GLORIA FERNANDEZ *v.* MAC MOTORS, INC.
(AC 43618)

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

Syllabus

The plaintiff sought to recover damages from the defendant, her former employer, for alleged discrimination and the creation of a hostile work environment on the basis of her gender in violation of the applicable provision (§ 46a-60) of the Connecticut Fair Employment Practices Act. The plaintiff, who had been a finance manager at the defendant's car dealership, claimed that she had been paid less than male employees who performed the same job and that she had been subjected to mistreatment by four male managers, which included sporadic incidents of yelling. She further alleged that male employees made remarks in the workplace that were crude and demeaning to women. The plaintiff initially brought an action in the United States District Court for the District of Connecticut, in which she alleged that the defendant had violated the federal Equal Pay Act of 1963 (29 U.S.C. § 206 et seq.). While the federal action was pending, the plaintiff filed a complaint with the Commission on Human Rights and Opportunities, in which she alleged violations of § 46a-60. The commission thereafter issued to the plaintiff a release of jurisdiction letter that authorized her to bring this action in the Superior Court. During the pendency of that action, the District Court rendered summary judgment for the defendant. The trial court then granted the defendant's motion for summary judgment on the grounds that the plaintiff's gender discrimination claim was barred by the doctrine of res judicata and that the evidence she presented was insufficient to raise a genuine issue of material fact as to her hostile work environment claim. On the plaintiff's appeal to this court, *held*:

1. The trial court correctly determined that res judicata barred the plaintiff's gender discrimination claim: contrary to the plaintiff's assertion that the statute of limitations for Equal Pay Act claims required her to litigate that claim before her gender discrimination claim, there was no genuine issue of material fact that she was not jurisdictionally barred from bringing the gender discrimination claim in the District Court, as she failed to take advantage of available options that included filing the Equal Pay Act claim in the District Court, then seeking a stay of that action until the proceeding before the commission concluded, amending the Equal Pay Act complaint to add the gender discrimination claim after the commission issued the release of jurisdiction letter, or exhausting her administrative remedies before the commission, then filing both the Equal Pay Act and gender discrimination claims in the District Court; moreover, as the complaint before the trial court and the pleadings in the District Court contained virtually identical allegations, and involved

the same parties and conduct that occurred during the same time period, the combined facts of both actions constituted a single transaction that would have formed a convenient trial unit for the District Court, which would not have been unexpected by the parties; furthermore, the plaintiff failed to present any evidence to suggest that the District Court would have declined to exercise supplemental jurisdiction over her gender discrimination claim, as federal courts routinely, and properly, exercise supplemental jurisdiction over state law claims of that nature when similar federal claims also have been alleged, and, although the plaintiff's Equal Pay Act and state law discrimination claims contained different legal elements, such differences do not affect the application of res judicata when the legal claims arise from the same transaction.

2. The trial court correctly determined that the defendant was entitled to judgment as a matter of law on the plaintiff's hostile work environment claim: the conduct at issue was not sufficiently severe or pervasive to give rise to a hostile work environment claim, as the plaintiff admitted that the incidents and conduct at issue were sporadic and not pervasive, she was unable to describe with specificity when the events occurred, and she never alleged, and the record did not suggest, that the conduct at issue altered the conditions of her employment; moreover, nothing in the record suggested that yelling, the only conduct clearly directed at the plaintiff, ever had anything to do with her gender, and the plaintiff stated that the yelling was always related to issues in the workplace; furthermore, there was no evidence as to when the comments and conduct directed at other female employees occurred or that the plaintiff ever took steps to report it, and she specifically stated that she was never the target of language or conduct of a sexual nature.

Argued April 14—officially released July 13, 2021

Procedural History

Action to recover damages for alleged employment discrimination, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Hon. A. Susan Peck*, judge trial referee, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Zachary T. Gain, with whom, on the brief, was *James V. Sabatini*, for the appellant (plaintiff).

Sara R. Simeonidis, with whom, on the brief, was *James F. Shea*, for the appellee (defendant).

Opinion

DEVLIN, J. In this employment discrimination case, the plaintiff, Gloria Fernandez,[1] appeals from the summary judgment rendered in favor of her former employer, the defendant, Mac Motors, Inc., as to both counts of her complaint, in which she alleged that the defendant had subjected her to discrimination and a hostile work environment on the basis of her gender. On appeal, the plaintiff claims that the trial court erred in granting the defendant's motion for summary judgment in its entirety because (1) her gender discrimination claim was not barred by the doctrine of res judicata, and (2) she submitted sufficient evidence to raise a genuine issue of material fact as to her hostile work environment claim. We affirm the judgment of the court.

The record before the court, viewed in the light most favorable to the plaintiff as the nonmoving party, reveals the following facts and procedural history. The defendant is a corporation that does business as Hartford Toyota Superstore and operates a car dealership in Hartford. On August 1, 2014, the defendant hired the plaintiff as a finance manager. The defendant employed one other finance manager, Marc Clemons, who is male. Among the responsibilities of finance managers was the sale of "back end" financial products[2] to customers who purchased vehicles. When the plaintiff was hired, finance managers received as compensation 14 percent of the gross profits from their own sales of back end products to customers.

During the time of the plaintiff's employment with the defendant, Asad "Tony" Mumtaz served as finance

[1] Gloria Fernandez died during the pendency of this appeal. We thereafter granted the motion filed by her appellate counsel to substitute her daughter, Christina Gonzalez, the executor of her estate, as the plaintiff.

[2] "Back end" financial products include warranties, environmental protection packages, and tire and wheel packages.

director, and he was responsible for overseeing the finance managers and working with financial institutions to obtain financing for customers. James Webster served as general manager, and he was responsible for overseeing Mumtaz and managing the day-to-day business of the defendant. Webster reported directly to the defendant's owner, Richard McAllister, whose son, Richard McAllister, Jr. (McAllister), served as sales manager.

In early 2016, the defendant revised the pay plan for finance managers, such that they would receive as compensation 4.6 percent of the gross profits of the sales of back end products made by the entire sales department. Approximately one month later, on February 12, 2016, the plaintiff tendered her resignation because this constituted a "huge reduction in [her] pay plan."

On July 15, 2016, the plaintiff, along with two other female employees of the defendant, instituted an action in the United States District Court for the District of Connecticut (federal action), alleging that the defendant had "fail[ed] to pay [the] plaintiffs the same as male employees performing the same job, in violation of the Equal Pay Act of 1963 [EPA], 29 U.S.C. § 206 et seq." On July 25, 2016, the plaintiff filed a complaint with the Commission on Human Rights and Opportunities (commission), "charg[ing] [the defendant] with gender discrimination and [having created a] hostile work environment . . . ." On April 21, 2017, the plaintiff received a release of jurisdiction letter from the commission, which authorized her to bring this action in the Superior Court. On July 18, 2017, the plaintiff commenced the present action, alleging that that she had been subjected to discrimination and a hostile work environment on the basis of her gender in violation of General Statutes § 46a-60 of the Connecticut Fair Employment Practices Act, General Statutes § 46a-51 et seq. On April 30, 2018, the District Court granted the defendant's motion for

summary judgment and rendered judgment in favor of the defendant.

On November 19, 2018, the defendant filed a motion for summary judgment as to both counts of the plaintiff's complaint on the grounds that her claim of gender discrimination was barred by res judicata and that the conduct she complained of did not create a hostile work environment as a matter of law. On November 13, 2019, the court rendered summary judgment in favor of the defendant as to both counts. It is from this judgment that the plaintiff appeals. Additional facts and procedural history will be set forth as necessary.

"We set forth our well established standard of review on appeal following a trial court's granting of a motion for summary judgment. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue at to any material fact and that the moving party is entitled to judgment as a matter of law. As an appellate tribunal, [w]e must decide whether the trial court erred in determining that there was no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The test is whether a party would be entitled to a directed verdict on the same facts. . . . A material fact is a fact which will make a difference in the result of the case. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist." (Internal quotation marks omitted.) *Mariano* v. *Hartland Building & Restoration Co.*, 168 Conn. App. 768, 776–77, 148 A.3d 229 (2016).

I

The plaintiff first claims that the trial court erred in concluding that her gender discrimination claim was barred by res judicata. Specifically, the plaintiff claims that res judicata does not apply because "there was a jurisdictional bar preventing [her] from bringing [the] claim before the federal court," and because her "[EPA] claims litigated in federal court are fundamentally different from her gender discrimination claim brought under [§ 46a-51 et seq.]." We are not persuaded.

"Res judicata, or claim preclusion, express[es] no more than the fundamental principle that once a matter has been fully and fairly litigated, and finally decided, it comes to rest. . . . Res judicata bars the relitigation of claims actually made in [a] prior action as well as any claims that might have been made there. . . . Public policy supports the principle that a party should not be allowed to relitigate a matter which it already has had an opportunity to litigate." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Wheeler* v. *Beechcroft, LLC*, 320 Conn. 146, 156–57, 129 A.3d 677 (2016). It is well established that "a federal court has jurisdiction over an entire action, including state-law claims, whenever the federal-law claims and state-law claims in the case derive from a common nucleus of operative fact and are such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding. . . . The [United States Supreme] Court intended this standard not only to clarify, but also to broaden, the scope of federal pendent jurisdiction. . . . According to [the United States Supreme Court], considerations of judicial economy, convenience and fairness to litigants support a wide-ranging power in the federal courts to decide state-law claims in cases that also present federal questions." (Citation omitted; internal quotation marks omitted.) *Connecticut National*

Bank v. *Rytman*, 241 Conn. 24, 47, 694 A.2d 1246 (1997). Therefore, the first question before this court is whether there was a jurisdictional bar to the plaintiff's bringing her gender discrimination claim in the federal action.

According to the plaintiff, she "was obligated to litigate her EPA claim before her gender discrimination claim due to the statute of limitations [because] [t]he filing of the gender discrimination claim with the [commission] [did] not extend/toll the two year statute of limitations for filing an EPA lawsuit." Although the plaintiff is technically correct, there existed several opportunities that were available to her that she could have employed in order to bring her gender discrimination claim before the District Court. See generally V. Hooper, note, "Avoiding the Trap of *Res Judicata*: A Practitioner's Guide to Litigating Multiple Employment Discrimination Claims in the Third Circuit," 45 Vill. L. Rev. 743 (2000). Under one such option, the plaintiff could have filed her EPA claim in federal court and then sought a stay of that action until the conclusion of her proceeding before the commission. This option was viable because the United States Court of Appeals for the Second Circuit is "of the firm opinion that a [D]istrict [C]ourt faced with a stay request in this type of situation . . . should grant the stay absent a compelling reason to the contrary." *Woods* v. *Dunlop Tire Corp.*, 972 F.2d 36, 41 (2d Cir. 1992), cert. denied, 506 U.S. 1053, 113 S. Ct. 977, 122 L. Ed. 2d 131 (1993). The plaintiff also could have filed her EPA claim in federal court and then amended that complaint to add her gender discrimination claim after the commission issued its release of jurisdiction letter. This option was also viable because the federal action was not disposed of until nine months after the plaintiff commenced the present action. Finally, the plaintiff could have first exhausted her administrative remedies before the commission, and then filed both her EPA and gender discrimination claims in federal

court. Because these options were clearly available, and the plaintiff simply failed to take advantage of them, we conclude that she was not jurisdictionally barred from bringing her gender discrimination claim in the District Court.

Having reached this conclusion, we turn now to the facts underlying the plaintiff's claims to determine whether the trial court correctly concluded that the plaintiff's gender discrimination claim was barred by res judicata. "We have adopted a transactional test as a guide to determining whether an action involves the same claim as an earlier action so as to trigger operation of the doctrine of res judicata. [T]he claim [that is] extinguished [by the judgment in the first action] includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. What factual grouping constitutes a transaction, and what groupings constitute a series, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. . . . In applying the transactional test, we compare the complaint in the second action with the pleadings and the judgment in the earlier action." (Citations omitted; internal quotation marks omitted.) *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 604, 922 A.2d 1073 (2007).

The operative complaint in the present case and the pleadings in the plaintiff's federal action contain virtually identical allegations regarding (1) the status of the plaintiff as a female citizen of Connecticut, (2) the defendant's status as a corporation operating a car dealership, Hartford Toyota Superstore, in Hartford, (3) the plaintiff's employment with the defendant, which began

August 1, 2014, and (4) the plaintiff's satisfactory job performance. Moreover, both actions involve the same parties—Webster, McAllister, Mumtaz, and Clemons—and involve conduct that occurred during the same eighteen month period of time. Furthermore, a central allegation in each action is that the defendant did not pay the plaintiff the equivalent of what it paid similarly situated male employees due to her gender. After considering these factors, we conclude that the combined facts of both actions constituted a single transaction that would have formed a convenient trial unit for the District Court and that their treatment as a unit would not have been unexpected by the parties. Accordingly, we conclude that the trial court properly found that no genuine issue of material fact existed as to whether the plaintiff had the opportunity to bring her gender discrimination claim before the District Court.

Because the plaintiff had the opportunity to bring her gender discrimination claim in the prior federal action, we next "apply the test set forth in . . . [1] Restatement (Second) of Judgments, § 25, comment (e) [1982]. Under [the relevant part of] this test . . . [i]f . . . the court in the first action . . . having jurisdiction, *would clearly have declined to exercise it as a matter of discretion* . . . then a second action in a competent court presenting the omitted theory or ground should [not be] precluded." (Emphasis in original; internal quotation marks omitted.) *Connecticut National Bank* v. *Rytman*, supra, 241 Conn. 44. Accordingly, for the plaintiff's gender discrimination claim to survive summary judgment on the ground of res judicata, she must show that the District Court would clearly have declined to exercise jurisdiction over it as a matter of discretion. The plaintiff has failed to make such a showing.

It is clear that federal courts routinely, and properly, exercise supplemental jurisdiction over state law claims

of this nature when similar federal claims also have been alleged. See *Eng* v. *New York*, 715 Fed. Appx. 49, 54 (2d Cir. 2017) (holding that District Court did not abuse its discretion in exercising supplemental jurisdiction over plaintiff's state law discrimination claims because they arose out of same common nucleus of operative facts as her federal claims); *Treglia* v. *Manlius*, 313 F.3d 713, 723 (2d Cir. 2002) (holding that supplemental jurisdiction over plaintiff's state law discrimination claim was proper because it "[arose] out of approximately the same set of events as his federal retaliation claim"); see also *Considine* v. *Brookdale Senior Living, Inc.*, 124 F. Supp. 3d 83 (D. Conn. 2015); *Schlafer* v. *Wackenhut Corp.*, 837 F. Supp. 2d 20, 24 (D. Conn. 2011); *Osborn* v. *Home Depot U.S.A., Inc.*, 518 F. Supp. 2d 377, 388–89 (D. Conn. 2007). Because the plaintiff failed to present any evidence to even suggest that the District Court would have declined to exercise supplemental jurisdiction over her gender discrimination claim, we conclude that the trial court correctly determined that res judicata applies to this claim.

Having reached this conclusion, we finally address the plaintiff's assertion that res judicata should not apply because her EPA and state law discrimination claims contain different legal elements. Although this is true, such differences do not affect the application of res judicata when, as here, the legal claims arise from the same transaction. "[W]hatever legal theory is advanced, when the factual predicate upon which claims are based [is] substantially identical, the claims are deemed to be duplicative for purposes of res judicata." *Berlitz Schools of Languages of America, Inc.* v. *Everest House*, 619 F.2d 211, 215 (2d Cir. 1980). Accordingly, we conclude, with regard to the plaintiff's gender discrimination claim, that the defendant was entitled to judgment as a matter of law under the doctrine of res judicata.[3]

[3] Having reached this conclusion, we find it unnecessary to consider the defendant's alternative ground for affirmance, which is that, even if the

II

The plaintiff's second claim is that the court erred in granting the defendant's motion for summary judgment as to her hostile work environment claim because she submitted sufficient evidence to raise a genuine issue of material fact as to such a claim. We disagree.

"It is clear that . . . individuals reasonably should expect to be subject to [the] vicissitudes of employment, such as workplace gossip, rivalry, personality conflicts and the like. Thus, it is clear that individuals in the workplace reasonably should expect to experience some level of emotional distress, even significant emotional distress, as a result of conduct in the workplace. . . . That is simply an unavoidable part of being employed. We recognize, however, that does not mean that persons in the workplace should expect to be subject to conduct that transgress[es] the bounds of socially tolerable behavior . . . ." (Citation omitted; internal quotation marks omitted.) *Perodeau* v. *Hartford*, 259 Conn. 729, 757, 792 A.2d 752 (2002). Accordingly, "[t]o establish a hostile work environment claim, a plaintiff must produce evidence sufficient to show that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment . . . . [I]n order to be actionable . . . a sexually objectionable environment must be objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. . . . Whether an environment is objectively hostile is determined by looking at the record as a whole and at all the circumstances, including the frequency of the discriminatory conduct; its

plaintiff's claim was not barred by res judicata, it failed on its merits because, as a matter of law, she did not suffer an adverse employment action and was not constructively discharged.

severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." (Internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 85, 111 A.3d 453 (2015).

In *Feliciano*, our Supreme Court noted that, in the context of a hostile work environment claim, summary judgment is appropriate when, "on the basis of all of [the] evidence, a reasonable juror could find that the defendant's workplace [was] permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the [plaintiff's] employment and create an abusive working environment . . . ." (Internal quotation marks omitted.) Id., 89. Accordingly, in the present case, we must review "all of the evidence . . . in the light most favorable to the nonmoving party . . . [to conclude whether] the trial court improperly determined that the plaintiff had not established a genuine issue of material fact as to whether the defendant had subjected her to a hostile work environment on the basis of her sex." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 88–89.

The following additional facts, considered in the light most favorable to the plaintiff, are relevant to our resolution of this claim. The plaintiff claimed that, during her employment with the defendant, she was mistreated by four persons: Webster, McAllister, Mumtaz, and Clemons. This mistreatment may be summarized as follows.

Webster would sometimes yell at the plaintiff during managers' meetings. The plaintiff described these incidents as follows: "I have to physically show you, because it wasn't just yelling; it was verbally intimidating. . . . Webster stood like this, if I move a centimeter

I could touch his nose, got into my face, while yelling, while spitting in my face . . . .'' Webster's conduct was always related to issues in the workplace, but the plaintiff did not remember what exactly Webster said to her. On one occasion, the plaintiff walked out of a managers' meeting due to Webster's yelling. Later that day, Webster told the plaintiff that she did the right thing by leaving and that he should not have spoken to her that way. According to the plaintiff, this was Webster ''trying to apologize the best he could . . . .'' Webster also yelled at other employees, including Luis Plaza, whom he accused of doing ''a terrible job with the used cars . . . .'' The plaintiff believed that Webster did not like anybody in the workplace but that he particularly disliked her because she ''would tell him to his face, no.'' The plaintiff's best characterization of how many incidents of this nature occurred was that, ''[i]t was a few, more than once.'' The plaintiff also stated that Webster's conduct during these meetings did not indicate to her that he was unhappy with her work.

