the state's reading of *Browne* as applied to the facts of the present case.

Our Supreme Court noted in *Browne* that "[a] further . . . distinction between *Groh* and this case is the actual knowledge of the parties involved. . . . In the present case . . . two of the executing officers . . . were the affiants for the warrant application and knew that the search warrant was based on probable cause to believe that the defendant was in possession of marijuana." (Citations omitted; footnote omitted.) Id., 738–39. This distinction clearly was important to the court in *Browne* because it declined to decide "whether accompaniment is required when the relevant documents are not sealed, or under circumstances indicating that the executing officers . . . [are] unaware of the items sought." Id., 737–38 n.12. Furthermore, the court noted that "[t]he only constitutional purpose that could be served by [the accompaniment] requirement would be to provide notice to uninformed officers of the authorized scope of the search so as to avoid a 'general, exploratory rummaging in a person's belongings.' *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). When, as in the present case, the factual circumstances indicate that the executing officers are clearly aware of the precise scope of

the search, this purpose already is satisfied without accompaniment." (Emphasis omitted.) *State* v. *Browne*, supra, 291 Conn. 737 n.11. Thus, evidence that the executing officers had actual knowledge that the warrant was intended to cover a scope greater than what is reflected on its face is critical to determining whether accompaniment is necessary.

Given the evidence presented to the trial court in the present case, we conclude that, without the Lundt affidavit accompanying the warrant, there was no basis for the executing officers to know that the warrant was intended by the magistrate to authorize a search of 351 Noble Avenue. Slaiby, the only executing officer to testify at the suppression hearing, never saw the warrant. There is also no evidence that he ever saw the Lundt affidavit or the application for the warrant. He also testified that he was not involved in the presearch surveillance of 351 Noble Avenue. Although other executing officers may have had knowledge of the specific activities, including possible illegal conduct at 351 Noble Avenue, that were the bases for the issuance of the warrant, no such evidence was presented to the court. Consequently, unlike in *Browne*, there was no evidentiary basis in the present case for the trial court to conclude that the executing officers understood the intended reach of the warrant and executed it in accordance with that reach. We therefore agree with the court that the executing officers exceeded the reach of the warrant when they entered 351 Noble Avenue.

The state next claims that "[a] technically wrong address does not invalidate a warrant if it otherwise describes the premises with sufficient particularity so that the police can ascertain and identify the place to be searched." (Internal quotation marks omitted.) In support of this claim, the state relies on a number of cases in which courts have held that an error in the description of the place to be searched does not neces-

sarily invalidate the warrant.[13] In contrast, Lyons claims in his brief that "there is no legal or factual merit to the state's claim that government officials committed an excusable mistake when they searched not at the address authorized by the magistrate but at the house next door." Likewise, the other defendants similarly challenge the state's claim that "the officers were justified in searching a premises other than that clearly identified in the warrant." (Emphasis omitted.) We agree with the defendants and conclude that the cases on which the state relies are factually distinguishable from the present case.

[13] In its brief, the state relies on certain Connecticut case law for the standard this court must apply in determining the validity of the warrant. See *State* v. *Zarick*, 227 Conn. 207, 224, 630 A.2d 565 (court should apply "common sense and may draw normal inferences from the facts alleged in the affidavit"), cert. denied, 510 U.S. 1025, 114 S. Ct. 637, 126 L. Ed. 2d 595 (1993); *State* v. *Johnson*, 219 Conn. 557, 565, 594 A.2d 933 (1991) (court should "afford deference to the magistrate's determination"); *State* v. *Barton*, 219 Conn. 529, 545, 594 A.2d 917 (1991) ("reviewing court should not invalidate the warrant by application of rigid analytical categories"). It then argues that those cases "stand for the proposition that the reviewing court must give deference to a signed warrant when determining that there is a proper finding of *probable cause*." (Emphasis added.) Those cases, however, concern the issue of whether there was probable cause for the issuance of the warrants, and the standards set forth therein apply to an appellate court's review of a finding of probable cause. The issue of whether there was probable cause for the issuance of the warrant to search 349 Noble Avenue is not before this court. Instead, we must determine whether the trial court properly granted the motions to suppress and determined that the search of 351 Noble Avenue constituted a warrantless search that violated the fourth amendment to the United States constitution. Accordingly, the state's reliance on, and arguments related to, case law concerning probable cause to support the issuance of a search warrant is misplaced. We also disagree with the state's reliance on *State* v. *Buddhu*, 264 Conn. 449, 467, 825 A.2d 48 (2003), cert. denied, 541 U.S. 1030, 124 S. Ct. 2106, 158 L. Ed. 2d 712 (2004), in support of its claim that an ambiguity existed in the warrant. *Buddhu* involved the issue of whether the officers had a duty to disclose to the judge issuing the warrant that the residence to be searched was located in a multiunit building. Id., 470. The factual circumstances of *Buddhu* are distinguishable from those in the present case, in which a warrant was issued to search a particular residence, and the police searched a residence different from the one identified in the warrant.

The state is correct that "[a]n erroneous description in the warrant . . . does not necessarily invalidate a warrant and subsequent search." *United States* v. *Owens*, 848 F.2d 462, 463 (4th Cir. 1988). The United States Supreme Court has recognized "the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants." *Maryland* v. *Garrison*, supra, 480 U.S. 87. "Courts of Appeals have rejected [f]ourth [a]mendment challenges to warrants that contain partial misdescriptions of the place to be searched so long as the officer executing the warrant could ascertain and identify the target of the search with no reasonable probability of searching another premises in error . . . . *Warrants have been upheld despite technical errors, such as an incorrect street address, when the possibility of actual error is eliminated by other information, whether it be a detailed physical description in the warrant itself, supplemental information from an appended affidavit, or knowledge of the executing agent derived from personal surveillance of the location to be searched.*" (Citation omitted; emphasis altered; internal quotation marks omitted.) *Velardi* v. *Walsh*, 40 F.3d 569, 576 (2d Cir. 1994); see also *United States* v. *Waker*, 534 F.3d 168, 171 (2d Cir. 2008) ("[M]inor errors in an affidavit are not cause for invalidating the warrant that it supports. . . . [A]ffidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. . . . It follows that courts should not invalidate [a] warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." (Citations omitted; internal quotation marks omitted.)); *United States* v. *Lora-Solano*, 330 F.3d 1288, 1293 (10th Cir. 2003) ("[a] technically wrong address does not invalidate a warrant if it otherwise describes the premises with sufficient particularity

so that the police can ascertain and identify the place to be searched"), cert. denied, 541 U.S. 940, 124 S. Ct. 1658, 158 L. Ed. 2d 362 (2004); *Youngs* v. *Fusaro*, 179 F. Supp. 3d 198, 204–205 (D. Conn. 2016) (technical error such as incorrect street address does not necessarily invalidate warrant when possibility of actual error can be eliminated by other information such as detailed description of property in warrant itself).

A number of cases have recognized that a minor error in the description of a premises, including an incorrect address or wrong house number on the warrant, does not necessarily invalidate the warrant. For example, in *United States* v. *Valentine*, 984 F.2d 906, 909 (8th Cir.), cert. denied, 510 U.S. 828, 114 S. Ct. 93, 126 L. Ed. 2d 60 (1993), the warrant incorrectly identified the number of the building to be searched as "3048 Thomas," rather than its actual number of "3050 Thomas." The United States Court of Appeals for the Eighth Circuit determined that, because the warrant described the target of the search in detail by providing a description of the building to be searched and because the search was confined to that building, the technical error in the particularity of the address in the warrant was insufficient to invalidate the warrant. Id. Similarly, in *United States* v. *Bonner*, 808 F.2d 864, 865 (1st Cir. 1986), cert. denied, 481 U.S. 1006, 107 S. Ct. 1632, 95 L. Ed. 2d 205 (1987), the warrant contained a detailed description of the premises to be searched but omitted the exact address or house number. The United States Court of Appeals for the First Circuit upheld the validity of the warrant, concluding that, because the case agent who executed the warrant previously had conducted surveillance of the premises on at least ten prior occasions and because the residence was described in the warrant with sufficient particularity, "there was no reasonable probability that another premises might be mistakenly

searched," despite the "minor, technical omission" in the warrant. Id., 866–67.