During her employment with the defendant, the plaintiff took a vacation. There was a discrepancy between the number of vacation days that the plaintiff requested and the return to work date that she provided on the vacation request form. Webster expected the plaintiff to return to work on the date listed on the form, whereas the plaintiff believed that she did not have to return until the following day. As a result of this confusion, the plaintiff did not return to work on the date listed on the form. Webster told the plaintiff several times that she was ''in big trouble . . . .'' According to the plaintiff, she was ''grounded'' by Webster: ''I lost my day off, I felt I was back in a totalitarian regime, I lost my early night. I was forced to work the next few Sundays as my punishment.'' Webster also yelled at Andrew Lombardi, another employee, about this issue, and ordered him to text the plaintiff. The plaintiff did

not recall Webster saying anything further about this issue.

Because of her managerial position with the defendant, the plaintiff was given a dealer vehicle to drive. There was an occasion when damage was discovered on the vehicle, and Webster was convinced that the plaintiff had caused the damage. The plaintiff denied responsibility. This resulted in another yelling incident in front of other employees: "Webster was convinced that I had done it . . . and he was going to yell . . . at me over [it], and it was horrific, same crap. . . . [I]n his mind I had done it, and no matter what I said . . . [h]e didn't believe me. And then he said, next time I damage the vehicle that I would pay for it." The plaintiff could not recall exactly what he said, "but it was to the effect of, you damaged that car . . . [y]ou are going to pay for it." Ultimately, the plaintiff was not required to pay for the damage.

While the plaintiff was employed by the defendant, the dealership produced a Spanish language television commercial that included several Spanish speaking employees. The plaintiff, who speaks Spanish, was not included. This embarrassed the plaintiff.

On one occasion, McAllister yelled at the plaintiff: "He came to my office . . . [which] was all glass [so] everybody outside could see . . . . He got this close to me and yell[ed] at me, while spitting in my face, because it was that close." This incident lasted for a couple of minutes. The plaintiff could not recall why McAllister yelled at her but believed that it was because of a work related issue. McAllister did not use any inappropriate language while yelling at the plaintiff. There were no other incidents involving McAllister.

On one occasion, Mumtaz remarked to the plaintiff: "I'll have to get up and choke you." Mumtaz also used the word "biatch," a term he described as a "fancy way

of saying a bitch" to describe women in the workplace. Additionally, Mumtaz constantly made comments in the plaintiff's presence to Lilia Browne, a female employee, regarding Browne's sex life.

Clemons was, according to the plaintiff, "very, very nasty, very short, [and] very sarcastic." Clemons would direct sarcastic and offensive comments at the plaintiff, and would not "answer [her] in the right way." The plaintiff, however, cannot recall the specifics of any interactions she had with Clemons.

A number of incidents also occurred in the workplace that did not directly involve the plaintiff. The plaintiff described the first incident as follows: "Browne was in my office, and [Webster] came and he physically started pushing her out. He said, 'get this cockroach out of my office.' " The plaintiff described another incident as follows: "There was a Christmas party. They were all drinking and stuff. . . . [Webster] grabbed [Browne] by the waist, that kind of stuff." The plaintiff also observed Webster making "innuendos about [Browne's] breasts . . . ." The plaintiff also described an incident involving Webster and another female employee, Jill Bruno: "[Webster] walked up to [Bruno] and grabbed her butt cheeks . . . either coming into . . . or leaving [a] managers' meeting." The plaintiff did not recall when this incident occurred.

The plaintiff also recounted observations about the conduct of male employees in the workplace generally. According to the plaintiff, Webster made jokes in the workplace that were demeaning to female employees, made comments such as "woman driver[s]," and would ask to "talk to the husband" when interacting with women. Webster also, at times, used words such as "bitch," "whore," and "trashy" when discussing women with other employees. Webster, however, never directed any sexually explicit language at the plaintiff. At no

time did the plaintiff make a complaint of harassment or bullying to the owner, Richard McAllister, or to the defendant's controller, Nancy Johnson.

After reviewing these facts, the court found: "[T]he plaintiff . . . fails to show that she was subjected to a hostile work environment based on gender. The plaintiff claims that her work environment was hostile because she was occasionally yelled at, other male employees used stereotypes and crude language when discussing females, and she witnessed another Hispanic female called a 'cockroach.' While this conduct is perhaps unprofessional and vulgar, it does not rise to the level of creating a hostile work environment. The yelling incidents that the plaintiff complains about were fairly infrequent, as she could only recall a few instances where she was yelled at during her employment with the defendant. . . . The stereotypes and crude language that the plaintiff witnessed others use also does not appear to be severe and pervasive enough to create a hostile work environment. . . . [T]he plaintiff failed to submit any evidence concerning the frequency and pervasiveness of such language, and could not specifically recall examples of any other colorful language that her manager used. . . . This language, while tasteless and crude, does not appear to have been pervasive or severe enough to alter the conditions of the plaintiff's employment. . . .

"The foregoing is unlike the scenarios encountered in cases where the court has found the conduct complained about to rise to the level of harassment required to sustain a hostile work environment claim. . . . Instead, the incidents that the plaintiff complains about appear to have been isolated and sporadic, and they do not constitute a hostile work environment as a matter of law. . . . In light of the evidence before the court, along with the plaintiff's failure to submit any evidence describing how the alleged conduct impacted her work

performance, the court cannot find that the plaintiff was subjected to a hostile work environment. Accordingly, the defendant is entitled to summary judgment on the plaintiff's hostile work environment claim." (Citations omitted.)

We agree with the analysis of the court. In order for the plaintiff's hostile work environment claim to survive summary judgment, she must establish the existence of a genuine issue of material fact as to whether, on the basis of her gender, the defendant subjected her to a "workplace . . . permeated with discriminatory intimidation, ridicule, and insult that [was] sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment . . . ." (Internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, supra, 316 Conn. 85. The plaintiff has failed to do so in two ways: she has not shown that the conduct at issue was sufficiently severe or pervasive, nor has she shown that it was based on her gender.

For purposes of summary judgment, the conduct at issue is deemed to have occurred during the eighteen month period when the plaintiff was employed by the defendant. The plaintiff, however, has failed to describe with any specificity the timing, duration, or frequency of these incidents. This omission is critical because it is well established that, for a hostile work environment claim to succeed, the conduct at issue must not be infrequent or isolated in time. This court has held that "two instances of inappropriate conduct within a one year span do not meet the high standard of severe and pervasive." *Heyward* v. *Judicial Dept.*, 178 Conn. App. 757, 765, 176 A.3d 1234 (2017). Additionally, in *Feliciano*, our Supreme Court discussed the facts of several cases in which it properly was found that a plaintiff's hostile work environment claim was not actionable: "*Quinn* v. *Green Tree Credit Corp.*, [159 F.3d 759, 768

(2d Cir. 1998)], involved only two isolated incidents. In *Bailey* v. *Synthes*, [295 F. Supp. 2d 344, 358 (S.D.N.Y. 2003)], the supervisor's actions were infrequent and isolated, were not physically threatening and occurred outside of the plaintiff's daily work routine. In *Lamar* v. *NYNEX Service Co.*, [891 F. Supp. 184, 185 (S.D.N.Y. 1995)], the plaintiff did not object to her supervisor's behavior and that behavior was not directed specifically at the plaintiff. In *Babcock* v. *Frank*, [783 F. Supp. 800, 808–809 (S.D.N.Y. 1992)], the incidents were isolated and, in one instance, uncorroborated, and the employer responded promptly to all of the plaintiff's complaints." *Feliciano* v. *Autozone, Inc.*, supra, 316 Conn. 87–88.

The incidents and conduct discussed in the present case were, by the plaintiff's own admission, both sporadic and not pervasive; she was unable to describe with any specificity when the events occurred, either in time or in relation to one another. Additionally, the plaintiff never alleged, and the record does not suggest, that the conduct at issue ever altered the conditions of her employment. To the contrary, the plaintiff stated that the incidents involving Webster did not indicate to her that he was unhappy with her work. Furthermore, the conduct in the present case, as described by the plaintiff, was not severe enough to give rise to a hostile work environment claim. The only conduct that clearly was directed at the plaintiff was yelling, and, although yelling is surely conduct that workers consider unpleasant—and that we do not condone—there is nothing in the record to indicate that this yelling was ever "sufficiently severe or pervasive to alter the conditions of the [plaintiff's] employment and create an abusive working environment . . . ." (Internal quotation marks omitted.) Id., 85. In fact, the plaintiff's own recollection supports the conclusion that this yelling was nothing more than one of the "vicissitudes of employment . . . [from which] individuals in the workplace reasonably

should expect to experience some level of emotional distress . . . .'' *Perodeau* v. *Hartford*, supra, 259 Conn. 757. Finally, there is nothing in the record to suggest that this yelling ever had anything to do with the plaintiff's gender; the plaintiff herself stated that it ''was always related to issues in the workplace.''

As for the comments and conduct directed at other female employees, there is again no evidence as to when these incidents occurred. There is also no evidence that the plaintiff ever took steps to report them. It should also be noted that, although these incidents were gender related, the plaintiff specifically stated that she was never the target of language or conduct of a sexual nature. Because the plaintiff has failed to show the existence of a genuine issue of material fact as to whether she was subjected to a hostile work environment, we conclude that the trial court correctly determined that the defendant was entitled to judgment as a matter of law on the plaintiff's hostile work environment claim.[4]

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOHN A. MASSARO (AC 43323)

Moll, Alexander and DiPentima, Js.

Syllabus

Convicted of the crime of the sale of a narcotic substance, the defendant appealed to this court. The defendant sold crack cocaine to M, who testified about the drug sale at trial. Prior to trial, M was interviewed and gave a statement to a defense investigator, P, who provided a

[4] We decline to address the defendant's alternative ground for affirmance, which is that the plaintiff's hostile work environment claim should be rejected on the ground of res judicata. This argument was not made before the trial court and was only briefly addressed in the defendant's appellate brief.

memorandum containing M's statement to defense counsel. In her statement, M indicated that she had possessed narcotics prior to meeting with the defendant and that she provided narcotics to the defendant. The parties agreed prior to trial that the state would not present expert testimony from its witnesses regarding narcotics trafficking. During trial, it was discovered that defense counsel failed to timely disclose P's memorandum. The trial court concluded that P's memorandum was not protected attorney work product and should have been disclosed to the state pursuant to the relevant rule of practice (§ 40-15). The court imposed a sanction on the defense limiting P's testimony and ruled that P's memorandum would not come into evidence. The trial court ordered defense counsel to provide a redacted copy of the memorandum to the prosecutor and to make P available for subsequent questioning. Defense counsel called P as a witness, who testified that M provided narcotics to the defendant on the day of his arrest. Immediately following this testimony, the court provided the jury with a limiting instruction that the testimony was to be used only for the purpose of impeaching M's prior inconsistent statement that she had purchased narcotics from the defendant. During his cross-examination of P, a former law enforcement officer, the prosecutor asked a series of questions regarding the sale and use of drugs. After P had answered these questions, defense counsel objected on the ground that the parties' agreement did not permit opinion testimony regarding the narcotics trade and that P had not been offered as an expert. The court denied defense counsel's motion for a mistrial. The trial court also denied the defendant's motion for a new trial on the basis of prosecutorial impropriety. *Held*:

1. The defendant could not prevail on his claim that the trial court abused its discretion in determining that defense counsel had violated discovery rules and by imposing a sanction limiting P's testimony as a result of that violation as any error relating to the court's discovery ruling and sanction was harmless: although the trial court improperly determined that P's memorandum constituted M's statement pursuant to § 40-15 and imposed a sanction limiting P's testimony regarding his memorandum, this court, in reviewing the entirety of the evidence adduced at trial, concluded that the record sufficiently provided a fair assurance that any nonconstitutional error relating to the determination of a discovery violation did not substantially affect the verdict, as the defendant was able to present to the jury the fact that M had made a prior inconsistent statement in which she claimed to have possessed the narcotics prior to her meeting with the defendant, and there was ample evidence presented by the state that M was the buyer and that the defendant was the seller in the narcotics transaction.
2. The defendant could not prevail on his claim that the trial court abused its discretion in permitting the prosecutor to go beyond the scope of direct examination on his cross-examination of P and to convert him

into an expert witness regarding the narcotics trade after the parties had agreed not to present expert testimony on that topic: even assuming, arguendo, that the court's evidentiary rulings regarding the state's cross-examination of P constituted an abuse of discretion, any such error was harmless as this court could not conclude that the jury's verdict was substantially swayed by the state's cross-examination of P, as testimony from several witnesses supported the state's case that the defendant sold the narcotics.

3. The defendant failed to establish that his due process right to a fair trial was violated as a result of prosecutorial impropriety:

a. The defendant failed to establish that any impropriety occurred during the prosecutor's cross-examination of P when P was asked if he knew the state had been unaware of the statement M purportedly had made to P regarding the possession of narcotics; contrary to the defendant's claim, P did not impugn the integrity of defense counsel as the thrust of the prosecutor's inquiry was on the actions of P, and not defense counsel, specifically, the prosecutor highlighted for the jury the contrast of P's statements on his company's website and P's actions, and this line of inquiry served to challenge P's credibility, rather than to demean the integrity or role of defense counsel; moreover, the prosecutor did not mention the relevant rules of practice regarding the timing of discovery materials to the jury.

b. The prosecutor's challenged comment during closing argument that the defendant "behaved himself well in court" was not improper; the remark was made in the context of the prosecutor's proper comments that the jurors were required to put aside any sympathy for the defendant, due to his age, and to decide the case on the basis of the evidence presented, and the challenged comment focused solely on the defendant's good in-court behavior and did not suggest, in any manner, any sort of illicit or untoward out-of-court conduct, and this court declined to infer the most damaging interpretation of the prosecutor's comment.

c. Although this court declined to decide whether the prosecutor's comment regarding M's credibility, that she was "open and honest" with certain aspects of the narcotics transaction, was improper, this court concluded that the defendant failed to establish a deprivation of his due process right to a fair trial; the comment was not severe, it was isolated, it was corrected by the prosecutor immediately, it was ameliorated by a specific jury charge, and much of the M's testimony was corroborated by other witnesses.

Argued January 6—officially released July 13, 2021

Procedural History

Substitute information charging the defendant with the crime of sale of narcotics, brought to the Superior Court in the judicial district of Litchfield at Torrington,

geographical area number eighteen, and tried to the jury before *Danaher*, *J.*; thereafter, the court denied the defendant's motion for a mistrial; verdict and judgment of guilty; subsequently, the court denied the defendant's motion for a new trial, and the defendant appealed to this court. *Affirmed.*

Lisa J. Steele, for the appellant (defendant).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Samantha L. Oden*, deputy assistant state's attorney, *Dawn Gallo*, state's attorney, and *David R. Shannon*, supervisory assistant state's attorney, for the appellee (state).

Opinion

ALEXANDER, J. The defendant, John A. Massaro, appeals from the judgment of conviction, following a jury trial, of the sale of a narcotic substance in violation of General Statutes § 21a-277 (a). On appeal, the defendant claims that (1) the court abused its discretion in determining that defense counsel had violated discovery rules and by imposing a sanction as a result of that violation, (2) the court abused its discretion with respect to its evidentiary ruling regarding the state's cross-examination of a defense witness, and (3) he was deprived of his due process right to a fair trial as a result of prosecutorial impropriety. We disagree, and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On July 13, 2017, Matthew Faulkner, a Torrington police officer assigned to the narcotics division, was on duty when he observed two known narcotics users, Sarah Mikuski[1] and her boyfriend, Anthony Roig, walking on East Main Street. Faulkner then saw the defendant approaching Mikuski and Roig. Faulkner continued

[1] Mikuski testified that, in July, 2017, she was using crack cocaine and heroin.

his surveillance of these individuals and watched as the defendant exchanged "something" with Mikuski. After this brief exchange, the defendant travelled in an opposite direction away from Mikuski and Roig.[2] Believing that a "hand-to-hand" illegal narcotic transaction had just occurred, Faulkner called for assistance, requesting that the responding officer intercept the defendant before he returned to his residence. The police, however, were unable to locate the defendant that day.

Faulkner approached Mikuski and Roig. He instructed Mikuski to surrender the item that the defendant had given her. She complied and placed a small, clear plastic bag containing a white powdery substance, later determined to be crack cocaine,[3] on the wall next to them. Mikuski also emptied her purse, which contained an assortment of used drug paraphernalia, including empty wax packets, needles, crack pipes containing a burnt residue, and Brillo pads used to filter crack cocaine when it is smoked. Mikuski admitted that she handed the defendant a cigarette packet with $26 tucked inside it and purchased $30 worth of crack cocaine from the defendant.[4] Mikuski also admitted that she had purchased illegal substances from the defendant in the past. Mikuski did not have any other illegal substances or cash in her possession.

The defendant subsequently was arrested and charged in an amended long form information with the sale of

[2] Mikuski had planned to walk to her mother's home, which was nearby, where she and Roig would then smoke the crack cocaine purchased from the defendant.

[3] Joseph Voytek, a forensic examiner employed by the Department of Emergency Services and Public Protection, testified that he had examined the seized substance and determined that it was cocaine in a rock form and weighed 0.218 grams.

[4] Faulkner stated that crack cocaine was sold at a rate of $10 per one tenth of a gram, so that a "30" meant 0.3 grams of crack cocaine and would sell for $30, while 0.2 grams of the narcotic substance, often referred to as a "doub," would sell for $20.

a narcotic substance in violation of § 21a-277 (a).[5] After a two day trial, the jury found the defendant guilty. On May 8, 2019, the court sentenced the defendant to ten years of incarceration, execution suspended after six years, and five years of probation. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court abused its discretion when it determined that defense counsel had violated discovery rules and by imposing a sanction as a result of that violation. The defendant argues that the court erred in finding that notes of his investigator, Benjamin Pagoni, constituted a statement as defined by the rules of practice. Specifically, the defendant contends that Pagoni's notes of the interview that he had conducted with Mikuski on March 5, 2018, did not constitute a statement and, accordingly, were not required to be disclosed to the state. The defendant also argues that, as a result of this ruling, the court erroneously imposed a sanction limiting Pagoni's testimony. We conclude that any error relating to the court's discovery ruling and sanction was harmless.

The following additional facts are necessary for the resolution of this claim. Pursuant to Practice Book §§ 40-7, 40-13, 40-18, and 40-27, the state filed a motion on October 26, 2017, requesting that the defendant disclose "any statements of the witnesses other than the defendant in his possession or in the possession of an agent of the defendant which statement relates to the subject matter about which such witness will testify . . . ." On January 7, 2019, defense counsel disclosed the defendant and Pagoni as potential witnesses.

[5] General Statutes § 21a-277 (a) (1) provides in relevant part: "No person may . . . sell . . . dispense . . . offer, give . . . to another person, except as authorized in this chapter, any controlled substance that is (A) a narcotic substance . . . ."

Mikuski testified on cross-examination that she had spoken with Pagoni on March 5, 2018. She denied telling Pagoni that she had possessed narcotics prior to meeting the defendant or that she was going to provide narcotics to the defendant.

After the state had rested, the court requested that defense counsel make an offer of proof regarding Pagoni and his testimony. Defense counsel stated that Pagoni worked as an investigator and would testify about a prior statement made to him by Mikuski that was inconsistent with her trial testimony identifying the defendant as the narcotics seller. Specifically, Pagoni would testify that Mikuski had told him that she possessed narcotics prior to meeting with the defendant on July 13, 2017, and that she gave narcotics to the defendant prior to her arrest. Defense counsel represented that he had communicated this information via e-mail to the prosecutor the day before.[6] He further indicated that Pagoni had provided him with a memorandum detailing his conversation with Mikuski and that this memorandum (Pagoni memorandum) had been in his possession since approximately March 12, 2018.

The prosecutor argued that Miksuki's purported inconsistent statement should not be permitted into evidence because its disclosure had been untimely and thereby constituted a violation of our rules of discovery, specifically, Practice Book § 40-15 (2).[7] The court inquired

[6] In this e-mail, defense counsel represented to the prosecutor that Pagoni would testify that he had spoken in person with Mikuski at approximately 1 p.m. on March 5, 2018, and that she admitted that (1) on July 13, 2017, she possessed narcotics before meeting with the defendant, (2) she was going to provide the defendant with narcotics, (3) she did not see Faulkner in the unmarked police vehicle prior to meeting with the defendant, (4) she and Roig met the defendant and gave him narcotics, and (5) she and Roig turned around and started walking when Faulkner stopped them. Defense counsel also indicated that Pagoni had not obtained a written statement from Mikuski.

[7] Practice Book § 40-15 provides: "The term 'statement' as used in Sections 40-11, 40-13 and 40-26 means: (1) A written statement made by a person and signed or otherwise adopted or approved by such person; or (2) A

whether defense counsel had provided the Pagoni memorandum to the state. He replied in the negative, indicating that, in his view, this document constituted protected attorney work product[8] and thus was exempt from disclosure.

The court rejected defense counsel's position that the Pagoni memorandum, even if protected work product, was exempt from disclosure, citing Practice Book § 40-13 (b).[9] The prosecutor noted that the state had submitted a discovery request and, therefore, sought to preclude Pagoni from testifying as a result of the nondisclosure of the Pagoni memorandum.[10] The court ordered defense counsel to provide the prosecutor with a redacted

stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by a person and recorded contemporaneously with the making of such oral statement." See also *State* v. *Johnson*, 288 Conn. 236, 277–78, 951 A.2d 1257 (2008).

[8] "The work product rule protects an attorney's interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs and countless other tangible and intangible items. . . . Work product can be defined as the result of an attorney's activities when those activities have been conducted with a view to pending or anticipated litigation." (Citation omitted; internal quotation marks omitted.) *Ullman* v. *State*, 230 Conn. 698, 714–15, 647 A.2d 324 (1994); see also *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, 249 Conn. 36, 51 n.17, 730 A.2d 51 (1999) (attorney work product doctrine encompasses work that is essentially result of attorney's activities when conducted with view towards litigation).

[9] Practice Book § 40-13 (b) provides: "Upon written request by the prosecuting authority, filed in accordance with Section 41-5 and without requiring any order of the judicial authority, the defendant, subject to Section 40-40 et seq., shall promptly, but no later than forty-five days from the filing of the request, unless such time is extended by the judicial authority for good cause shown, disclose to the prosecuting authority the names and, subject to the provisions of subsection (g) of this section, the addresses of all witnesses whom the defendant intends to call in the defendant's case-in-chief *and shall additionally disclose to the prosecuting authority any statements of the witnesses other than the defendant in the possession of the defendant or his or her agents, which statements relate to the subject matter about which each witness will testify*." (Emphasis added.)

[10] Practice Book § 40-5 provides: "If a party fails to comply with disclosure as required under these rules, the opposing party may move the judicial authority for an appropriate order. The judicial authority hearing such a

copy of the Pagoni memorandum and to make Pagoni available for questioning. It also deferred ruling on whether Pagoni would be permitted to testify until the next day.

On January 11, 2019, the defendant filed a memorandum of law regarding the admissibility of Pagoni's proposed testimony and whether the Pagoni memorandum constituted a statement that should have been disclosed to the prosecutor.[11] With respect to the Pagoni memorandum, the court stated: "[E]vidence as to the exis-

motion may enter such orders and time limitations as it deems appropriate, including, without limitation, one or more of the following: (1) Requiring the noncomplying party to comply; (2) Granting the moving party additional time or a continuance; (3) Relieving the moving party from making a disclosure required by these rules; (4) Prohibiting the noncomplying party from introducing specific evidence; (5) Declaring a mistrial; (6) Dismissing the charges; (7) Imposing appropriate sanctions on the counsel or party, or both, responsible for the noncompliance; or (8) Entering such other order as it deems proper." See also *State* v. *Rabindranauth*, 140 Conn. App. 122, 136, 58 A.3d 361, cert. denied, 308 Conn. 921, 62 A.3d 1134 (2013).

We note that Practice Book § 40-5 vests the trial court with broad discretion to fashion an appropriate remedy for noncompliance with discovery. See *State* v. *Respass*, 256 Conn. 164, 186, 770 A.2d 471, cert. denied, 534 U.S. 1002, 122 S. Ct. 478, 151 L. Ed. 2d 392 (2001). "In determining what sanction is appropriate for failure to comply with court ordered discovery, the trial court should consider the reason why disclosure was not made, the extent of prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances. . . . Suppression of relevant, material and otherwise admissible evidence is a severe sanction which should not be invoked lightly. . . . As with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." (Citations omitted; internal quotation marks omitted.) *State* v. *Cooke*, 134 Conn. App. 573, 578–79, 39 A.3d 1178, cert. denied, 305 Conn. 903, 43 A.3d 662 (2012).

[11] Defense counsel attached a copy of his January 9, 2019 e-mail to the prosecutor to this memorandum of law as Exhibit A. He also attached, as Exhibit B, a copy of the Pagoni memorandum. This memorandum, dated March 5, 2018, stated in part: "On March 5, 2018 at approximately 1300 hrs, this Investigator met [Mikuski] . . . . The interview was conducted away from her home within the Investigator's vehicle, specifically, the Wendy's restaurant parking area . . . .

"In her verbal statement, [Mikuski] stated that she met up with [the defendant] on the day of her arrest, but had the drugs on her already. She

tence . . . of that written statement is not admissible and it will not be the subject of testimony by Pagoni or questioning by any attorney or argument by any attorney." The court further ruled that the testimony of Pagoni, if permitted, would be limited to impeaching Mikuski's testimony that she had purchased the crack cocaine from the defendant and not for the purpose of establishing that she had sold it. It also determined that the Pagoni memorandum constituted a substantially verbatim recital of Mikuski's oral statement that had been recorded sufficiently contemporaneously, so as to meet the definition of a statement as set forth in Practice Book § 40-15. As a result, the court reasoned that defense counsel should have disclosed the Pagoni memorandum to the state. The state declined the court's offer to delay the proceedings. Defense counsel placed his disagreements with the court's ruling and analysis on the record.

Defense counsel called Pagoni as a witness. He stated that he had met with Mikuski on March 5, 2018, and drove her to a nearby Wendy's restaurant. They ordered some food and spoke for approximately ten minutes. Pagoni testified that Mikuski had told him that she provided narcotics to the defendant on July 13, 2017. At this point, the court provided the jury with a limiting instruction that this testimony was to be used only for the purpose of impeaching Mikuski's prior statement that she had purchased narcotics from the defendant.[12]

stated she walked east on East Main Street with Roig to meet with [the defendant] to provide him some drugs. She stated at the time she did not see the officer or his unmarked vehicle. She stated she and Roig did meet with [the defendant] and gave some drugs to him. They turned around and headed west on East Main Street at which point the officer stopped them.

"When questioned if Roig would support her statement, [Mikuski] stated yes, that he was presently in a rehabilitation facility . . . . When questioned again who had the drugs, she confirmed she had them, not [the defendant].

"When questioned where the police found the drugs on her, she stated they were in her hand at the time she was stopped."

[12] During the jury charge, the court instructed the jury: "Some testimony has been allowed for a limited purpose. Testimony that was limited to a

During cross-examination, the prosecutor inquired about Pagoni's business relationship with defense counsel. Specifically, he asked how many hours Pagoni had worked on this case. When Pagoni replied that he was uncertain, the prosecutor asked: "So, as you sit here today, you remember specifically what . . . Mikuski said to you but you can't remember—you can't even approximately—how many hours you worked on this case?" Pagoni, indirectly referring to his memorandum, answered: "I can remember what . . . Mikuski said to me because it's written down." The prosecutor objected on the ground that Pagoni's answer was nonresponsive. The court excused the jury and reminded counsel that, during conversations in chambers and on the record, it had indicated that the Pagoni memorandum would not come into evidence. The court then admonished Pagoni and directed him to refrain from mentioning that he had written down or memorialized Mikuski's statements during his testimony. The court iterated this ruling to both defense counsel and Pagoni. The court subsequently instructed the jury to disregard any reference in Pagoni's testimony to a written memorandum. After the prosecutor's cross-examination resumed, Pagoni stated that Mikuski appeared to be under the influence of heroin when he had spoken with her on March 5, 2018. He also admitted that he did not record Mikuski's statement or ask her to make a formal written statement. Additionally, Pagoni acknowledged that he had not asked whether Mikuski had purchased narcotics from the defendant in the past, or why she would have given narcotics to the defendant. Finally, he admitted

specific purpose can be considered only as it relates to the limits for which it was allowed, and cannot be considered in finding any other facts as to any other issues.

"Specifically, the testimony offered through Benjamin Pagoni is limited to the purpose of impeaching Sarah Mikuski's testimony that she bought cocaine from the defendant. It is not admissible, and may not be used to find that Sarah Mikuski sold cocaine to the defendant."

that he never interviewed Roig to verify any of Mikuski's statements.

Following the close of evidence, the defendant moved for a mistrial on the basis that the prosecutor had impugned the character of defense counsel when he mentioned the late disclosure of Mikuski's purported statement. The prosecutor disputed the assertion that the character of the defense counsel had been impugned as a result of the cross-examination of Pagoni. The court agreed with the prosecutor and denied the motion for a mistrial.

On February 14, 2019, the defendant filed a motion for a new trial pursuant to Practice Book § 42-53. The defendant argued that, as a result of the court's erroneous discovery sanction prohibiting the Pagoni memorandum from being admitted into evidence, he "could not effectively counter the state's impeachment of Pagoni's memory by having Pagoni testify that he had a written memorandum to support his memories of his encounter with Mikuski. As a result, the jury held the impression that Pagoni had 'selective memory' regarding his work on the case."

On May 17, 2019, the court issued a corrected memorandum of decision denying the defendant's motion for a new trial. It again concluded that the Pagoni memorandum constituted a statement for purposes of Practice Book § 40-15, and therefore should have been disclosed to the state. The court concluded that, by calling Pagoni as a witness, any work product protection had been waived. Next, the court determined that the sanction imposed, precluding the defendant from presenting any evidence that Pagoni had memorialized Mikuski's March 5, 2018 statement, did not constitute an abuse of discretion.

On appeal, the defendant claims that "the trial court abused its discretion in sanctioning the defendant by

limiting the use of Pagoni's testimony and limiting his ability to answer the state's question about how he recalled what Mikuski said." He further contends that he was harmed as a result of this abuse of discretion. Specifically, he argues that the Pagoni memorandum of the interview with Mikuski did not constitute her statement for purposes of Practice Book § 40-15.

In its appellate brief, the state acknowledged that, based on the relevant case law and the facts of this case, "it does not appear that Pagoni's memorandum constituted a statement by Mikuski under either subsection of Practice Book § 40-15, as the trial court determined." The state maintained, however, that the Pagoni memorandum constituted Pagoni's statement under Practice Book § 40-15 (1), and, therefore, the court properly determined that it should have been disclosed. The state also claimed that the sanction imposed by the court did not constitute an abuse of discretion. Finally, the state argued, in the alternative, that any error in imposing the discovery sanction was harmless because (1) the defendant was able to present evidence that Mikuski had made an inconsistent statement, (2) the case did not consist of a credibility contest between Mikuski and Pagoni, as independent evidence existed that the defendant was the seller of the narcotics, (3) the court properly struck, as nonresponsive, Pagoni's answer to the prosecutor's inquiry as to why he had recalled what Mikuski told him, but not how many hours he had worked on the case, and (4) the value of Pagoni's memorialization of what Mikuski purportedly had told him would have been undermined by the existing circumstances, namely, that Mikuski was under the influence of narcotics during the interview, that Pagoni had bought her food and had promised her food in the future, and that he never attempted to verify the accuracy of her statements.

We begin our analysis by setting forth our standard of review and the relevant law. The defendant filed a motion for a new trial pursuant to Practice Book § 42-53.[13] This rule of practice is limited to trial errors and provides for the granting of a motion for a new trial in the interests of justice for constitutional error or other materially injurious error. *State* v. *Santaniello*, 96 Conn. App. 646, 672, 902 A.2d 1, cert. denied, 280 Conn. 920, 908 A.2d 545 (2006). The appellate standard of review when considering whether the court properly denied a motion for a new trial is the abuse of discretion standard. *State* v. *Sanders*, 86 Conn. App. 757, 765–66, 862 A.2d 857 (2005).

This standard also applies to the court's ruling related to discovery. *State* v. *Manousos*, 179 Conn. App. 310, 334, 178 A.3d 1087, cert. denied, 328 Conn. 919, 181 A.3d 93 (2018). In that case, we stated: "[T]he purpose of criminal discovery is to prevent surprise and to afford the parties a reasonable opportunity to prepare for trial. . . . To that end, [t]he trial court has broad discretion in applying sanctions for failure to comply with discovery orders. . . . We review the court's actions in managing discovery pursuant to the abuse of discretion standard." (Citations omitted; internal quotation marks omitted.) Id.; see also *Caccavle* v. *Hospital of St. Raphael*, 14 Conn. App. 504, 507, 541 A.2d 893, cert. denied, 208 Conn. 812, 545 A.2d 1107 (1988).

With respect to nonconstitutional claims, a defendant must show harm resulting from the error. See *State* v.

[13] Practice Book § 42-53 (a) provides: "Upon motion of the defendant, the judicial authority may grant a new trial if it is required in the interests of justice. Unless the defendant's noncompliance with these rules or with other requirements of law bars him or her asserting the error, the judicial authority shall grant the motion: (1) For an error by reason of which the defendant is constitutionally entitled to a new trial; or (*2*) *For any other error which the defendant can establish was materially injurious to him or her.*" (Emphasis added.) See also *State* v. *McCoy*, 331 Conn. 561, 589–90, 206 A.3d 725 (2019).

Jones, 205 Conn. 723, 728 n.1, 535 A.2d 808 (1988). Accordingly, we apply a harmless error analysis to a motion for a new trial filed pursuant to Practice Book § 42-53. Additionally, in *State* v. *Cavell*, 235 Conn. 711, 720–23, 670 A.2d 261 (1996), our Supreme Court engaged in harmless error analysis with respect to the claim that a discovery sanction had been imposed improperly. In that case, the court noted than any impropriety was nonconstitutional and therefore the defendant bore the burden of establishing harm. Id., 721.

The test for harmless error is well established. "When an error is not of constitutional magnitude, the defendant bears the burden of demonstrating that the error was harmful. . . . The proper standard for review of a defendant's claim of harm is whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Citation omitted; internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 553, 34 A.3d 370 (2012); see also *State* v. *Jackson*, 334 Conn. 793, 818, 224 A.3d 886 (2020).

We agree with the parties that the trial court improperly determined that the Pagoni memorandum constituted Mikuski's statement, as defined by the relevant rules of practice. We nevertheless conclude that such nonconstitutional error, and the resulting sanctions, were harmless.[14] See, e.g., *State* v. *Gansel*, 174 Conn. App. 525, 529–30, 166 A.3d 904 (2017) (reviewing court may assume error and resolve appeal on issue of harmlessness). Mikuski testified that she was not working in July, 2017, but stole money for the purpose of using

[14] As noted previously, the state argued in its appellate brief, in the alternative, that the Pagoni memorandum constituted Pagoni's statement and, therefore, should have been disclosed to the prosecutor. As a result of our conclusion that the defendant failed to establish harm, we need not address the state's alternative argument.

drugs daily, namely, heroin and crack cocaine. She stated that she knew the defendant because he was a source to obtain drugs and she had purchased them from him in the past. On July 13, 2017, she texted the defendant: "Hey u do a 30 for $26?" Impatient after not receiving a reply, Mikuski then called the defendant.[15] Mikuski also testified that she and Roig had planned to obtain the illegal narcotics from the defendant and then use them.

After Mikuski was stopped by Faulkner, she placed the bag of crack cocaine and her used drug paraphernalia on a nearby wall. At the time of her arrest, Mikuski did not have any money, as she had given the $26 to the defendant for the bag of narcotics. Mikuski indicated that except for one time in the past, she "never had the means or the money to be able to sell drugs."

Faulkner testified that he knew Mikuski and Roig as "heavy" narcotics users. When he saw them on July 13, 2017, his intention was to observe them and see if they would purchase narcotics from someone. Faulkner stated that he observed the defendant exchange "something" with Mikuski. He then requested assistance from additional officers and stopped Mikuski and Roig because he believed an illegal narcotics transaction had just occurred. Mikuski opened her hand and emptied her purse, which contained a clear plastic cellophane bag with crack cocaine and various used pieces of drug paraphernalia, respectively. Faulkner seized this contraband. He also stated that Mikuski did not have any money on her person at this time.[16] Faulkner observed that the seized crack pipes contained a burnt residue.

Roig testified that on July 13, 2017, his intention was to consume drugs with Mikuski. Roig indicated on that

[15] Mikuski stated that, in her experience, sellers of narcotics did not like to text or put things in writing to avoid incriminating themselves.

[16] Faulkner further testified that he had searched Roig and found neither drugs nor money on his person.

date, Mikuski had money to purchase drugs, met with another individual, and then came back with drugs. During redirect examination, Roig stated that he was with Mikuski as she purchased drugs for them to use.