In *United States* v. *Burke*, 784 F.2d 1090, 1092 (11th Cir.), cert. denied, 476 U.S. 1174, 106 S. Ct. 2901, 90 L. Ed. 2d 987 (1986), the warrant incorrectly stated the address for an apartment in a housing project as "38 Throop Street," apartment 840, when in fact the correct address was 48 Troup Street, apartment 840, in Atlanta, Georgia. The United States Court of Appeals for the Eleventh Circuit, nevertheless, found that the warrant was valid and satisfied the particularity requirements of the fourth amendment. Id., 1093. In making that determination, the court first explained that there is no such road as "Throop Street" in Atlanta and that the only street with a similar name was Troup Street. Id., 1092. The court further stated: "The search warrant contained a detailed physical description of the building, minimizing the possibility that an apartment in any building other than the correct one would be searched. See *United States* v. *Figueroa*, 720 F.2d 1239, 1243 n.5 (11th Cir. 1983) (mistaken address 'inconsequential in light of a clear description of the name of the building and its physical appearance'). In addition, the warrant correctly named the apartment number, and there was only one apartment with the number '840' in the . . . [h]ousing [p]roject in which [the] appellee resided." *United States* v. *Burke*, supra, 1092.

As the court in *Burke* explained: "In evaluating the effect of a wrong address on the sufficiency of a warrant, this [c]ourt has also taken into account *the knowledge of the officer executing the warrant, even where such knowledge was not reflected in the warrant or in the affidavit supporting the warrant.* . . . In the present case, Agent [John] Benesh knew precisely which premises were to be searched. Although Benesh did not himself execute the warrant, he pointed out the correct apartment to the executing officer . . . . The

actions of Benesh and [the executing officer] insured that there was no possibility the wrong premises would be searched." (Citations omitted; emphasis added.) Id., 1092–93.

The preceding cases make clear that when a warrant has been found to be valid, despite a technical error in the address stated, it is because the warrant itself contained a detailed description of the premises that enabled the executing officers to identify the place to be searched or because there was evidence that at least one of the executing officers had prior knowledge related to the premises searched, such that there was no possibility that the wrong premises would be searched. Those factors do not exist in the present case. Here, the warrant simply contained the address of the place to be searched—349 Noble Avenue—with no physical description of the property itself, which was identified at trial as a duplex with two separate addresses, including two driveways, parking areas, walkways, porches, mailboxes, front doors and utility meters. As the trial court determined, the description in the warrant was clear and unambiguous and left "no room for interpretation"; the police were authorized by the warrant to search 349 Noble Avenue, not the property located at 351 Noble Avenue. There was nothing on the face of the warrant that eliminated the possibility that another premises might be mistakenly searched.

Moreover, the state's claim that the search of the wrong address was valid because "Slaiby was part of the surveillance team and had surveilled the property approximately three times" and because he "took part in the presearch briefing" is unavailing. It is clear from the transcript of Slaiby's testimony that he was not familiar with the building searched, he never saw a copy of the warrant, the presearch briefing did not include a discussion of the location to be searched, he previously had conducted surveillance only of the area,

"[n]ot of the house itself," and he was not part of the preparation of the warrant, nor did he know what information was contained in the warrant. In rejecting the state's assertion, the court found that in the cases in which warrants have been upheld despite a lack of particularity, "the same law enforcement officers conducted the investigation, *prepared* the warrant application and led or participated in the execution, which was sufficient to prevent general rummaging, the evil against which the particularity clause of the fourth amendment is designed to protect. In this case, the only evidence in the record is that . . . Slaiby never conducted surveillance of the house at 349–351 Noble Avenue; there is no evidence about any other executing officer." (Emphasis in original.) We agree with the court that the factors that may justify a search where there is an error in the warrant are simply not present here.

We agree with the trial court that when the police searched 351 Noble Avenue rather than 349 Noble Avenue, they searched a residence that was not authorized by the warrant. Therefore, the search of 351 Noble Avenue was a warrantless search that was per se unreasonable and violated the fourth amendment.[14] See *State* v. *Blades*, 225 Conn. 609, 617, 626 A.2d 273 (1993). Accordingly, the court properly granted the defendants' motions to suppress the evidence seized as a result of that warrantless search.

The judgments are affirmed.

In this opinion the other judges concurred.

[14] The trial court found that "[t]he state relie[d] entirely on the warrant as legal authorization for the search" and did "not claim any exception to the warrant requirement." On appeal, the state also has not argued that a valid exception to the warrant requirement applies, and it stated at oral argument before this court that it was not arguing for the application of the good faith exception. We, therefore, do not address whether the search of 351 Noble Avenue should, nevertheless, be held valid pursuant to, inter alia, the good faith or exigent circumstances exceptions to the warrant requirement.