During cross-examination, Pagoni testified, based on his thirty-four years of law enforcement experience, that individuals addicted to heroin generally do not give their drugs away for free. He admitted that addicts usually do not hold onto drugs before consuming them. Pagoni also stated, based on his experience, that quick, hand-to-hand transactions involving drugs are done to avoid detection and, if an individual had drugs in his or her hand, that would indicate a recent transaction.[17]

Additionally, as noted in the state's brief, the defendant was able to present to the jury the fact that Mikuski had made a prior inconsistent statement in which she claimed to have possessed the narcotics prior to her meeting with the defendant. Given the ample evidence presented by the state that Mikuski was the buyer and the defendant was the seller in the July 13, 2017 narcotics transaction, we conclude that any errors by the court relating to whether the Pagoni memorandum constituted a statement under our rules of practice and the imposition of a discovery sanction were harmless. See, e.g., *State* v. *Grant*, 179 Conn. App. 81, 92–93, 178 A.3d 437 (improper evidentiary ruling found to be harmless given strength of state's case based on other evidence), cert. denied, 328 Conn. 910, 178 A.3d 1041 (2018); *State* v. *Rios*, 171 Conn. App. 1, 39–40, 156 A.3d 18 (same), cert. denied, 325 Conn. 914, 159 A.3d 232 (2017). In reviewing the entirety of the evidence adduced during the trial, the record provides us with a fair assurance that any error relating to these matters did not substantially affect the verdict. We conclude, therefore, that

[17] During this portion of Pagoni's testimony, defense counsel did not object on the basis of improper opinion testimony. See part II of this opinion.

the defendant's claim that the court's determination of a discovery violation and its imposition of a sanction must fail as any error was harmless in light of the evidence.

II

The defendant next claims that the court abused its discretion with respect to the evidentiary ruling regarding the state's cross-examination of Pagoni. Specifically, he argues that the court improperly permitted the prosecutor to convert Pagoni, a defense witness, into an expert regarding narcotics trafficking after the parties had agreed that the state would not present expert testimony on this topic. We conclude that any error was harmless.

The following additional facts are necessary for our discussion. The defendant filed a pretrial motion for supplemental discovery on December 4, 2018, seeking information regarding the narcotics unit of the Torrington Police Department, any records of narcotics arrests made by Faulkner, as well as his training, experience, and education relating to the investigation of narcotics crimes. Approximately one month later, the defendant filed a motion in limine to preclude the state's witnesses "from giving expert testimony or opinion testimony regarding drug trafficking or common characteristics of drug dealers." He also moved for the disclosure of the curriculum vitae of any expert witness for the state, the substance of any facts relied on by the state's experts, and a summary of each expert's opinion. Prior to the court addressing these motions, the parties reached an agreement. In their agreement, the state indicated that it would not present expert testimony from its witnesses regarding narcotics trafficking.

During the trial, the defense called Pagoni as a witness. He stated that he had been a Connecticut state trooper for approximately thirty-four years and that in his career

he had worked in a variety of assignments, including the narcotics division. During cross-examination, the prosecutor asked if people who possessed drugs normally carried them in their hands while walking down the street. The court overruled an objection based on speculation, and Pagoni responded that sometimes that does, in fact, occur. The prosecutor continued to question Pagoni regarding certain aspects of drug transactions without objection.

After the cross-examination addressed other topics, the prosecutor asked Pagoni whether drug dealers generally prefer not to conduct sales inside their homes or apartments. Defense counsel objected, arguing that it called for speculation and improper opinion testimony, as Pagoni had not been offered as an expert witness. The court overruled the objection, stating that defense counsel had questioned Pagoni about his law enforcement background on direct examination. The prosecutor then asked a series of questions regarding the sale and use of drugs.[18]

After these questions, the court excused the jury. Defense counsel noted that he objected to the entire line of questioning. He stated that, based on his understanding of the parties' agreement, no opinion testimony regarding the narcotics trade would be permitted at trial and that Pagoni had not been offered as an expert. Defense counsel also moved for a mistrial. The prosecutor countered that the agreement of the par-

[18] The defendant subsequently identified these topics in his motion for new trial as follows: "Drug dealers normally do not sell inside their own home and/or apartment . . . . Drug users can get 'dope sick' when they do not have ready access to drugs . . . . Street-level drug addicts are not wealthy . . . . Drug dealers sometimes carry scales to weigh their product . . . . Drug dealers usually have more than one cell phone . . . . Drug dealers typically carry various amount[s] of small denominations of cash . . . . Drug dealers sometimes carry weapons . . . . Drug users usually carry paraphernalia . . . and . . . [a]s between dealers and addicts, the power in the relationship rests with the dealer."

ties only prevented the state from calling expert witnesses.[19]

The court ruled that Pagoni had not testified as an expert for the defense or for the state. It further determined that the state was entitled to cross-examine Pagoni to challenge his credibility regarding his law enforcement background and, specifically, his experience in the narcotics division. The court overruled the defendant's objection and denied his motion for a mistrial.

Defense counsel iterated his arguments regarding the state's cross-examination of Pagoni in his motion for a new trial. Specifically, he stated that this cross-examination focused on the issues of narcotics dealing and addiction, and involved expert testimony from an experienced law enforcement officer well beyond the ken of an average member of the jury.[20] In conclusion, the

[19] Both our Supreme Court and this court, in the context of a prosecutorial impropriety analysis, have stated: "We are mindful throughout this inquiry, however, of the unique responsibilities of the prosecutor in our judicial system. A prosecutor is not only an officer of the court, like every other attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . [The prosecutor's] conduct and language in the trial of cases in which human life or liberty are at stake should be forceful, but fair, because he [or she] represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice or resentment. If the accused be guilty, he [or she] should [nonetheless] be convicted only after a fair trial, conducted strictly according to the sound and [well established] rules which the laws prescribe." (Internal quotation marks omitted.) *State* v. *A. M.*, 324 Conn. 190, 205, 152 A.3d 49 (2017); *State* v. *Reddick*, 174 Conn. App. 536, 559–60, 166 A.3d 754, cert. denied, 327 Conn. 921, 171 A.3d 58 (2017), cert. denied, U.S. , 138 S. Ct. 1027, 200 L. Ed. 2d 285 (2018); see also *State* v. *Owen*, 331 Conn. 658, 668–69, 207 A.3d 17 (2019) (prosecutors held to higher standard than other attorneys). Because a prosecutor is held to a higher standard of conduct, we note that care must be taken to ensure that the state adheres to both the letter and the spirit of a stipulation entered into with a criminal defendant during a trial.

[20] "Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . .

defendant claimed that the state had gone beyond testing Pagoni's credibility and "clearly used [his] law enforcement background as a means to admit expert opinion testimony unfavorable to the defendant." The court rejected this claim in its memorandum of decision denying the motion for a new trial.

On appeal, the defendant claims that the court abused its discretion by permitting the state to go beyond the scope of the direct examination of Pagoni and to "convert" him into an expert witness. Even assuming, arguendo, that the court's evidentiary rulings regarding the state's cross-examination of Pagoni constituted an abuse of discretion,[21] we conclude that any such error was harmless.[22]

In other words, [i]n order to render an expert opinion the witness must be qualified to do so and there must be a factual basis for the opinion. . . .

"It is well settled that [t]he true test of the admissibility of [expert] testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue. . . . Implicit in this standard is the requirement . . . that the expert's knowledge or experience . . . be directly applicable to the matter specifically in issue." *State* v. *Brett B.*, 186 Conn. App. 563, 600–601, 200 A.3d 706 (2018), cert. denied, 330 Conn. 961, 199 A.3d 560 (2019).

[21] See, e.g., *State* v. *Brett B.*, 186 Conn. App. 600, 200 A.3d 706 (2018) (deferential standard of review applies to appellate review of rulings regarding admissibility of expert testimony), cert. denied, 330 Conn. 961, 199 A.3d 560 (2019); *State* v. *Edward M.*, 135 Conn. App. 402, 409, 41 A.3d 1165 (abuse of discretion standard applies to claims regarding scope of cross-examination), cert. denied, 305 Conn. 914, 46 A.3d 172 (2012).

[22] This court has stated: "[T]he appellate harmless error doctrine is rooted in [the] fundamental purpose of our criminal justice system—to convict the guilty and acquit the innocent. The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . . and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." (Internal quotation marks omitted.) *State* v. *Maner*, 147 Conn. App. 761, 772, 83 A.3d 1182, cert. denied, 311 Conn. 935, 88 A.3d 550 (2014).

"When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . We have concluded that a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict. . . . We previously have considered a number of factors in determining whether a defendant has been harmed by the admission or exclusion of particular evidence. Whether such error is harmless in a particular case depends [on] a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Considering these various factors, we have declared that the proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error." (Internal quotation marks omitted.) *State* v. *Edwards*, 202 Conn. App. 384, 403, 245 A.3d 866, cert. denied, 336 Conn. 920, 246 A.3d 3 (2021); see also *State* v. *Kirsch*, 263 Conn. 390, 412, 820 A.2d 236 (2003) (defendant must prove abuse of discretion and harm that resulted from such abuse to establish reversible error from evidentiary impropriety).

On the basis of the reasons set forth in part I of this opinion, we cannot conclude that the jury's verdict was substantially swayed by the state's cross-examination of Pagoni. See, e.g., *State* v. *Fernando V.*, 331 Conn. 201, 215, 202 A.3d 350 (2019). The testimony of Faulkner, Mikuski, and Roig, and the accompanying evidence, particularly the text message from Mikuski to the defendant wherein she asked if he would sell her $30 of narcotics for $26, support the state's case that the defendant sold the narcotics on July 13, 2017. In other words,

given the other evidence presented by the state, we have a fair assurance that, even if the court improperly allowed the prosecutor to cross-examine Pagoni regarding the narcotics trade, any such error did not substantially affect the verdict. Accordingly, this claim must fail.

III

Last, the defendant claims that he was deprived of his due process right to a fair trial as a result of prosecutorial impropriety. Specifically, he argues that prosecutorial impropriety occurred during the cross-examination of Pagoni and during closing argument and that he suffered prejudice as a result. The state counters that there was neither impropriety nor prejudice in this case. We conclude that the defendant failed to establish that his due process right to a fair trial were violated as a result of prosecutorial impropriety.

We begin with the relevant legal principles. "In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it had deprived the defendant of his due process [right] to a fair trial. . . . The defendant has the burden to show both that the prosecutor's conduct was improper and that it caused prejudice to his defense. . . .

"In determining whether the defendant was deprived of his due process right to a fair trial, we are guided by the factors enumerated by this court in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). These factors include [1] the extent to which the [impropriety] was invited by defense conduct or argument, [2] the severity of the [impropriety], [3] the frequency of the [impropriety], [4] the centrality of the [impropriety] to the critical issues in the case, [5] the strength of the curative measures adopted, and [6] the strength of the

state's case. . . . [A] reviewing court must apply the *Williams* factors to the entire trial, because there is no way to determine whether the defendant was deprived of his right to a fair trial unless the [impropriety] is viewed in light of the entire trial. . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties." (Citations omitted; internal quotation marks omitted.) *State* v. *Sinclair*, 332 Conn. 204, 236-37, 210 A.3d 509 (2019); see also *State* v. *Thomas*, 177 Conn. App. 369, 405, 173 A.3d 430, cert. denied, 327 Conn. 985, 175 A.3d 43 (2017).

"[T]he touchstone of due process analysis in cases of alleged prosecutorial [impropriety] is the fairness of the trial, and not the culpability of the prosecutor. . . . The issue is whether the prosecutor's conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. . . . In determining whether the defendant was denied a fair trial [by virtue of prosecutorial impropriety] we must view the prosecutor's comments in the context of the entire trial." (Internal quotation marks omitted.) *State* v. *Andrews*, 313 Conn. 266, 279, 96 A.3d 1199 (2014). Guided by these principles, we address each of the claimed improprieties in turn.

The defendant first claims that impropriety occurred during the prosecutor's cross-examination of Pagoni. The prosecutor asked if Pagoni knew that the state had been unaware of the statement Mikuski purportedly had made to him at the Wendy's restaurant regarding the possession of the narcotics. The court overruled a relevance objection made by defense counsel. The prosecutor then stated: "You're aware that what you testified to today, what you claim [Mikuski] said to you at the Wendy's, that wasn't made—the state—you did

not make the state or [defense counsel] did not make the state aware of that until the day before the trial. You can look at me. You don't need to look at [defense counsel]." Defense counsel again objected, and an off-the-record discussion occurred. Pagoni then admitted that he knew that the state did not learn about his claim regarding Mikuski's statement at the Wendy's restaurant until the day before the trial.

Later, Pagoni stated that, in the past, when he took statements that tended to exculpate someone, he had shared that information with a prosecutor, and, in one instance, "well in advance" of the trial. The court overruled defense counsel's objection based on relevance. Finally, Pagoni stated that his company's website advertised that it maintained "excellent relationships with local and state law enforcement . . . ."

Subsequently, and outside of the presence of the jury, defense counsel moved for a mistrial based on these matters. Specifically, he argued: "[T]here were some questioning early on in the examination of Mr. Pagoni with respect to the disclosure of the oral statement—yeah, it was relating to the contents of the oral statement in that it questioned along the lines that [defense counsel] just disclosed that last night. I think that's improper, Your Honor, and I objected because I thought it was improper. I think it impermissibly impugns my character [and] integrity. The discovery rules aren't really something for the jury to consider. Other than me taking the stand to explain it to the jury, there's no real way to rebut that. There's no witness that I'm prepared to call that can explain why that happened or our position with it so it paints the defense and in particularly me in a negative light in front of the jury. I think it is detrimental to my client's right to a fair trial so that is my objection and just in case I need to do it for the record, Your Honor, I would ask for a mistrial based

on that improper comment and the impact it may have to my client's right to a fair trial."

The prosecutor countered that the questions were not intended to impugn the integrity of defense counsel, nor did they do so; rather, they contrasted the statement on Pagoni's website and what had occurred in the present case with respect to the disclosure of Mikuski's purported statement. The court, after noting its agreement with the prosecutor, stated: "What [the prosecutor] established was a fact, that he only received the information on the eve of trial. That was a simple fact. As to whether it was improper or not, there's no evidence before the jury as to whether it was improper or not. There's no evidence and nor should there be that the jurors know the rules of the Practice Book, the rules of discovery, when statements should be produced. It also is appropriate because the state only had the opportunity to do whatever investigation it could yesterday and the questioning serves to explain to the jury why the investigation of Mr. Pagoni took place yesterday. . . . And so [the state has] the right to establish why [it] didn't meet with Mr. Pagoni until shortly before he testified."

"We are mindful . . . of the unique responsibilities of the prosecutor in our judicial system. . . . [T]he prosecutor is expected to refrain from impugning, directly or through implication, the integrity or institutional role of defense counsel." (Citation omitted; internal quotation marks omitted.) *State* v. *Outing*, 298 Conn. 34, 82, 3 A.3d 1 (2010), cert. denied, 562 U.S. 1225, 131 S. Ct. 1479, 179 L. Ed. 2d 316 (2011); see also *State* v. *Fasanelli*, 163 Conn. App. 170, 180, 133 A.3d 921 (2016); *State* v. *Kendall*, 123 Conn. App. 625, 643, 2 A.3d 990, cert. denied, 299 Conn. 902, 10 A.3d 521 (2010).

We agree that the challenged actions of the prosecutor during the cross-examination of Pagoni did not impugn

the integrity of defense counsel. The thrust of the prosecutor's inquiry was on the actions of Pagoni, and not of defense counsel. Specifically, the prosecutor highlighted for the jury the contrast of the statements on his company's website and Pagoni's actions in the present case. This line of inquiry served to challenge Pagoni's credibility, rather than to demean the integrity or role of defense counsel. See *State* v. *Fasanelli*, supra, 163 Conn. App. 180 (distinction between argument that disparages integrity or role of defense counsel and one that disparages theory of defense); *State* v. *Kendall*, supra, 123 Conn. App. 643–44 (prosecutor's closing argument highlighted difference between state's and defendant's versions and inferences of case). Additionally, we note that the prosecutor did not mention our rules of practice regarding the timing of discovery materials to the jury. For these reasons, we conclude that the defendant has failed to establish that any impropriety occurred during the prosecutor's cross-examination of Pagoni.

The defendant next argues that two instances of prosecutorial impropriety occurred during closing argument. "[O]ur Supreme Court has acknowledged that prosecutorial impropriety of a constitutional magnitude can occur in the course of closing arguments. In determining whether such [impropriety] has occurred, the reviewing court must give due deference to the fact that [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . While a prosecutor may argue the state's case forcefully, such argument must be fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Consequently, the state must avoid arguments which are calculated to influence the passions or prejudices

of the jury, or which would have the effect of diverting the jury's attention from [its] duty to decide the case on the evidence." (Internal quotation marks omitted.) *State* v. *Carey*, 187 Conn. App. 438, 454–55, 202 A.3d 1067 (2019), aff'd, Conn. , A.3d (2020).

During closing argument, the prosecutor stated: "It is extremely important when you reach your verdict that feelings of sympathy don't come into play. And again, we're asking for something that might be counter-intuitive for some of you. Some people may come in here and say, listen, it is what it is. I call it how I see it and that's it. It's not a big problem for me. Some people may say that and then not realize that sympathy does, kind of, trickle into your deliberations, we're humans. Some people come in and say, no, I know it's going to be an issue, but I can put it out of my mind and I'm sure they can. It's extremely important that you don't sit there when you deliberate on this case and say geez, [the defendant] seems like an old guy. *He behaved himself well in court*. You know, wasn't a lot of drugs. I can't say guilty even though the state proved its case, if you feel the state proved its case. You can't do that." (Emphasis added.)

After the arguments of counsel had been completed, defense counsel objected to the prosecutor's comment regarding the in-court behavior of the defendant. He argued that this comment suggested that the prosecutor had knowledge of how the defendant may have acted outside of the courtroom and, thus, amounted to a comment based on facts not presented to the jury. The court determined that the comment constituted a compliment and was made in the context that the jurors should not allow sympathy to play any role in their deliberations, and thus was permissible.

Our Supreme Court has noted that, "[w]hile the privilege of counsel in addressing the jury should not be too

closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider." (Internal quotation marks omitted.) *State* v. *Luster*, supra, 279 Conn. 429; see also *State* v. *Fernandez*, 169 Conn. App. 855, 869, 153 A.3d 53 (2016) (when prosecutor suggests facts not in evidence, there is risk that jury may conclude he has independent knowledge of fact that could not be presented during trial); *State* v. *Campbell*, 141 Conn. App. 55, 66, 60 A.3d 967 (statements regarding facts that have not been proven amount to unsworn testimony and are not subject of proper closing argument), cert. denied, 308 Conn. 933, 64 A.3d 331 (2013). It also recognized that "closing arguments of counsel . . . are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial [impropriety], *they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations*." (Emphasis added; internal quotation marks omitted.) *State* v. *Luster*, supra, 441.

We conclude that the prosecutor's comment regarding the defendant's in-court behavior was not improper. This remark was made in the context of the prosecutor's proper comments that the jurors were required to put aside any sympathy for the defendant, due to his age, and to decide the case based on the evidence presented. See *State* v. *James E.*, 154 Conn. App. 795, 828, 112 A.3d 791 (2015), aff'd, 327 Conn. 212, 173 A.3d 380 (2017). Further, the challenged comment focused solely on the defendant's good in-court behavior and did not suggest, in any manner, any sort of illicit or untoward

out-of-court conduct. We decline to infer the most damaging interpretation of the prosecutor's comment.

The second challenged comment during closing argument occurred during the prosecutor's summary of the narcotics transaction. Specifically, the prosecutor stated: "[Faulkner] believed [that Mikuski and Roig] were about to make a drug deal, purchase drugs. And you know what, he was right. The evidence bears it out because she had the drugs in her hand. Literally, in her hand. She hadn't even put them in her pocket or put in her purse with all the paraphernalia.

"Yes, Sarah Mikuski, she lied. Lied to the police, she stole, she lied to her friend. *She was open and honest* with that. Well, I don't want to use the word honest. It's for you to decide whether she was open and honest. But [defense counsel] thought you could believe her, certainly, when she says—that she stole, that she lied, she lied to her to her friends—she did this, she did that. So she was open about that." (Emphasis added.)

Outside of the presence of the jury, defense counsel objected to the prosecutor's comment that Mikuski was "open and honest." The prosecutor acknowledged that he "inartfully" commented but claimed that it constituted fair argument to defense counsel's comments regarding Mikuski. The court disagreed with the prosecutor that his statement constituted a fair response, but noted that he had corrected it immediately.

"[A] prosecutor may not express his own opinion, directly or indirectly, as to the credibility of the witnesses. . . . Nor should a prosecutor express his opinion, directly or indirectly, as to the guilt of the defendant. . . . Such expressions of personal opinion are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position. . . . Moreover, because the jury is aware that the prosecutor has pre-

pared and presented the case and consequently, may have access to matters not in evidence . . . it is likely to infer that such matters precipitated the personal opinions." (Internal quotation marks omitted.) *State* v. *Luster*, supra, 279 Conn. 435; see also *State* v. *Williams*, 200 Conn. App. 427, 440, 238 A.3d 797, cert. denied, 335 Conn. 974, 240 A.3d 676 (2020); *State* v. *Jerrell R.*, 187 Conn. App. 537, 553, 202 A.3d 1044, cert. denied, 331 Conn. 918, 204 A.3d 1160 (2019).

Assuming, without deciding, that the prosecutor's "open and honest" comment was improper, we conclude that the defendant failed to establish a deprivation of his due process right to a fair trial. See *State* v. *Papantoniou*, 185 Conn. App. 93, 108, 196 A.3d 839, cert. denied, 330 Conn. 948, 196 A.3d 326 (2018); *State* v. *Aviles*, 154 Conn. App. 470, 486, 106 A.3d 309 (2014), cert. denied, 316 Conn. 903, 111 A.3d 471 (2015); see generally *State* v. *McCoy*, 331 Conn. 561, 571 n.4, 206 A.3d 725 (2019). Considering the *Williams* factors, we conclude that the challenged comment was not severe, was isolated, was corrected by the prosecutor immediately, and was ameliorated by a specific jury charge.[23] We also note that much of Mikuski's testimony was corroborated by other witnesses, namely, Roig and Faulkner. For these reasons, we conclude that the defendant

[23] The court instructed the jury: "You are the sole judge of the facts. It is your duty to find the facts. You are to recollect and weigh the evidence and form your own conclusions as to what the ultimate facts are. . . . The law prohibits the [prosecutor] or defense counsel from giving personal opinions as to whether the defendant is guilty or not guilty. It is not their assessment of the credibility of witnesses that matter, only yours. . . . You will decide what the facts are from the evidence that was presented in the courtroom. . . .

"Now in deciding what the facts are, you must consider all of the evidence. In doing this, you must decide which testimony to believe and which testimony not to believe. You may believe all, none or part of any witness' testimony. In making that decision, you may take into account a number of factors including the following: Was the witness able to see, or hear, or know the things about which the witness testified? How well was the witness able to recall and describe these things? What was the witness' manner while testifying? Did the witness have an interest in the outcome of the

failed to establish a violation of his due process right to a fair trial. Accordingly, his claim of prosecutorial impropriety must fail.

The judgment is affirmed.

In this opinion the other judges concurred.

DONNA VENEZIANO *v.* JAMES VENEZIANO (AC 41296)

Elgo, Cradle and Suarez, Js.

Syllabus

The defendant, whose marriage to the plaintiff had previously been dissolved, appealed to this court from the decision of the trial court denying his motion to open the judgment of dissolution on the basis of, inter alia, fraud. The defendant claimed that the court erred by, sua sponte,

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case or any bias or prejudice concerning any party or any matter involved in the case? Was the witness' testimony contradicted by what the witness has said or done at any time, or by the testimony of other witnesses, or by other evidence?

"If you should think that a witness has testified falsely in some respect, you should carefully consider whether you should rely upon any of his or her testimony. . . .

"Now in weighing the testimony of an accomplice who is a self-confessed criminal, you should consider that fact. It may be that you would not believe a person who had committed a crime as readily as you would believe a person of good character. In weighing the testimony of an accomplice who has not yet been sentence or whose case had not yet been disposed of or who has not been charged with offenses in which the state has evidence, you should keep in mind that she may in her own mind be looking for some favorable treatment in the sentence or disposition of her own case or hoping not to be arrested. Therefore, she may have such an interest in the outcome of this case that her testimony may have been colored by the fact. Therefore, you must look with particular care at the testimony of an accomplice and scrutinize it very carefully before you accept it.

"There are many offenses that are of such a character that the only person capable of giving useful testimony are those who are themselves implicated in the crime. It is for you to decide what credibility you will give to a witness who has admitted her involvement in criminal wrongdoing, whether you will believe or disbelieve the testimony of a person who by her own admission had committed or contributed to the crime charge by the state here. Like all other questions of credibility, this is a question you must decide based on all the evidence presented to you."

quashing certain subpoenas he issued in connection with his motion to open the judgment and in finding that he failed to establish probable cause that the dissolution judgment was procured through fraud or mutual mistake. *Held*:

1. The defendant could not prevail on his claim that the trial court abused its discretion in quashing the subpoenas at issue because the underlying civil action resulting in a final judgment of dissolution had been resolved and there was no active civil matter pending that would have permitted the defendant to subpoena witnesses and to conduct discovery in connection with his motion to open the judgment: the court properly interpreted the applicable legal principle of *Oneglia* v. *Oneglia* (14 Conn. App. 267), that once a court has rendered a final judgment, until and unless the court has opened that judgment, there can be no civil action within the meaning of the applicable statute (§ 52-197) or rule of practice (§ 13-2); moreover, because the fraud alleged by the defendant took place prior to the rendering of the judgment of dissolution, the motion to open did not implicate the trial court's continuing jurisdiction over an outstanding order; furthermore, because the plaintiff filed certain motions for contempt to effectuate and enforce orders of the court issued after it had rendered its judgment of dissolution, and the plaintiff did not take issue with the underlying judgment but, rather, the defendant's failure to comply with it, there was no active civil matter pending that gave the defendant the authority to issue subpoenas in connection with his unrelated motion to open the judgment, as a party may file a motion for contempt before or after judgment is rendered to effectuate prior judgments or otherwise enforceable orders.
2. The record was inadequate to review the defendant's claim that the trial court erred in finding that he failed to establish probable cause that the dissolution judgment was procured through fraud or mutual mistake; the defendant only submitted a nine page excerpt from a transcript of the relevant hearing, which related solely to the portion of the hearing in which the court addressed certain motions to quash, and did not provide additional portions of the transcript relating to the motion to open the judgment, such that it was not possible to make a determination regarding what the evidence presented at the hearing demonstrated about the issue of probable cause.

Argued March 2—officially released July 13, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Litchfield and tried to the court, *Pickard*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Dooley*, *J.*, quashed

certain subpoenas issued by the defendant and denied the defendant's motion to open the judgment, and the defendant appealed to this court. *Affirmed*.

Gregory Thomas Nolan, with whom, on the brief, was *Patsy Michael Renzullo*, for the appellant (defendant).

Regina M. Wexler, with whom, on the brief, was *Judith Dixon*, for the appellee (plaintiff).

Opinion

SUAREZ, J. The defendant, James Veneziano, appeals from the judgment of the trial court denying his motion to open the judgment dissolving his marriage to the plaintiff, Donna Veneziano. The defendant claims that the court erred (1) by, sua sponte, quashing subpoenas issued in connection with his motion to open the judgment and (2) in finding that he failed to establish probable cause that the dissolution judgment was procured through fraud or mutual mistake. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The parties were married in February, 1969. In February, 2012, the plaintiff commenced a dissolution action against the defendant. On October 29, 2013, the court, *Pickard, J.*, rendered a judgment of dissolution, which incorporated by reference a marital settlement agreement of the parties. At the time of the dissolution, the parties jointly owned, among other things, a marital home in Winchester and 1835 shares of stock in Village Mortgage Company (Village Mortgage). Under § 6.1 of the marital settlement agreement, the plaintiff was required to quitclaim her interest in the parties' marital home to the defendant, and the defendant was to hold her harmless and indemnify her from a home equity line of credit on the property and any and all expenses, costs, notes and liens associated with the property. The defendant was then required either

to apply to refinance the equity line of credit on the home by October 29, 2015, or to list the property for sale with a licensed real estate agent at a price recommended by the agent by May 1, 2016. Section 6.6.1 of the marital settlement agreement provided that the parties were to divide equally the 1835 jointly owned shares of Village Mortgage stock.

On November 30, 2016, the plaintiff filed a motion for contempt in which she alleged that the defendant "ha[d] neither refinanced the home to remove [her] name therefrom, nor ha[d] he listed the property for sale with a licensed [real estate agent] by May 1, 2016." She further alleged that she had made payments on the home equity line of credit because the defendant had failed to do so. A hearing on the motion was scheduled for January 3, 2017.

On January 17, 2017, the parties entered into an agreement, which became an order of the court, to resolve the November 30, 2016 motion for contempt, requiring the defendant to make monthly payments to Chase Bank for past due property taxes on the marital home, and to the town of Winchester for current property taxes on the marital home. The agreement also required the defendant to reduce the listing price in ninety days if the property was not under contract. The matter was continued to May 1, 2017, for review. On May 1, 2017, the parties entered into another agreement, which became an order of the court, requiring the defendant to continue making the payments to Chase Bank, and to again reduce the listing price of the marital home in ninety days if the home was not under contract. On July 26, 2017, the plaintiff filed a separate motion for contempt alleging that the defendant failed to abide by the May 1, 2017 order.

On August 31, 2017, the defendant filed a motion to open the judgment of dissolution on the basis of fraud

and intentional misrepresentation. The defendant subsequently amended the pleading to include a claim of mutual mistake. He alleged that all 1835 shares of Village Mortgage stock had been transferred to the plaintiff prior to February 1, 2012, without his knowledge. He further alleged that, during the dissolution proceeding, the plaintiff misrepresented to the court that both parties jointly owned the 1835 shares of stock. Accordingly, he argued, the divorce decree was "a product of actual fraud" and "must be opened." To support this allegation, the defendant attached to his amended pleading a required regulatory filing by Village Mortgage with the Department of Banking that listed the direct owners and executive officers of Village Mortgage.[1] This regulatory filing purportedly showed that the defendant was no longer a direct owner or an executive officer of Village Mortgage as of February 1, 2012. It does not, however, indicate the number of shares that each owner or executive officer had in Village Mortgage as of February 1, 2012.

The defendant issued four subpoenas in connection with his motion to open. On September 12, 2017, the defendant issued a subpoena to the Department of Banking requesting that it authenticate a certified copy of the regulatory filing that it previously had provided to him. On September 22, 2017, the Department of Banking moved to quash this subpoena. On October 10, 2017, the court, *Dooley*, *J.*, held a hearing on the motion to quash and granted it. The defendant also issued subpoenas to Justin Girolimon, a vice president of Village Mortgage, and Laurel Caliendo, the president of Village Mortgage. On October 3, 2017, Girolimon and Caliendo moved to quash the subpoenas. The defendant objected to the motions to quash and on October 30, 2017, the

[1] The February 1, 2012 regulatory filing shows that both parties were owners or executive officers of Village Mortgage at some point during the course of their marriage.

court, *Danaher*, *J.*, sustained the defendant's objections. Lastly, the defendant issued a subpoena to Hailey Gallant Rice, another vice president of Village Mortgage. On November 2, 2017, Rice moved to quash the subpoena. On November 14, 2017, the defendant objected to the motion.

On November 15, 2017, the court, *Dooley*, *J.*, held an evidentiary hearing on the plaintiff's motions for contempt and a preliminary hearing on the defendant's motion to open. As an initial matter, the court addressed the motions to quash the subpoenas and the objections thereto. The court effectively revisited prior rulings with respect to the subpoenas and resolved any pending motions to quash by concluding that there was no authority for counsel to have issued *any* subpoenas in this matter. The court stated that, pursuant to *Oneglia* v. *Oneglia*, 14 Conn. App. 267, 540 A.2d 713 (1988), "on a motion to open, there is absolutely no authority to conduct any discovery unless and until a decision is made by the court on a preliminary basis to open the judgment for the purpose of allowing discovery." The court further concluded that "there [was] no civil action pending from which our statutes and our Practice Book [gave] us authority to issue subpoenas and otherwise conduct discovery."[2] The court excused the witnesses present in the court who had responded to the defendant's subpoenas, and proceeded with the evidentiary hearing on the plaintiff's motions for contempt and a preliminary hearing on the defendant's motion to open.

On December 4, 2017, the court, in a memorandum of decision, denied the defendant's motion to open. The court, *Dooley*, *J.*, concluded that "the defendant failed

[2] In its subsequent memorandum of decision, the court reiterated that, in light of the procedural posture of the case, it had determined that the subpoenas that had been issued by the defendant's counsel were not legally authorized and that it had "vacated prior orders sustaining the defendant's objections to the motions to quash . . . ."

to establish probable cause that the judgment was procured through fraud or mutual mistake."

On December 6, 2017, in a separate memorandum of decision, the court found that the defendant wilfully violated its May 1, 2017 order and granted the plaintiff's motions for contempt.

On December 21, 2017, the defendant filed a motion to reargue his motion to open. On January, 5, 2018, the court, *Dooley*, *J.*, denied the motion. This appeal followed.[3] Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the court erred by, sua sponte, quashing his subpoenas issued in connection with his motion to open the judgment.[4] Specifically, he asserts that the court erred in relying on *Oneglia* v. *Oneglia*, supra, 14 Conn. App. 267, when it quashed the subpoenas and that, instead, it should have relied on *Brody* v. *Brody*, 153 Conn. App. 625, 103 A.3d 981, cert. denied, 315 Conn. 910, 105 A.3d 901 (2014). We disagree.

"[A] trial court's decision to quash a subpoena is . . . reviewed on appeal under the abuse of discretion

[3] As part of this appeal, the defendant also appealed the court's decision granting the plaintiff's motions for contempt. This court dismissed this portion of the appeal as untimely.

[4] We note that in his statement of this claim, the defendant also states that the court "erred in denying [his] motion to reargue, because there was an active civil matter pending based upon the plaintiff's two motions for contempt and service upon [him] of a summons and order to show cause . . . ." The defendant does not thereafter refer to or analyze the court's ruling on his motion to reargue in this section of his brief, nor does he analyze this portion of the claim anywhere in his brief. Accordingly, we consider this portion of the claim to be abandoned. "We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [A]ssignments of error which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court." (Internal quotation marks omitted.) *Keating* v. *Ferrandino*, 125 Conn. App. 601, 603–604, 10 A.3d 59 (2010).

standard. . . . Discretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . The salient inquiry is whether the court could have reasonably concluded as it did. . . . It goes without saying that the term abuse of discretion does not imply a bad motive or wrong purpose but merely means that the ruling appears to have been made on untenable grounds. . . . In determining whether there has been an abuse of discretion, much depends upon the circumstances of each case." (Citation omitted; internal quotation marks omitted.) *DeRose* v. *Jason Robert's, Inc.*, 191 Conn. App. 781, 799, 216 A.3d 699, cert. denied, 333 Conn. 934, 218 A.3d 593 (2019). Although the ruling is discretionary in nature, we nonetheless must afford plenary review to the issue of whether the court applied the correct legal principle to the facts before it. See *State* v. *Saucier*, 283 Conn. 207, 218–19, 926 A.2d 633 (2007) (trial court's interpretation of law is subject to plenary review and its application of correct view of law is subject to review for abuse of discretion).

General Statutes § 52-197 (a) provides in relevant part: "In any civil action, the court, upon motion of either party, may order disclosure . . . ." Practice Book § 13-2 provides in relevant part: "In any civil action . . . a party may obtain . . . discovery of information or disclosure, production and inspection of papers, books, documents and electronically stored information material to the subject matter involved in the pending action . . . ." Once a court has rendered a final judgment, "[u]ntil and unless the trial court [has] opened the previous judgment, there [can] be no 'civil action' within the meaning of . . . § 52-197 or Practice Book § [13-2]." *Oneglia* v. *Oneglia*, supra, 14 Conn. App. 270 n.2.

"[A]though a motion to open a judgment normally must be filed within four months of entry of the judgment . . . a motion to open on the basis of fraud is not subject to this limitation . . . . In *Oneglia*, this court rejected a claim that a party, following the entry of a judgment of dissolution, had a right to conduct discovery and to compel the defendant to testify, based only on [the] filing of a motion to open. . . . The court explained that [t]his is clearly an incorrect premise; until the court acts on a motion to open, the earlier judgment is still intact and neither our rules of practice nor our statutes provide for such a thing as postjudgment discovery. . . .

"*Oneglia* and its progeny are grounded in the principle of the finality of judgments. . . . [T]he finality of judgments principle recognizes the interest of the public as well as that of the parties [that] there be fixed a time after the expiration of which the controversy is to be regarded as settled and the parties freed of obligations to act further by virtue of having been summoned into or having appeared in the case. . . . Without such a rule, no judgment could be relied on. . . . *Oneglia* carefully balanced that interest in finality with the reality that in some situations, the principle of protection of the finality of judgments must give way to the principle of fairness and equity. . . . The court in *Oneglia* thus ratified the gatekeeping mechanism employed by the trial court, whereby a court presented with a motion to open by a party alleging fraud in a postjudgment dissolution proceeding conducts a preliminary hearing to determine whether the allegations are substantiated. . . . The court held that [i]f the plaintiff was able to substantiate her allegations of fraud beyond mere suspicion, then the court [properly] would open the judgment for the limited purpose of discovery, and would later issue an ultimate decision on the motion to open after discovery had been completed and another hearing

held." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Brody* v. *Brody*, supra, 153 Conn. App. 631–32.