DONALD GEORGE CARTEN, JR. *v.* JUDY JUNYING CARTEN
(AC 41858)

Elgo, Suarez and DiPentima, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving her marriage to the plaintiff. The defendant claimed that the trial court erred in declining to award her alimony. *Held* that the trial court properly exercised its broad discretion in declining to make an award of alimony to the defendant: the court considered the statutory (§ 46b-82) factors in determining whether alimony should be awarded, assessed the credibility of the parties' trial testimony, finding certain testimony of the defendant to be not credible, and, based on the evidence presented, found that the parties were able to continue the standard of living to which they were accustomed during the marriage, considering the defendant's average gross income, education and employability, as well as the division of marital property, and the defendant did not challenge any of the factual findings that supported the court's decision not to award alimony.

Argued January 13—officially released March 30, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Tindill*, *J.*; judgment dissolving the marriage, from which the defendant appealed to this court; thereafter, the court, *Tindill*, *J.*, denied the defendant's motion for articulation; subsequently, this court granted the defendant's motion for review, and the court, *Tindill*, *J.*, issued an articulation. *Affirmed.*

Jeffrey D. Ginzberg, for the appellant (defendant).

Maria F. McKeon, for the appellee (plaintiff).

Opinion

DiPENTIMA, J. The defendant, Judy Junying Carten, appeals from the judgment of the trial court dissolving

her marriage to the plaintiff, Donald George Carten, Jr. The defendant claims on appeal that the court should have awarded her alimony. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The parties were married on June 27, 1999, in Orange and had two minor children at the time of the dissolution. In February, 2017, the plaintiff commenced this dissolution action. The court dissolved the marriage on June 26, 2018, finding that it had broken down irretrievably, and that the defendant "[was] more at fault for the irretrievable breakdown of the marriage than the plaintiff." The court did not award alimony to either party and divided the marital property between the parties. Additionally, the court found the following: "[T]he defendant wilfully violated the automatic orders . . . and the May 15, 2017 court orders . . . The plaintiff's pendente lite motion for contempt . . . is granted. The defendant shall pay the reasonable attorney's fees and costs associated with the preparation and prosecution of the motion for contempt." This appeal followed.

During the pendency of this appeal, the defendant filed a motion for articulation regarding the court's decision to make no award of alimony. The trial court denied the motion, and the defendant filed a motion for review with this court. This court granted the defendant's motion and ordered the trial court to "articulate what the parties' earnings and/or earning capacities were at the time of judgment, as well as the factual and legal basis for its determination that neither party would be awarded alimony with reference to the factors set forth in General Statutes [§] 46b-82 (a)." The trial court responded to this order, stating: "At the time of judgment, the court determined that the [plaintiff] had an annual gross earning capacity of $350,000 . . . and a current income of $41,184 . . . . His sole source of income at the time of judgment was severance and

unemployment compensation. At the time of judgment, the court determined that the [defendant] had an annual gross income of $150,000. . . . In order to determine its alimony order, the court considered the factors enumerated in § 46b-82, assessed the credibility of the parties' testimony at trial, reviewed and considered the proposed orders . . . and the parties' written closing argument . . . and reviewed the evidence before it.

"Based on this review . . . the court determined . . . that it was within the court's discretion to decline to award alimony to either party; that an award of alimony, given the conduct of the defendant . . . would be unfair and inequitable; that based on the credible evidence before the court, the parties are able to continue to enjoy the standard of living to which they were accustomed during the marriage; that during the parties' eighteen year marriage, they were gainfully employed, made good financial decisions and investments, accumulated substantial savings, planned well for their respective retirements, and planned well for the financing of the children's postsecondary educational pursuits; that the [defendant] was at fault for the breakdown of the marriage . . . that the parties were in good health at the time of the trial; that both parties are well educated with significant employment experience, work history, and employability . . . that the [defendant] came to the marriage with approximately $20,000 more than the [plaintiff] [and that] [t]he parties grew their estate together during the marriage with steady employment, ample income, and financial acumen . . . in spite of the [defendant's] spending and hoarding habits and lack of accountability for moneys spent once the [plaintiff] filed for divorce; and that the division of property . . . and other assets, as well as the agreed upon parenting plan . . . did not warrant an award of alimony to either party."

The standard of review in domestic relations cases is well established. "[T]his court will not disturb trial court orders unless the trial court has 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 factors significant to a domestic relations case . . . ." (Citations omitted; internal quotation marks omitted.) *Borkowski* v. *Borkowski*, 228 Conn. 729, 739, 638 A.2d 1060 (1994). "Appellate review of a factual finding, therefore, is limited both as a practical matter and as a matter of the fundamental difference between the role of the trial court and an appellate court. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Anderson* v. *Anderson*, 160 Conn. App. 341, 344, 125 A.3d 606 (2015). "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." (Internal quotation marks omitted.) *Merk-Gould* v. *Gould*, 184 Conn. App. 512, 516, 195 A.3d 458 (2018).