This court also had occasion to address *Oneglia* in *Bruno* v. *Bruno*, 146 Conn. App. 214, 216, 76 A.3d 725 (2013), a case in which a trial court permitted a plaintiff husband and his current wife "to obtain discovery upon their filing of motions to open certain postjudgment orders on the basis of alleged fraudulent conduct on the part of the defendant [wife] without first substantiating their allegations of [the defendant's] fraud beyond mere suspicion in a court hearing." On appeal, the defendant wife argued that "the court did not have the authority to permit discovery without first making a preliminary finding [of fraud]." Id., 229. This court agreed, and held: "Until a motion to open has been granted, the earlier judgment is unaffected, which means that *there is no active civil matter*. . . . In this postjudgment posture, discovery is not available to the moving party for the simple reason that discovery is permitted only when a cause of action is pending." (Citation omitted; emphasis added.) Id., 230–31. This court remanded the case to the trial court with direction to make a preliminary finding, consistent with *Oneglia*, as to whether probable cause existed to open the judgment *prior* to ruling on the plaintiff husband's request for discovery in connection with his motion to open. Id., 216.

In the present case, the defendant argues that the court should have relied on *Brody*, which, he contends, permitted postjudgment discovery because it "held that *Oneglia* is inapplicable if a motion for contempt has been filed." He further argues that because the plaintiff filed motions for contempt, there was an "active civil matter pending" that gave him the authority to issue subpoenas in connection with his motion to open the judgment. In support of this argument, he contends that *Brody* also held that "when a party has moved

for contempt, a civil action is pending, and parties' attorneys have authority to issue subpoenas." The defendant notes that, in the present case, the court held hearings on the motions for contempt and the motion to open on the same date. He also relies on his representation to this court that the plaintiff issued a subpoena to a witness in connection with the motions for contempt, and that the court permitted the witness to produce documents and testify in accordance with this subpoena at the November 15, 2017 hearing, even though it had, on the same date, quashed the subpoenas issued in connection with the motion to open.[5] He states that "[i]t cannot be the case that one party has authority to issue a subpoena for a hearing, while the adverse party lacks that same authority." We disagree.

"Motions for contempt implicate the court's inherent equitable authority to effectuate and vindicate its judgments. . . . Although ordinarily our trial courts lack jurisdiction to act in a case after the passage of four months from the date of judgment . . . there are exceptions. One exception arises when the exercise of jurisdiction is necessary to effectuate prior judgments or otherwise enforceable orders." (Citations omitted; internal quotation marks omitted.) *Brody* v. *Brody*, supra, 153 Conn. App. 635.

In *Brody*, the trial court rendered judgment dissolving a marriage and entered various financial orders. Id., 627. Three years later, the defendant moved to open

[5] In connection with the motions for contempt, the plaintiff subpoenaed the real estate agent who listed the marital home for sale to provide information about the listing. In his brief to this court, the defendant represents that the agent "appeared, testified and produced the subpoenaed documents" at the November 15, 2017 hearing on the motions for contempt. As we discuss in greater detail in part II of this opinion, the defendant has not provided this court with any portions of the hearing transcript related to the motions for contempt. Thus, we do not know if the agent appeared, testified or produced any documents requested in the subpoena issued by the plaintiff.

the judgment and filed a motion for contempt. Id., 627–28. The plaintiff filed her own motion for contempt against the husband based on an allegation of fraud.[6] Id., 628. While her motion for contempt was pending, the plaintiff issued a subpoena to the sister of the defendant requiring her to produce certain documents and to appear at a deposition. Id. The sister filed a motion to quash the subpoena and a motion for a protective order, and, after a hearing, the court denied both motions. Id., 629. In a writ of error brought to this court, the sister argued, among other things, that there is no general right to postjudgment discovery in Connecticut, and that, "[b]ecause the court did not conduct a hearing pursuant to *Oneglia* prior to denying her motions . . . the court lacked the authority to allow the plaintiff to engage in postjudgment discovery." Id., 630.

In dismissing the sister's writ of error, this court stated that "*Oneglia* concerns the authority of a trial court to act on a request for postjudgment discovery pertaining to allegedly fraudulent conduct that transpired *prior* to the entry of the underlying judgment." (Emphasis in original.) Id., 630–31. Further, this court explained, "*Oneglia* and its progeny do not implicate the trial court's continuing jurisdiction to effectuate its outstanding orders, but rather deal with allegations that an underlying judgment has been procured by fraud. For that reason, this court has held that a party may only engage in what we termed 'postjudgment discovery' after the party first moves to open the judgment and establishes the allegations of fraud beyond mere suspicion. . . .

"By contrast, [*Brody*] plainly involves the court's continuing jurisdiction to effectuate and vindicate outstanding orders. The plaintiff's allegations of fraud arise

[6] Specifically, the plaintiff alleged that the defendant had failed to make payments in accordance with certain financial orders, and that he had received other monetary distributions that he did not disclose to her in violation of the order. *Brody* v. *Brody*, supra, 153 Conn. App. 628.

from conduct *subsequent* to the entry of judgment and involve the defendant's allegedly wilful noncompliance with the court's outstanding orders. For that reason, no motion to open was needed to confer authority on the trial court to allow discovery, as the court's continuing jurisdiction over the matter necessarily conveyed upon it the authority to do so." (Citations omitted; emphasis in original.) Id., 635–36.

The defendant's reliance on *Brody* is misplaced. Although *Brody* and the present case both involve allegations of fraud, the fraud alleged in *Brody* took place *after* the judgment of dissolution was rendered and the plaintiff in *Brody* sought to vindicate her rights under the dissolution judgment by filing a motion for contempt. See id., 637 ("[p]ermitting discovery as part of a postjudgment motion for contempt vindicates a party's interest in obtaining competent evidence of contempt, including contempt accomplished through fraudulent conduct").

Brody is factually distinguishable from the present case. The fraud allegations in the present case, in contrast to the allegations in *Brody*, took place prior to the rendering of the judgment of dissolution. Thus, unlike in *Brody*, the motion to open at issue in the present case did not implicate the trial court's continuing jurisdiction over an outstanding order. When a party alleges fraud that took place before a judgment is rendered, it is well settled that a court must first determine whether there is probable cause to open the judgment for the limited purpose of proceeding with discovery related to the fraud claim. See, e.g., *Bruno* v. *Bruno*, supra, 146 Conn. App. 231. As this court observed in *Brody*, to permit discovery in such a situation without first finding probable cause, a court would impermissibly disturb the finality of the underlying judgment. See *Brody* v. *Brody*, supra, 153 Conn. App. 632.

Additionally, we reject the defendant's argument that, because the plaintiff filed motions for contempt, there was an "active civil matter pending" that gave him the authority to issue subpoenas in connection with his unrelated motion to open the judgment. The defendant again misstates *Brody*'s holding in support of this argument, and cites no other authority that supports this proposition.

A party may file a motion for contempt before or after judgment is rendered to effectuate prior judgments or otherwise enforceable orders. In the present case, the plaintiff first filed a motion for contempt seeking to effectuate the judgment of dissolution requiring the defendant to list the marital home for sale and to make certain payments to protect her interest in the property. After the court issued an order in connection with this motion, the plaintiff filed a second motion alleging that the defendant was not complying with court orders. The purpose of both motions was to effectuate and to enforce orders of the court issued *after* the court had rendered its judgment of dissolution. Thus, the plaintiff did not take issue with the underlying judgment, but rather the defendant's failure to comply with it. Our review of the record reflects that when the court permitted the plaintiff's subpoenaed witness to testify in the present case, it did so for the limited purpose of permitting the plaintiff to present information about the defendant's compliance, or lack thereof, with orders previously entered related to the marital home and arising from the final judgment. Because the underlying civil action resulting in that final judgment had been resolved, there was no active civil matter pending that would have permitted the defendant to subpoena witnesses in connection with his motion to open the judgment. Thus, we conclude that the court properly interpreted the applicable legal principle, as set forth in

Oneglia, and that it correctly applied the law in quashing the subpoenas at issue in this claim and, thus, the defendant is unable to demonstrate that its ruling reflected an abuse of discretion.

II

The defendant next claims that the court erred in finding that he failed to establish probable cause that the dissolution judgment was procured through fraud or mutual mistake.[7] We conclude that the defendant has not provided this court with an adequate record to review this claim.

As the defendant correctly acknowledges in his brief, this court's review of the trial court's judgment with respect to the issue of probable cause is dependent upon the particular facts before the court at the time of its ruling. "We do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. . . . 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." (Citations omitted; internal quotation marks omitted.) *Pospisil* v. *Pospisil*, 59 Conn. App. 446, 449, 757 A.2d 655, cert. denied, 254 Conn. 940, 761 A.2d 762 (2000).

[7] In his brief to this court, the defendant states that, "on the date judgment entered, October 29, 2013, the parties' financial affidavits were inaccurate, either through fraud, intentional misrepresentation *or mutual mistake* . . . ." (Emphasis added.) He makes no reference to mutual mistake elsewhere in his brief. We do not consider this aspect of his argument, as it is inadequately briefed.

In the present case, the court held an evidentiary hearing on November 15, 2017, to address the subpoenaed parties' motions to quash, the defendant's motion to open the judgment, and the plaintiff's motions for contempt. The defendant has only provided this court with a nine page excerpt from a transcript of the November 15, 2017 hearing. This excerpt relates solely to the portion of the hearing in which the court addressed the motions to quash. The defendant did not, however, provide us with additional portions of the transcript relating to the motion to open the judgment. The plaintiff aptly argues that it is not possible for this court to "make any determination regarding what the evidence presented at the November 15 hearing demonstrated [about the issue of probable cause] when none of that evidence is before [it]." In his reply brief, the defendant argues that the remaining portion of the transcript is "irrelevant" because much of it "is almost entirely related to the [plaintiff's] motions for contempt, which are not on appeal." We agree with the plaintiff.

It is the responsibility of the defendant, as the appellant, to provide this court with an adequate record for review. Practice Book § 61-10; see also Practice Book § 60-5. "[I]t is incumbent upon the [defendant] to take the necessary steps to sustain [his] burden of providing an adequate record for appellate review. . . . [A]n appellate tribunal cannot render a decision without first fully understanding the disposition being appealed. . . . Our role is not to guess at possibilities, but to review claims based on a complete factual record developed by a trial court." (Internal quotation marks omitted.) *Stutz* v. *Shepard*, 279 Conn. 115, 125–26, 901 A.2d 33 (2006). If a claim requires appellate review of the evidence, and the evidence before the trial court consisted in whole or in part of testimony, the failure to provide the reviewing court with transcripts deprives this court of the ability to review the evidence. See,

e.g., *Desrosiers* v. *Henne*, 283 Conn. 361, 366–67, 926 A.2d 1024 (2007); *O'Halpin* v. *O'Halpin*, 144 Conn. App. 671, 675–76, 74 A.3d 465, cert. denied, 310 Conn. 952, 81 A.3d 1180 (2013).

We cannot evaluate the court's decision with regard to the issue of probable cause without the portions of the hearing transcript that are related to this issue. On the basis of the court's memorandum of decision, we can glean that the plaintiff testified about the alleged stock transfer and that stock certificates, which indicate that the plaintiff and the defendant jointly owned 1835 shares of Village Mortgage stock until September, 2014, were admitted into evidence. We do not know, however, the specific testimony that the court heard about the stock transfer. Most importantly, although the regulatory filing serves as the basis for the defendant's fraud claim, without the ability to review testimony concerning the regulatory filing, we are deprived of the ability to review testimony concerning this document. The defendant's representations about what transpired at the hearing are an inadequate substitute for our thorough and necessary examination of all of the evidence that was before the court at the time of its ruling. Accordingly, we conclude that the record is inadequate for this court to review this claim.

The judgment is affirmed.

In this opinion the other judges concurred.

MARIE FAIN *v.* BETHANY BENAK ET AL.
(AC 43898)

Alvord, Cradle and Eveleigh, Js.

Syllabus

The plaintiff sought to recover damages for personal injuries that she sustained when her vehicle was struck by a vehicle driven by the defendant B, an employee of the defendant Department of Administrative Services. The plaintiff alleged that her injuries were the result of B's negligence.

Following a trial to the court, the court rendered judgment in favor of the plaintiff and awarded damages. The plaintiff filed a motion for reconsideration as to her claimed future medical expenses, and attached to that motion a letter from her treating physician, G, which had been admitted as a full exhibit at trial. The letter stated that it was more probable than not that the plaintiff would require future medical treatment. The court granted the plaintiff's motion, awarded additional damages, and the defendant Department of Administrative Services appealed to this court. *Held:*

1. The defendant Department of Administrative Services could not prevail on its claim that the trial court erred in declining to apply the unavoidable accident doctrine, which was based on its claim that B was not negligent because she experienced a sudden emergency caused by the blowout of her left front tire: because the court found that B was negligent and caused the collision with the plaintiff's vehicle, the accident could not be considered unavoidable as a matter of law; the court determined that B was negligent in the way in which she operated the vehicle and that her actions were the proximate cause of the plaintiff's injuries, and, because these findings were inapposite to a determination that the record could support a finding that the negligence of neither party was involved, the court correctly determined that its finding of negligence necessarily precluded a finding that the accident was unavoidable.
2. The trial court did not abuse its discretion in granting the plaintiff's motion for reconsideration after it determined that she had presented sufficient evidence to support an award of damages for future medical expenses: G's letter and certain additional evidence presented at trial supported a conclusion that the plaintiff would incur future medical expenses and also provided evidence as to the specific costs of those expenses; this evidence took the plaintiff's claimed future medical expenses out of the realm of speculation, provided a degree of medical certainty that she would need future care, and presented sufficient evidence from which the court could approximate the costs of future medical treatment.

Argued March 10—officially released July 13, 2021

Procedural History

Action to recover damages for personal injuries the plaintiff sustained as a result of the named defendant's alleged negligence, brought to the Superior Court in the judicial district of New London, where the action was withdrawn as to the named defendant; thereafter, the case was tried to the court, *Knox*, *J.*; judgment for the plaintiff, from which the defendant Department of

Administrative Services appealed to this court; subsequently, the court, *Knox*, *J.*, granted the plaintiff's motion for reconsideration and awarded the plaintiff additional damages, and the defendant Department of Administrative Services amended its appeal; thereafter, the court, *Knox*, *J.*, denied the motion for reconsideration and to set aside the judgment filed by the defendant Department of Administrative Services, and the defendant Department of Administrative Services amended its appeal. *Affirmed.*

James E. Coyne, for the appellant (defendant Department of Administrative Services).

Charles K. Norris, with whom, on the brief, was *Anthony D. Sutton*, for the appellee (plaintiff).

Opinion

ALVORD, J. The defendant Department of Administrative Services[1] appeals from the judgment of the trial court rendered in favor of the plaintiff, Marie Fain, in this negligence action following a trial to the court. On appeal, the defendant claims that the court erred in (1) declining to apply the "unavoidable accident doctrine" to the facts of the case and (2) granting the plaintiff's motion for reconsideration after it determined that she presented sufficient evidence to support an award of damages for future medical expenses. We affirm the judgment of the trial court.

The following facts, as found by the court in its memorandum of decision, and procedural history are relevant to our discussion of the claims on appeal. On the morning of June 5, 2017, the plaintiff was driving south on Flanders Road in East Lyme. The plaintiff was traveling

[1] Although the plaintiff's complaint originally also named Bethany Benak as a defendant, the plaintiff subsequently withdrew her complaint against Benak, and Benak is not a party to this appeal. We refer in this opinion to the Department of Administrative Services as the defendant.

at the posted speed limit of thirty-five miles per hour. The plaintiff drove this route daily during her commute to her job as a school teacher. That morning, a vehicle operated by the defendant's employee, Bethany Benak, struck the plaintiff's vehicle.[2] The collision happened suddenly and without warning; the two vehicles were heading in opposite directions and were in their respective lanes when Benak's vehicle crossed into the plaintiff's lane, the southbound lane, and struck the plaintiff's vehicle. On impact, the plaintiff's vehicle spun and entered the northbound lane, where it collided with another vehicle. Finally, the plaintiff's vehicle came to a stop at a stone wall. On the basis of the plaintiff's testimony, which the court found was credible, the court determined that during the course of the accident, Benak's vehicle crossed the center line and did not slow down.

Just prior to the accident, Benak heard a popping sound, and the vehicle she was operating pulled to the left,[3] toward the southbound lane of traffic. At trial, the police officer who responded to the scene testified that Benak's front left tire appeared to have blown out, and the court found that there was a tear in the tire. At the time the tire burst, Benak did not know the speed at which she was traveling, whether she had applied her vehicle's brakes, or how far she was from the plaintiff's vehicle.

After the accident, an ambulance transported the plaintiff to the emergency department of a hospital. The

[2] The defendant admits that Benak "was operating a vehicle owned and insured by the defendant . . . and with its full permission and consent," and that her operation of the vehicle was in the course of her employment when the accident occurred.

[3] In its memorandum of decision, the court stated that Benak testified that "prior to the impact, she heard a pop-like sound and experienced the car pull to the right," but, as noted by the defendant in its principal appellate brief, Benak's testimony indicates that the vehicle pulled to the left and into the other lane of traffic.

plaintiff sustained a fractured hip, a bruised kidney, and a fractured arm as a result of the accident. Due to the nature of the fracture, her arm required surgery to attach a plate and screws to the broken bone. The plaintiff remained hospitalized for four days before being discharged to a rehabilitative center for two weeks. Because of the fracture in her hip, the plaintiff was "non-weight bearing" for approximately two months and, as a result, spent much of her time in a bed or a wheelchair. In addition to these physical ailments, the plaintiff was unable to take part in her normal summertime activities and was unable to properly care for herself or her family. Furthermore, the plaintiff was unable to return to work as an elementary school teacher until December, 2017, six months after the accident. At the time of trial, two and one-half years after the accident, the plaintiff continued to experience pain as a result of her injuries.

On August 15, 2018, the plaintiff commenced the present action. In the plaintiff's operative complaint, filed on December 2, 2019, she alleged that Benak was negligent and claimed that the defendant was liable for the plaintiff's damages pursuant to General Statutes § 52-556.[4] The case was tried to the court, *Knox*, *J.*, on December 12 and 13, 2019. Both parties submitted posttrial briefs. On January 15, 2020, the court issued its memorandum of decision, in which it found that Benak had negligently operated her vehicle and had caused the collision with the plaintiff's vehicle. The court rendered judgment in favor of the plaintiff and awarded damages in the amount of $344,867.33. This award included compensation for economic damages in the amount of

[4] General Statutes § 52-556 provides: "Any person injured in person or property through the negligence of any state official or employee when operating a motor vehicle owned and insured by the state against personal injuries or property damage shall have a right of action against the state to recover damages for such injury."

$84,867.33[5] and noneconomic damages in the amount of $260,000.

In its memorandum of decision, the court found that it was reasonably probable that the plaintiff would require future surgery and physical therapy; however, the court also found that there was "insufficient evidence upon which to determine future medical expenses." On January 23, 2020, the plaintiff filed a motion for reconsideration as to her claimed future medical expenses and attached a letter from her treating physician, Daniel Gaccione, which was admitted into evidence as a full exhibit during trial. The defendant objected to the plaintiff's motion for reconsideration. While the motion was pending, the defendant filed this appeal. On February 11, 2020, the trial court granted the plaintiff's motion for reconsideration and awarded the plaintiff an additional $14,250 in damages for future medical expenses.[6]

On February 3, 2020, while the plaintiff's motion for reconsideration remained pending, the defendant filed a motion for reconsideration, reargument and to set aside the judgment in favor of the plaintiff. On February 17, 2020, the court denied the defendant's motion. The defendant thereafter amended its appeal. Additional facts will be set forth as necessary.

I

The defendant first claims that the trial court erred in refusing to apply the "unavoidable accident doctrine" to the facts of the case. In particular, the defendant argues

[5] The award of economic damages included compensation for medical bills ($59,699.05), lost wages ($23,289), and expenses incurred to modify the plaintiff's home to accommodate her wheelchair ($1909.28).

[6] The defendant filed a motion for articulation and rectification as to the court's award of damages for future medical expenses. The court denied the motion. The defendant did not seek review of the court's ruling denying its motion for articulation.

that the court should have applied the "unavoidable accident doctrine" because "the blowout of the tire was not foreseeable and amount[ed] to an unavoidable accident." We disagree.

Before we address the substance of the defendant's first claim, we set forth the appropriate standard of review. The defendant maintains that whether a court should apply the "unavoidable accident doctrine" is a question of law subject to plenary review. The plaintiff, on the other hand, maintains that our review is guided by the abuse of discretion standard.

"The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts as they appear in the record." (Internal quotation marks omitted.) *DeLeo* v. *Equale & Cirone, LLP*, 202 Conn. App. 650, 659, 246 A.3d 988, cert. denied, 336 Conn. 927, 247 A.3d 577 (2021).

In its memorandum of decision, the court set forth its determination with respect to the applicability of the "unavoidable accident doctrine" as follows: "In *Shea* v. *Tousignant*, [172 Conn. 54, 372 A.2d 151] (1976), the court held that liability cannot be imposed on the operator of a vehicle who has a sudden medical emergency resulting in the loss of control of the vehicle. See also *Smith* v. *Czescel*, [12 Conn. App. 558, 533 A.2d 223, cert. denied, 206 Conn. 803, 535 A.2d 1316] (1987). The court rejects the application of the 'unavoidable accident' doctrine for the following reasons. First, there is no claim that Benak experienced a sudden medical emergency which prevented her . . . [from] maintain[ing] control of the vehicle. This court will not by analogy

extend the doctrine to a mechanical issue with the vehicle. Second, and more significantly, the court finds that the plaintiff has sustained her burden of proof that the driver of the state vehicle negligently operated her vehicle and caused the collision with the plaintiff's vehicle in one or more of the ways set forth in the operative complaint."

The defendant does not argue clear error with respect to the court's factual finding that there was no claim that Benak experienced a sudden medical emergency that prevented her from controlling her vehicle or its factual finding that Benak negligently operated her vehicle. Rather, the defendant claims only that the court erred in declining to apply the concept of unavoidable accident to these facts. Our resolution of this issue depends on whether the court properly declined to apply the "unavoidable accident doctrine" to the facts of this case.[7] Therefore, our standard of review is plenary.

Having established the standard of review, we turn to the defendant's claim that the court erred in refusing to apply the "unavoidable accident doctrine." The plaintiff responds that the "court's decision to not apply the unavoidable accident doctrine to the evidence adduced at trial was correct, as the trial court clearly and unequivocally found that the defendant's operator was negligent as alleged by the plaintiff in the operative complaint." We agree with the plaintiff.

The following additional facts are relevant to our resolution of this claim. In the trial court's memorandum of decision, the court expressly credited the plaintiff's testimony that "the state vehicle when it was

[7] We note that a trial court's denial of a request to charge the jury on unavoidable accident is subject to abuse of discretion review. See *Tomczuk* v. *Alvarez*, 184 Conn. 182, 190–91, 439 A.2d 935 (1981); see also *Barrese* v. *DeFillippo*, 45 Conn. App. 102, 108–109, 694 A.2d 797 (1997). In the present case, however, plenary review is appropriate to address the applicability of the unavoidable accident concept in light of the court's unchallenged findings of negligence.

approaching the plaintiff's vehicle crossed the center line and failed to slow down." The court found that "the plaintiff [had] sustained her burden of proof that the driver of the state vehicle negligently operated her vehicle and caused the collision with the plaintiff's vehicle in one or more of the ways set forth in the operative complaint." Further, the court determined that Benak's negligence was the proximate cause of the plaintiff's damages.

In her operative complaint, the plaintiff alleged that Benak was negligent in a number of ways. The allegations relate to Benak's actions *after* her tire blew out, with the exception of the allegation that she failed to adhere to the speed limit in the time leading up to the accident. [8] Failing to remain in her lane, failing to brake,

[8] The plaintiff's allegations in her operative complaint are as follows: Benak (1) "[f]ailed to grant one half of the highway to the plaintiff's vehicle in violation of" General Statutes § 14-231; (2) "[f]ailed to pass to the right of the plaintiff's vehicle in violation of" § 14-231; (3) "[f]ailed to grant the right of way to the plaintiff's motor vehicle"; (4) "[f]ailed to grant one half of the highway to the plaintiff's motor vehicle"; (5) "[f]ailed to operate her motor vehicle upon the right in violation of" General Statutes § 14-230; (6) "[f]ailed to keep a proper and reasonable lookout for other motor vehicles on the highway"; (7) "[f]ailed to apply her brakes in time to avoid a collision although by a proper and reasonable exercise . . . of her faculties, she could and should have done so"; (8) "[f]ailed to turn her motor vehicle so as to avoid a collision with the plaintiff's motor vehicle"; (9) "[f]ailed to sound her horn or otherwise warn the plaintiff of the impending collision"; (10) "[f]ailed to take reasonable precautions to avoid the collision"; (11) "[f]ailed to keep her motor vehicle under proper and reasonable control"; (12) "[w]as inattentive and failed to keep and maintain a reasonable and proper lookout"; (13) "[o]perated her motor vehicle at an excessive rate of speed in violation of" General Statutes §14-219; (14) "[o]perated her motor vehicle at a rate of speed greater than was reasonable, having regard to traffic, highway, weather, and other conditions, in violation of" General Statutes §14-218a; (15) "[o]perated her motor vehicle at an excessive rate of speed under the circumstances then and there existing"; (16) "[o]perated her motor vehicle on the left side of the highway in violation of" General Statutes §§ 14-235 and 14-234; (17) "[d]rove her motor vehicle on the left side of the highway into the path of the plaintiff's vehicle; and (18) "[f]ailed to operate her motor vehicle within her single lane of traffic in violation of" General Statutes § 14-236.

and general inattentiveness while driving are among the allegations.[9]

On the basis of these theories of liability and the evidence presented at trial, the court determined that the plaintiff proved that Benak "negligently operated her vehicle and caused the collision with the plaintiff's vehicle . . . ." On the basis of the court's conclusion that the plaintiff proved that Benak negligently operated her vehicle, the court "[rejected] the application of the 'unavoidable accident' doctrine" to the facts of the case. The court elucidated that there was "no claim that Benak experienced a sudden medical emergency which prevented her [from] maintain[ing] control of the vehicle," and it declined to extend "by analogy . . . the doctrine to a mechanical issue with the vehicle."

On appeal, the defendant argues that, because Benak "experienced a sudden, unexpected emergency, caused by the blowout of her left front tire causing her to cross over the centerline of the highway and go partially into the lane in which the plaintiff was operating her vehicle," she was not negligent. It is the defendant's position that, "in order for the plaintiff to prevail the plaintiff would have had to have produced evidence that . . . Benak had some 'premonition, warning, or advanced notice' that the tire on the subject vehicle was about to blow out." This argument is premised on the defendant's claim that the "unavoidable accident doctrine" precludes liability. However, this argument is not responsive to the plaintiff's allegations or to the court's findings.

The defendant does not challenge on appeal the trial court's findings aside from its claim that the "unavoidable accident doctrine" precludes a finding of negligence and its related claim that, in order to prevail at

[9] At no point does the plaintiff claim that Benak negligently caused the blowout or that she had notice of the impending mechanical problem.

trial, the plaintiff needed to prove that Benak knew of the impending blowout or negligently caused it to occur.[10] Ultimately, because the court found that Benak was negligent, the accident cannot be considered unavoidable or inevitable as a matter of law.

In support of its claim, the defendant relies on Professors Prosser and Keeton's definition of "unavoidable accident," which provides that "[a]n unavoidable accident is an occurrence which is not intended and which, under all the circumstances, could not have been foreseen or prevented by the exercise of reasonable precautions. That is, an accident is considered unavoidable or inevitable at law if it was not proximately caused by the negligence of any party to the action, or to the accident. . . . [T]he driver of an automobile who suddenly loses control of the car because the driver is seized with a heart attack, a stroke, a fainting spell, or an epileptic fit is not liable, unless the driver knew that he might become ill, in which case he may have been negligent in driving the car at all." (Footnotes omitted.) W. Keeton et al., Prosser and Keeton on the Law of Torts (5th Ed. 1984) § 29, p. 162.

In Connecticut, this concept has been incorporated into a model jury instruction, which provides: "The defendant claims that any injury suffered by the plaintiff was the result of an unusual or unexpected event and was not the result of either party's negligence. If you find that the alleged injuries and/or losses in question did not result from either the defendant's or the plaintiff's negligence but were caused solely by some other happening, then the defendant is not liable to the plaintiff." Connecticut Civil Jury Instructions 3.6-16, available at https://www.jud.ct.gov/JI/Civil/Civil.pdf (last visited July 7, 2021). Our Supreme Court has condoned

[10] The defendant asserts that this issue is based on a question of law, indicating that it does not dispute the trial court's factual findings.

this instruction only in the context of a driver losing consciousness while operating a motor vehicle. See *Shea* v. *Tousignant*, supra, 172 Conn. 56, 58 (directing trial court to provide instruction on remand in case in which defendant passed out or fell asleep without warning). Additionally, on more than one occasion, the court has expressed disapproval of the charge. See, e.g., *Tomczuk* v. *Alvarez*, 184 Conn. 182, 190–91, 439 A.2d 935 (1981); see also W. Keeton et al., supra, § 29, p. 163 (noting that instructions on doctrine have fallen into disfavor in many states).

The concept of unavoidable accident does not excuse a defendant from liability. Rather, it contextualizes the question of whether an actor has been negligent. See *Tomczuk* v. *Alvarez*, supra, 184 Conn. 190–91. Indeed, our Supreme Court has explained that "[a]n instruction on unavoidable accident serves no useful purpose and functions to confuse and mislead the jury and direct their attention from the primary issues of negligence, proximate cause and burden of proof. An additional, unnecessary instruction on the concept of unavoidable accident would only complicate the rules concerning negligence, proximate cause and burden of proof which must be explained to the jury. Instructions concerning unavoidable accident usually should be given only when the record can support a finding that the negligence of neither party is involved. When a foundation has been established it still remains within the sound discretion of the trial judge to determine whether an unavoidable accident charge is appropriate. Even if we assume an abuse of discretion, instructions on negligence, proximate cause and burden of proof could operate as a sufficient substitute for the unavoidable [accident] charge so as to preclude us from finding error." Id.; see also *Barrese* v. *DeFillippo*, 45 Conn. App. 102, 108–109, 694 A.2d 797 (1997).

In the present case, the court, acting as the fact finder, determined that Benak was negligent in the way in which she operated her vehicle, noting issues with her speed and braking, and that her actions were the proximate cause of the plaintiff's injuries. Because these findings are inapposite to a determination that "the record can support a finding that the negligence of neither party is involved"; (internal quotation marks omitted) *Barrese* v. *DeFillippo*, supra, 45 Conn. App. 108; the court correctly determined that its finding of negligence necessarily precluded a finding that the accident was unavoidable.[11]

II

The defendant's second claim is that the court erred in granting the plaintiff's motion for reconsideration and in increasing the award of damages to include future medical expenses. We disagree.

The question of whether to grant a motion for reconsideration "is within the sound discretion of the court." *Shore* v. *Haverson Architecture & Design, P.C.*, 92 Conn. App. 469, 479, 886 A.2d 837 (2005), cert. denied, 277 Conn. 907, 894 A.2d 988 (2006). "The standard of review regarding challenges to a court's ruling on a motion for reconsideration is abuse of discretion. As with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did." (Internal quotation marks omitted.) Id.

The following additional facts are relevant to our resolution of this claim. As discussed previously, the court, in its memorandum of decision, determined that there was insufficient evidence on which to determine future medical expenses. In support of her motion for

[11] Because the court found that the plaintiff's injuries were a result of Benak's negligence and were not caused by an unavoidable accident, we need not address whether this concept applies to mechanical issues.

reconsideration, the plaintiff attached a letter from her physician, which was admitted as a full exhibit during the trial. Gaccione stated in his letter: "With [regard] to further treatment, there is a better than 50 [percent] chance that it may be necessary to remove [the plaintiff's] left forearm hardware in the future. In addition, she may require physical therapy treatment for up to [ten] visits on an annual basis for the next several years while she continues to recover from her right hip and lower back injuries. In other words, it is more probable than not that she would require this treatment related to her left ulna and right acetabular fracture/lumbar sprain in the future." Gaccione went on to state that future arm surgery would cost between $6000 and $8000 and that physical therapy usually costs between $100 and $150 per visit. At trial, the plaintiff also introduced a summary of her physical therapy visits showing that she already had incurred $4987 in physical therapy bills; this exhibit was entered into evidence in full. Additionally, in its initial memorandum of decision, the court found that the plaintiff had a life expectancy of thirty-seven years. Upon review of the plaintiff's motion and over the defendant's objection, the court found "that the plaintiff offered sufficient evidence of the reasonable cost of future medical expenses for the surgical removal of hardware for the right acetabular fracture and physical therapy treatments. The court award[ed] the plaintiff future medical expenses in the sum total of $14,250."

On appeal, the defendant argues that because the letter from Gaccione "does not provide the court . . . with sufficient evidence to make a reasonable estimate of the cost of such treatment . . . [and] does not provide the court with sufficient evidence upon which to calculate how much physical therapy is going to be necessary and for how long . . . the award of . . . future medical expenses is not supported by the evidence . . . ." We disagree.

"Damages for the future consequences of an injury can never be forecast with certainty." (Internal quotation marks omitted.) *Marchetti* v. *Ramirez*, 240 Conn. 49, 56, 688 A.2d 1325 (1997). Accordingly, an award of future medical expenses should be "based upon an estimate of reasonable probabilities, not possibilities. . . . The obvious purpose of this requirement is to prevent the [fact finder] from awarding damages for future medical expenses based merely on speculation or conjecture. Because, however, [f]uture medical expenses do not require the same degree of certainty as past medical expenses . . . [i]t is not speculation or conjecture to calculate future medical expenses based upon the history of medical expenses that have accrued as of the trial date . . . *when there is also a degree of medical certainty that future medical expenses will be necessary*." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 54–55.

In *Marchetti*, the plaintiff's treating physician "expressed the opinion that the plaintiff [would] require future medical treatment for his injuries." Id., 55. Although the physician could not estimate the costs of that future treatment, our Supreme Court determined that the jury reasonably could have awarded the plaintiff damages for future medical expenses because "the evidence established that the plaintiff had received medical treatment for his injuries on a regular basis since the date of the accident," and because the plaintiff established life expectancy and total costs of treatment as of the date of trial. Id., 56.

In the present case, Gaccione's letter and the additional evidence presented at trial support a conclusion that the plaintiff would incur future medical expenses and also provided evidence as to the costs of her future medical expenses. Specifically, the plaintiff submitted evidence of the treatment she likely would need in the future (follow-up arm surgery and physical therapy),

the costs of such treatment (between $6000 and $8000 for the arm surgery and between $100 and $150 per physical therapy appointment), the approximate length of time she would need physical therapy (several years), her past medical expenses (including $4987 for physical therapy), and her life expectancy (thirty-seven years). This evidence took the plaintiff's claimed future medical expenses out of the realm of speculation, provided "a degree of medical certainty" that she would need future care, and presented sufficient evidence from which the court could approximate the costs of future medical treatment. (Emphasis omitted; internal quotation marks omitted.) *Marchetti* v. *Ramirez*, supra, 240 Conn. 55. Thus, the trial court did not abuse its discretion in granting the motion for reconsideration and in determining that this evidence was sufficient to support the award of future medical expenses.

The judgment is affirmed.

In this opinion the other judges concurred.

KENNETH A. BLACK *v.* TOWN OF WEST HARTFORD ET AL.
(AC 43918)

Cradle, Suarez and Bear, Js.

Syllabus

The plaintiff appealed to the Superior Court from an assessment by the Board of Assessment Appeals for the defendant town of West Hartford in connection with certain of the plaintiff's personal property. In his appeal, the plaintiff also named as a defendant the state Office of Policy and Management, claiming that it violated a certain statute (§ 12-71d) in recommending the schedule of motor vehicle values the town used to assess his vehicle. The Office of Policy and Management moved to dismiss the action as against it and the trial court granted the motion on the ground that the action was barred by the doctrine of sovereign immunity. *Held* that the judgment of the trial court was affirmed on the alternative ground that the plaintiff lacked standing to maintain the action against the Office of Policy and Management because he was not

classically aggrieved; the personal and legal interest claimed by the plaintiff, namely, the way in which vehicles are assessed for tax purposes, is common to all taxpayers, and not specific and personal to the plaintiff, and apart from the Office of Policy and Management's recommendation that municipalities use a certain guide's schedule to assess vehicles, the plaintiff did not allege that the Office of Policy and Management had any involvement in the assessment of the plaintiff's vehicle or any other vehicle, the plaintiff recognizing that it was the responsibility of each municipality to perform that function.

Argued April 19—officially released July 13, 2021

Procedural History

Appeal from the decision of the named defendant's Board of Assessment Appeals revising the assessment of certain of the plaintiff's personal property, brought to the Superior Court in the judicial district of Hartford, where the court, *Cobb, J.*, granted the motion to dismiss filed by the defendant Office of Policy and Management and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Kenneth A. Black, self-represented, the appellant (plaintiff).