According to the defendant, "[t]his is a case in which the trial court should have at least awarded nominal alimony." In support of her claim, the defendant asserts that "the court focused on the defendant's alleged bad behavior . . . gave scant attention to the issue of alimony and why it decided not to award even nominal alimony in a long-term marriage involving middle-aged people . . . [and] gave no attention to the defendant's sublimating herself for the plaintiff's financial betterment during the marriage and the plaintiff's superior

earning capacity."[1] (Footnote omitted.) The plaintiff argues in response that the court properly applied the statutory provisions and considered the evidence before it. We agree with the plaintiff.

As the court stated in its articulation, it considered "the factors enumerated in § 46b-82, assessed the credibility of the parties' testimony at trial . . . and reviewed the evidence before it" in determining that no award of alimony should be made. Section 46b-82 (a) provides in relevant part: "In determining whether alimony shall be awarded . . . the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment."

In its memorandum of decision, the court made the following findings: "The [defendant] is more at fault for the irretrievable breakdown of the marriage than the [plaintiff]. . . . Based on the credible evidence before the court and considering the factors required by § 46b-82, an award of alimony for either party is unwarranted. . . . The defendant's testimony regarding the $20,000 received by the parties from her mother, the source of the shoebox money ($13,380), the rental of the . . .

[1] To the extent the defendant argues that the court improperly failed to consider her future needs in declining to award her alimony, we are not persuaded. In its articulation, the court stated that it "considered the factors enumerated in § 46b-82." Hence, "[a]ny ambiguity as to the criteria upon which the court relied for alimony was put to rest in [the] articulation . . . wherein the trial court indicated that it had relied upon the criteria in § 46b-82 . . . ." *Maguire* v. *Maguire*, 222 Conn. 32, 47, 608 A.2d 79 (1992).

beach houses . . . and income from those beach houses is not credible."[2] In its articulation, the court also found that "the parties are able to continue to enjoy the standard of living to which they were accustomed during the marriage . . . the [defendant] was at fault for the breakdown of the marriage . . . the parties were in good health at the time of the trial; that both parties are well-educated with significant employment experience, work history, and employability . . . [t]he parties grew their estate together during the marriage with steady employment, ample income, and financial acumen . . . in spite of the [defendant's] spending and hoarding habits and lack of accountability for moneys spent once the [plaintiff] filed for divorce; and [because of] the division of property . . . and other assets, as well as the agreed upon parenting plan," no award of alimony was warranted. The defendant challenges none of the factual findings that supported the court's decision not to award alimony. Further, § 46b-82 (a) provides in relevant part that, "[i]n determining whether alimony shall be awarded . . . the court shall consider the evidence presented by each party" and also directs the court to consider the statutory factors; this is what the court did. Accordingly, the court did not abuse its discretion by declining to award alimony to the defendant based on its consideration of the evidence and factors set forth in § 46b-82 (a).

Furthermore, the cases cited by the defendant are clearly distinguishable from the present case. In *Casey* v. *Casey*, 82 Conn. App. 378, 844 A.2d 250 (2004), the

[2] The court also found that "[t]he defendant . . . has intentionally caused delay, failed to comply with court orders, failed to appear in court, reneged on agreements, fired or sabotaged attorneys representing her, and has taken other action to avoid orderly, efficient proceedings because she does not want to be divorced from the plaintiff." Although these findings may support the court's findings of contempt and award of attorney's fees, a trial court should resist including findings related to misconduct during court proceedings with those findings properly made pursuant to § 46b-82 (a).

opening sentence of this court's opinion sets the stage as to why it does not support the defendant's position: "This case represents one of the *very rare* matrimonial cases in which a disappointed party successfully argues that the financial orders entered incident to a dissolution action exceed the broad discretion of the trial court." (Emphasis added.) Id., 379. In *Casey*, the parties were married in June, 1996, and the plaintiff husband filed a dissolution action in May, 2001. Id., 380–81. At the time of the dissolution, the plaintiff was fifty-two years old and the defendant was fifty-four years old. Id., 381. The trial court found that, "[a]s to the breakdown of the marriage . . . although both parties' conduct ultimately caused the breakdown, the plaintiff's sexual infidelities initiated the breakdown and were the primary cause of the failure of the marriage." Id., 381–82. The court made no award of alimony but did distribute the principal assets of the parties. Id., 382. In reviewing the order of the trial court, this court held that "the financial orders were logically inconsistent with the facts found and that the court could not reasonably have concluded as it did." Id., 385. Specifically, this court held: "Applying those factual findings to the statutory considerations set forth in General Statutes §§ 46b-81 and 46b-82, we cannot reconcile the court's financial orders with its findings. . . . That is particularly true when, as here, the evidence revealed that the defendant would be unable to make the monthly [mortgage] payments and, therefore, faced the daunting prospect of defaulting on the mortgage or selling the property in the near future." Id.

These facts are clearly distinguishable from the present case, where the trial court found, and the record shows, that "the parties are able to continue the standard of living to which they were accustomed during the marriage," and the defendant has raised no issue with the manner in which the court distributed marital

property. Accordingly, we conclude that, unlike *Casey*, the present case is not one of the "very rare cases" in which the court has abused its discretion.

In *Wiegand* v. *Wiegand*, 129 Conn. App. 526, 539, 21 A.3d 489 (2011), this court concluded that the trial court abused its discretion by failing to make an award of alimony to the plaintiff husband because "the plaintiff had little or no income, while the defendant had a net income of approximately $889 weekly. The plaintiff was ordered to assume and to pay a substantial portion of the marital debt, despite having little or no income to pay that debt, and the court did not make any findings regarding his prospects for employment or his earning capacity. Because the parties did not have substantial personal assets, it reasonably is foreseeable that if the plaintiff complied with the court's orders, he quickly would become destitute, to the extent that he was not already destitute." Thus, *Wiegand* is clearly distinguishable from the present case, in which the court found, and the record shows, that the defendant, at the time of dissolution, "had an annual gross income of $150,000" and was "well educated with significant employment experience, work history, and employability" and that "[t]he parties grew their estate together during the marriage with steady employment, ample income, and financial acumen." The court in the present case also took into account "the division of property . . . and other assets" in concluding that an award of alimony was not warranted.

In *Kovalsick* v. *Kovalsick*, 125 Conn. App. 265, 7 A.3d 924 (2010), this court held the following in concluding that it was unreasonable for the trial court to decide to make no award of alimony to the plaintiff wife: "The court found that the parties had 'equal standing in their educational level' and that the plaintiff had 'additional skills' in the job market because she is bilingual. In declining to award time limited alimony, the court found

that the plaintiff is 'in good health, that she has obtained a four year bachelor of arts degree and has bilingual skills with a good work history . . . .' Despite the evidence of actual earnings, the court appeared to equate the parties' 'equal standing in their education level' to equal earning capacity. The court, however, found that the plaintiff earned only $13 to $15 per hour throughout the marriage and that she was working 37.5 hours per week at only $13 per hour at the time of trial. The plaintiff's earnings from her employment never exceeded $25,000 per year while the defendant historically earned roughly five times that amount. No evidence was presented that would tend to show that the plaintiff could earn more than the salary that she earned throughout the marriage without additional education and training. In light of the court's emphasis on 'equal . . . education level' as opposed to actual historical earnings, we cannot conclude that it was reasonable for the court to decide as it did based on the facts found or the evidence presented." (Emphasis omitted; footnote omitted.) Id., 274. This court further held that "there was evidence that the plaintiff was not able to meet her obligations, which included the payments on the debt . . . [and that] [i]t is reasonably foreseeable that, if the court's financial orders are allowed to stand and the plaintiff continues to be responsible for the entire debt but is unable either to increase her earning capacity or to receive alimony or a portion of the marital property, she could well be in dire financial straits." (Footnote omitted.) Id., 274–75.

The facts in *Kovalsick*, like the facts in *Wiegand*, are clearly distinguishable from those in the present case. As in *Wiegand*, this court, in addressing the plaintiff's claim in *Kovalsick*, focused on the income of the plaintiff and her level of debt. The defendant in the present case is in a situation significantly distinct from that of the plaintiff in *Kovalsick*; nothing in this case suggests

that, without alimony, the defendant could find herself in "dire financial straits," or be unable to meet her obligations. In fact, the court in the present case found, and the record indicates, that "the [defendant] had an annual gross income of $150,000 . . . [and that] the parties are able to continue to enjoy the standard of living to which they were accustomed during the marriage." Accordingly, *Kovalsick* does not support the defendant's position.

We conclude by noting that while there may be a common thread that runs through these cases—a potential inability of a party to meet its expenses and debt obligations after dissolution—they do not create, as the defendant suggests, a hard and fast rule that requires a trial court to make an award of alimony in specific factual circumstances. Because the record in the present case supports the court's conclusion that no award of alimony was warranted, we find that the court was within its broad discretion in declining to make such an award.

The judgment is affirmed.

In this opinion the other judges concurred.

DARYL L. STARKE *v.* THE GOODWIN ESTATE ASSOCIATION, INC.
(AC 42736)

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

Syllabus

The plaintiff sought to recover damages from the defendant pursuant to the Common Interest Ownership Act (§ 47-200 et seq.), for its alleged failure to repair water damage to the floor, walls, ceilings, and window treatments of his condominium unit. The trial court granted the defendant's motion to dismiss the plaintiff's complaint as moot because the plaintiff no longer owned the condominium unit, having lost title in a foreclosure action. Thereafter, the court rendered judgment dismissing the plaintiff's complaint and the plaintiff appealed to this court. *Held* that there was

no merit to the plaintiff's claim that the trial court erred in dismissing the negligence count of his complaint because it alleged personal property damage that was not contingent on his continued ownership interest in the unit; the plaintiff's complaint was based entirely on the defendant's alleged violations of the act and his rights as a unit owner pursuant to the act, and the plaintiff did not argue before the trial court that his claim for damages to the window treatments was a claim for damages to personal property.

Argued January 19—officially released March 30, 2021

Procedural History

Action to recover damages for, inter alia, violations of the Common Interest Ownership Act, brought to the Superior Court in the judicial district of Hartford, where the court, *Dubay, J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Keith Yagaloff, for the appellant (plaintiff).

Anita M. Varunes, with whom was *Christopher S. Young*, for the appellee (defendant).

Opinion

BRIGHT, C. J. The plaintiff, Daryl L. Starke, appeals from the judgment of dismissal rendered by the trial court of his complaint against the defendant, The Goodwin Estate Association, Inc., brought pursuant to the Common Interest Ownership Act (act), General Statutes § 47-200 et seq. On appeal, the plaintiff claims that the court improperly dismissed his complaint as moot, after he lost title to his condominium unit in a foreclosure proceeding, because the damages he claimed included damages for personal property, namely, window treatments, which, he alleges are not contingent on his ownership of the condominium unit. We affirm the judgment of the trial court.

The following facts and procedural history, as reflected in the record, are relevant to our analysis. On February 12, 2016, the plaintiff, pursuant to the act,

brought a five count complaint against the defendant for its alleged failure to repair water damage to his "floor, walls, ceilings and window treatments" caused by ice damming. He alleged in count one a cause of action for "material noncompliance with [General Statutes] § 47-255 (h) (1)"; in count two, "material noncompliance with [General Statutes] § 47-245 (a)"; in count three, "breach of obligation of good faith [in violation of General Statutes] § 47-211"; in count four, "breach of fiduciary duty" to a "unit owner"; and, in count five, "negligence" for the defendant's alleged failure to repair damages in accordance with § 6.6 of the defendant's declaration on the ground that the "association has a duty of care . . . to the plaintiff as [a] unit owner."

On May 5, 2017, the defendant filed a motion to dismiss the complaint as moot because the plaintiff no longer owned the condominium unit due to a foreclosure judgment. The plaintiff, however, had appealed from the foreclosure judgment and, therefore, the court denied the motion because the plaintiff still possessed a right of redemption. Following the affirmance of the foreclosure judgment by this court; see *Goodwin Estate Assn., Inc.* v. *Starke*, 184 Conn. App. 92, 194 A.3d 351 (2018); the defendant filed another motion to dismiss on the ground that the complaint was moot because the plaintiff no longer owned the condominium unit. The plaintiff opposed the motion on the grounds that the "law of the case" doctrine controlled and that he owned the condominium unit when the complaint was filed.

On January 17, 2019, the court granted the defendant's motion to dismiss, concluding that the case had become moot once the plaintiff lost title to the condominium unit. The plaintiff then filed a motion to reargue, alleging that the court had failed to consider the "law of the case" doctrine and the defendant's answer to his complaint in which it admitted that the plaintiff owned

his condominium unit. The defendant objected to the motion to reargue, and the court sustained the objection and denied the motion to reargue. This appeal followed.

On appeal, the plaintiff claims that the court erred in dismissing count five of his complaint on mootness grounds because he had "alleged personal property damage whose redressability was not contingent on [his] continued ownership interest in the unit." He argues that "[t]he only portions of [his] complaint that may have been mooted by [his] loss of ownership in the unit were those that sought to redress the damage to the floor, walls, and ceiling." He contends that count five sought damages for personal property, namely, "window treatments."

The defendant argues that the plaintiff never mentioned a claim for personal property in his opposition to the motion to dismiss, during oral argument on the motion to dismiss,[1] or in his motion to reargue the granting of the motion to dismiss, and that he should be prohibited from raising such an argument on appeal.

"Mootness is a question of justiciability. . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . Mootness is connected to the first factor of justiciability, that there be a live controversy at all stages of the litigation." (Citations omitted;

[1] The plaintiff has failed to provide this court with a transcript of the oral argument. Because we are able to consider this appeal on the basis of the pleadings, we conclude that it is not essential to our decision.

internal quotation marks omitted.) *Russo* v. *Common Council*, 80 Conn. App. 100, 104–105, 832 A.2d 1227 (2003). "Mootness . . . implicates subject matter jurisdiction, which imposes a duty on the [trial] court to dismiss a case if the court can no longer grant practical relief to the parties. . . . Mootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition of affairs between the parties. . . . A case becomes moot when due to intervening circumstances a controversy between the parties no longer exists." (Citations omitted; internal quotation marks omitted.) *We the People of Connecticut, Inc.* v. *Malloy*, 150 Conn. App. 576, 581, 92 A.3d 961 (2014).

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [decision to] grant . . . the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Gerlt* v. *South Windsor*, 284 Conn. 178, 188–89, 931 A.2d 907 (2007).

In his complaint, the plaintiff, in count one, alleged that he was a condominium unit owner within the "common interest community known as the Goodwin Estate . . . ." He further alleged that the Goodwin Estate was formed as The Goodwin Estate Association, Inc., under the act. The plaintiff further alleged that the defendant was in violation of its duties under specific portions of the act, which duties they owed to the plaintiff because he was a condominium unit owner in the Goodwin Estate. In count five of his complaint, sounding in negligence, which is the only count he claims on appeal to be viable still, the plaintiff specifically incorporated most of the allegations from count one. Additionally, he alleged that, pursuant to the defendant's declaration,

the defendant was "responsible for damage to the plaintiff's unit" because it "has a duty of care . . . to the plaintiff as [a] unit owner," and that "[t]he plaintiff incurred damages to [the unit's] walls, ceilings, floors, and window treatments" as a result of the defendant's negligence.

Although the plaintiff, on appeal, argues that in count five of his complaint he, in part, was seeking damages for loss of "personal property," a review of the pleadings, including the complaint, the plaintiff's opposition to the defendant's motion to dismiss, his supplemental opposition to the defendant's motion to dismiss, and the plaintiff's motion to reargue, reveals no indication that he ever argued that to the trial court. Furthermore, there is nothing in his complaint that would indicate that "window treatments" was referring to personal property rather than to fixtures,[2] or that he was proceeding on that count in his capacity as the owner of damaged personal property rather than as a unit owner. To the contrary, the plaintiff's complaint was based entirely on the defendant's alleged violations of the act and his rights of action, *as a unit owner*, pursuant to the act. Whether his negligence claim, seeking damages for, inter alia, the loss of "window treatments," was a claim for damaged personalty was neither raised before nor decided by the trial court, nor was any argument made by the plaintiff that he was seeking damages on that count as a former unit owner or as the owner of those window treatments, which he considered to be

[2] "Property is divided into two great divisions, things personal and things real, and fixtures may be found along the dividing line. They are composed of articles that were once chattels, or such in their nature, and by physical annexation to real property have become accessory to it and parcel of it." *Capen* v. *Peckham*, 35 Conn. 88, 93 (1868). At least one Connecticut court, when distributing marital property in a dissolution action, included window treatments among the "fixtures" to "go with the home." *Jendraszek* v. *Jendraszek*, Superior Court, judicial district of New London, Docket No. FA-98-0115224-S (October 4, 1999).

personal property; he clearly alleged in count five only that the defendant had a duty to him because he was a unit owner. We, therefore, conclude that the plaintiff's claim, raised for the first time on appeal, is without merit.

The judgment is affirmed.

In this opinion the other judges concurred.