Patrick T. Ring, assistant attorney general, with whom were *Joseph J. Chambers*, deputy associate attorney general, and, on the brief, *William Tong*, attorney general, and *Clare E. Kindall*, solicitor general, for the appellee (defendant Office of Policy and Management).

Opinion

SUAREZ, J. The self-represented plaintiff, Kenneth A. Black, appeals from the judgment of the trial court dismissing his action as against the defendant Office of Policy and Management for allegedly violating General Statutes § 12-71d in recommending the schedule of motor vehicle values that the defendant town of West Hartford (town) used to assess his vehicle for the 2018

tax year.[1] On appeal, the plaintiff claims that the court erred in granting the defendant's motion to dismiss on the ground that the action was barred by the doctrine of sovereign immunity. We affirm the judgment of the court, but on the alternative ground that the plaintiff lacks standing to maintain the action against the defendant. Because we affirm on this alternative ground, we do not reach the trial court's determination that the action was barred by the defendant's sovereign immunity.

The following facts, which either are undisputed or are taken from the underlying complaint and viewed in the light most favorable to the plaintiff; *Godbout* v. *Attanasio*, 199 Conn. App. 88, 90–91, 234 A.3d 1031 (2020); are relevant to our consideration of the plaintiff's claim on appeal. On October 21, 2019, the plaintiff, pursuant to General Statutes § 12-117a,[2] filed a complaint with the trial court appealing from the motor vehicle assessment made by the town assessor and the subsequent action of the town's Board of Assessment Appeals (board).[3] The complaint alleged the following facts. At all relevant times, the plaintiff was the owner of a 2017 Subaru

[1] The plaintiff also brought the action against the town for its role in assessing his vehicle. As we discuss later in this opinion, the action was not dismissed as against the town, and, at the time the plaintiff brought the present appeal, the action was still pending against the town. Because the litigation between the plaintiff and the town continued after judgment was rendered in favor of the Office of Policy and Management, the town is not participating in this appeal. We thus refer to the Office of Policy and Management as the defendant.

[2] General Statutes § 12-117a provides in relevant part: "Any person . . . claiming to be aggrieved by the action of . . . the board of assessment appeals . . . in any town or city may, within two months from the date of the mailing of notice of such action, make application, in the nature of an appeal therefrom . . . to the superior court for the judicial district in which such town or city is situated, which shall be accompanied by a citation to such town or city to appear before said court."

[3] We generally will refer only to the portions of the complaint that are relevant to the defendant, and not to the portions that are relevant to the town.

Crosstrek 2.0L Premium Automatic (vehicle) that was registered in the town. On or about July 1, 2019, the plaintiff received a property tax bill for the vehicle covering the period of October 1, 2018 through September 30, 2019, in the amount of $645.39. The town assessor valued the vehicle at $15,440, which, pursuant to General Statutes § 12-62, was 70 percent of the vehicle's "present true and actual value." On September 12, 2019, the plaintiff appealed to the board "claiming to be aggrieved by the original valuation," and the board reduced the vehicle's assessed value to $14,770. On September 16, 2019, the board sent a "Notice of Change of Assessment" reflecting this reduction to the plaintiff.[4]

The plaintiff next alleged that the defendant "is a duly authorized agency of the State of Connecticut and is responsible for recommending a schedule of motor vehicle value which shall be used by the assessors in each municipality pursuant to . . . [§] 12-71d."[5] He then alleged that, "[u]pon information and belief, the [defendant] [is] not following . . . [§] 12-71d by basing the motor vehicle tax on the National Automobile Dealers Association (NADA) 'clean retail' value instead of the plain language of [§] 12-71d which requires motor vehicle taxes to be based on the average retail price." He further alleged that the "NADA 'clean retail' value of [the plaintiff's vehicle] was . . . $22,050. The base [Manufacturer's Suggested Retail Price (MSRP)] when

[4] The plaintiff alleged that he "believes the revised assessment in the Notice of Change of Assessment is due to the vehicle having a mileage of approximately 46,430 at the time of appeal, a higher value than the October 1, 2018 assessed assumed mileage of 27,500."

[5] General Statutes § 12-71d provides in relevant part that the secretary of the defendant "shall recommend a schedule of motor vehicle values which shall be used by assessors in each municipality in determining the assessed value of motor vehicles for purposes of property taxation. . . . The value for each motor vehicle as listed shall represent one hundred per cent of the *average retail price* applicable to such motor vehicle . . . ." (Emphasis added.)

the vehicle was purchased in May of 2017 was $22,495. . . . This means under the valuation scheme, the over two year old vehicle has lost only $445 in value, or [2] percent of its MSRP. The 'clean retail' value as defined by the NADA does not state 'average' within the text . . . ." To support this assertion, the plaintiff provided in the complaint an excerpt that was allegedly taken from the NADA guides' website, which contained answers to frequently asked questions about values and pricing. The excerpt states: "Clean Retail values reflect a vehicle in clean condition. This means a vehicle with no mechanical defects and passes all necessary inspections with ease. Paint, body and wheels have minor surface scratching with a high gloss finish and shine. Interior reflects minimal soiling and wear with all equipment in complete working order. Vehicle has a clean title history. Because individual vehicle condition varies greatly, users of NADAguides.com may need to make independent adjustments for actual vehicle condition."

The plaintiff attached four documents to the complaint and incorporated them by reference in his allegations.[6] Among the attachments was a September 28, 2018 memorandum from the defendant to municipal assessors in which the defendant, in accordance with § 12-71d, recommended a motor vehicle pricing schedule to be used for the 2018 Grand List. The memorandum recommended the use of the October, 2018 NADA guides to value certain types of motor vehicles. The memorandum stated that the schedules in the NADA guides "reflect the 100 [percent] average retail price/'[c]lean [r]etail [v]alue' of motor vehicles for the current assessment year . . . . The assessment must reflect [70] percent . . . of the recommended values." Another attachment listed the NADA guides' used car values for

[6] The first attachment is the July 1, 2019 tax bill that the plaintiff received from the town. The second attachment is the Notice of Change of Assessment that the plaintiff received from the board.

the plaintiff's make and model of vehicle with 27,500 miles, as of October 1, 2018. This document provided, among other things, multiple categories of base values for this type of vehicle.[7] The clean retail value was the highest of these base values.

The complaint sought (1) "declaratory relief that the assessment should be based on the average retail price pursuant to . . . [§] 12-71d rather than [the] NADA 'clean retail' value," (2) "[a] [r]efund of the plaintiff's overpayment of taxes, an amount less than [$2500], exclusive of interest and costs," (3) "[d]eclaratory and other costs pursuant to [General Statutes §§] 12-117a and 52-257, including service fees," and (4) "[s]uch other relief as injunction and equity appertains."

On November 18, 2019, the defendant, pursuant to Practice Book § 10-30, moved to dismiss the plaintiff's claims for lack of subject matter jurisdiction, arguing that "sovereign immunity completely bar[red] the plaintiff's action against [it]."[8] The defendant also argued that "the plaintiff ha[d] not exhausted his available administrative remedies," "the plaintiff lack[ed] standing to bring his claims against [the defendant] due to lack of aggrievement," and "the plaintiff's claims against [the defendant] are nonjusticiable because they are not ripe."

On December 2, 2019, the plaintiff filed an objection to the motion in which he disputed each of the defendant's arguments. He argued in relevant part that sovereign immunity did not apply because the defendant "acted in excess and contrary to the plain language of [§ 12-71d] . . . ." On the issue of standing, he argued that he had been "personally aggrieved by [the] improper

[7] The categories are low auction, average auction, high auction, rough trade-in, average trade-in, clean trade-in, clean loan, and clean retail.

[8] The town filed its own motion to dismiss, which is not relevant to this appeal.

tax valuation and failure of the [defendant] to follow [§ 12-71d],'' and provided a list comparing the NADA clean retail value of his vehicle to the values of the same vehicle contained in other guides.[9] The plaintiff attached to his objection a letter that he purportedly e-mailed to Martin L. Heft, a policy development coordinator in the defendant's Intergovernmental Policy and Planning Division, on June 30, 2019, with ''questions . . . in regard to [the defendant's] role with [m]otor [v]ehicle [a]ssessment valuation.'' The last question in the letter asked: ''Why is the clean retail value used in determining the average retail value?'' He also attached what he represented to be Heft's reply, which stated in relevant part: ''NADA's Used Car and Older Car Guides do not list the average retail prices of vehicles. Instead, they list 'clean retail value.' These terms are synonymous—NADA's clean retail value has the same meaning as the term average retail price or average retail value.'' On December 10, 2019, the defendant filed a reply to the plaintiff's objection.

On January 13, 2020, the court heard oral argument on the motion to dismiss.[10] The defendant began by arguing that the plaintiff had not exhausted his administrative remedies before bringing the action, and that the plaintiff failed to plead an exception to the doctrine of sovereign immunity.[11] The defendant then addressed

[9] The plaintiff provided a total of seven values from Consumer Reports, Kelley Blue Book, and Edmunds. These values were for vehicles with 50,000 miles in either ''good'' or ''average'' condition. Each value was less than the NADA clean retail value.

[10] At the hearing, the court also heard argument on the town's motion to dismiss. The court spent the majority of the hearing discussing that motion.

[11] Although they are not applicable to the present appeal, there are three exceptions to the sovereign immunity enjoyed by the state: ''(1) [W]hen the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity . . . (2) 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 (3) when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose

its argument that the plaintiff did not have standing.[12] Later in the hearing, the plaintiff addressed the defendant's argument that he failed to exhaust his administrative remedies and that sovereign immunity barred the action.

On January 31, 2020, the court granted the motion to dismiss on the ground that the action was barred by sovereign immunity. In its order granting the motion, the court stated: "It is axiomatic that the state as the sovereign cannot be sued without its consent. *Allen* v. *Commissioner of Revenue Services*, 324 Conn. 292, 298, [152 A.3d 488] (2016). Sovereign immunity applies to the state and its agencies and officers. Id. To overcome sovereign immunity the plaintiff must establish that the legislature either expressly or by force of necessary implication waived sovereign immunity or in an action for declaratory or injunctive relief, the state or its officers acted in excess of their statutory authority or pursuant to an unconstitutional statute. *DaimlerChrysler Corp.* v. *Law*, 284 Conn. 701, 711–12, [937 A.2d 675] (2007). Here, the plaintiff does not allege that the state has waived its sovereign immunity, [or refer to] any statute that constitutes a waiver and has failed to allege that the state or its officers acted in excess of their statutory authority or pursuant to an unconstitutional

in excess of the officer's statutory authority." (Citations omitted; internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 349, 977 A.2d 636 (2009).

[12] Specifically, the defendant's attorney argued: "[A]ggrievement requires a specific personal legal interest . . . as opposed to the community as a whole. And [the plaintiff] has to show that [he] has been specially and injuriously affected by the agency's action . . . ." The court then asked: "But isn't [the plaintiff] claiming that? Isn't this all about his assessment appeal involving his motor vehicle?" The defendant's attorney replied: "It is, but that appeal is not concluded. I mean, I don't actually know what he's claiming his damage is in this case." The defendant's attorney went on to argue that the defendant "ha[d] been kind of bootstrapped along into the matter" as "part of the process of [the plaintiff] challenging the [board's] valuation [of his vehicle] . . . ."

statute. See *Carter* v. *Watson*, 181 Conn. App. 637, 642, [187 A.3d 478] (2018)." The court did not address the merits of the defendant's argument that the action should be dismissed on the ground that the plaintiff lacked standing. From that judgment, the plaintiff now appeals. Additional facts and procedural history will be set forth as necessary.

The plaintiff claims that the court erred in granting the defendant's motion to dismiss on the ground that the action was barred by the doctrine of sovereign immunity. The defendant argues that the court properly dismissed the action on the ground of sovereign immunity. In the alternative, the defendant argues, as it did before the trial court, that the judgment should be affirmed because the plaintiff cannot establish that he was aggrieved and, thus, had standing. We deem it appropriate to uphold the trial court's dismissal of the action as to the defendant on the ground that the plaintiff lacked standing to bring the action against the defendant.[13]

"Our Supreme Court has stated that [o]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised *and decided* in the trial court. . . . This rule applies equally to alternat[ive] grounds for affirmance. . . . One such exceptional circumstance is a claim that implicates the trial court's subject matter jurisdiction, which may be raised at any time and, thus, is not subject to our rules of preservation." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Board of Education* v. *Bridgeport*, 191 Conn. App. 360, 378–79 n.8, 214 A.3d 898 (2019). "[B]ecause aggrievement implicates subject matter jurisdiction, [a]

[13] This court may uphold a decision on an alternative legal ground. See *Florian* v. *Lenge*, 91 Conn. App. 268, 281, 880 A.2d 985 (2005) ("[i]t is axiomatic that [w]e may affirm a proper result of the trial court for a different reason" (internal quotation marks omitted)).

possible absence of subject matter jurisdiction must be addressed and decided whenever the issue is raised." (Internal quotation marks omitted.) *Wucik* v. *Planning & Zoning Commission*, 113 Conn. App. 502, 506, 967 A.2d 572 (2009).

As we have observed, the defendant raised the issue of standing before the trial court and the plaintiff had an opportunity to, and did, address the issue of standing. Moreover, the defendant raised the issue of standing in its brief to this court and the plaintiff addressed the issue in his reply brief.[14] Accordingly, the issue of standing is properly before this court despite the fact that the trial court did not rely on that ground in dismissing the action. Our plenary review of the record persuades us that the plaintiff lacks standing to maintain the action and, therefore, we affirm the court's judgment of dismissal on this ground.

"It is well established that a party must have standing to assert a claim in order for the court to have subject matter jurisdiction over the claim. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . Standing . . . is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. . . .

[14] Additionally, this court, during oral argument, asked the plaintiff to respond to the defendant's argument that he did not have standing to bring the action as against the defendant.

Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . .

"When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . . Because standing implicates the court's subject matter jurisdiction, the plaintiff . . . bears the burden of establishing standing. . . . Our review of the question of the plaintiff's standing is plenary." (Citations omitted; internal quotation markets omitted.) *State Marshal Assn. of Connecticut, Inc.* v. *Johnson*, 198 Conn. App. 392, 398–99, 234 A.3d 111 (2020).

The defendant argues that the plaintiff lacks standing because he has failed to establish classical aggrievement. Specifically, the defendant argues that the plaintiff cannot demonstrate that he has a "specific, personal, and legally protected interest" in the matter, and that, even if he could, he "did not allege an actual harm" that was caused by its actions. To support its argument, the defendant states that the "schedule is created by [the defendant] for use in every municipality in this state. It is not applied solely to the plaintiff's property, or exclusively in one municipality. That is, the plaintiff's interests with respect to [the defendant's] recommended schedule are no different from every other taxpayer in the state. Indeed, the plaintiff's claims are similar to general 'taxpayer standing' claims, which the courts have historically and routinely rejected." The defendant further states that it "does not administer the tax at issue," and contends that it has not "imposed assessed values that are set in stone and cannot be altered." It points to the fact that "the initial determination of a vehicle's value still rests with the municipal assessors," and that these assessments "are subject to review by the municipalities' boards of assessment

appeals, which can alter the assessed values as necessary." Accordingly, the defendant argues, it "is not, and could not be, the cause of any injury here." In his reply brief to this court, the plaintiff quotes from his objection to the defendant's motion to dismiss to reiterate that he has been aggrieved by the defendant's "direct [role] in administering [the] tax bill . . . ." He argues that he has standing because he has a personal interest in the property that was taxed and that the burden is solely on him to "pay, appeal, and now bring [this matter] to court." We agree with the defendant.

"It is axiomatic that aggrievement is a basic requirement of standing, just as standing is a fundamental requirement of jurisdiction. . . . There are two general types of aggrievement, namely, classical and statutory; either type will establish standing, and each has its own unique features. . . . Classical aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the [controversy], as opposed to a general interest that all members of the community share. . . . Second, the party must also show that the [alleged conduct] has specially and injuriously affected that specific personal or legal interest. . . . Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation. . . . Aggrievement is established if there is a *possibility*, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Trikona Advisers Ltd.* v. *Haida Investors Ltd.*, 318 Conn. 476, 485–86, 122 A.3d 242 (2015).

In the present case, the plaintiff did not claim statutory aggrievement as a basis for the trial court's jurisdiction in the underlying complaint, in his main brief or

reply brief to this court, or at oral argument before this court. Rather, his arguments on the issue of standing focus on classical aggrievement. Therefore, we consider whether he has been classically aggrieved by the defendant's recommendation that the municipalities of this state, including, but not limited to, the town, should apply the NADA guides' schedule that includes the "clean retail values" of motor vehicles, as opposed to their "average retail prices." In the complaint, the plaintiff challenges only the defendant's act of choosing the "clean retail value" portion of the motor vehicle pricing schedule, and there is no allegation that the defendant itself could apply or did apply any terms of that schedule to determine the value of the plaintiff's vehicle or any other vehicle, the plaintiff recognizing that it was the responsibility of each municipality to perform that function.[15] The NADA guides recommended by the defendant cover numerous makes and models of vehicles[16] that are registered in the state.[17] Thus, the defendant's act of choosing the 2018 NADA guides as its recommended motor vehicle pricing schedule affected every taxpayer whose vehicle was included in these guides.

[15] At the January 13, 2020 hearing on the motion to dismiss, the court asked the plaintiff: "So . . . did you bring this [action] because you think that the value on your car is too high because [the town] used the wrong standard?" The plaintiff replied: "Correct. I maintain that clean retail, as specified by the NADA, is higher than average retail value as specified in the statute." The plaintiff thus alleges that the town, and not the defendant, applied the relevant portions of the schedule in its determination of the value of his vehicle.

[16] The defendant's September 28, 2018 memorandum recommending the use of the NADA guides states that they include "domestic cars, imported cars, light and medium duty trucks, 100, 200, and 300 series vans and minivans . . . motorcycles, snowmobiles and all-terrain vehicles . . . motors homes, travel trailers and camping trailers."

[17] Some vehicles are not included in the NADA guides. General Statutes § 12-71d provides in relevant part: "For every vehicle not listed in the schedule the determination of the assessed value of any motor vehicle for purposes of the property tax assessment list in any municipality shall continue to be the responsibility of the assessor in such municipality . . . ."

The plaintiff does not allege that the defendant played a role in assessing his vehicle beyond merely recommending the use of the "clean retail value" portion of the NADA guides. In other words, the plaintiff does not allege any affirmative conduct by the defendant determining or requiring that his vehicle should be valued in a manner different from any of the other vehicles registered with the town that are included in the NADA guides. As previously noted in this opinion, when the defendant issued its memorandum recommending the motor vehicle pricing schedule for 2018, it stated that the NADA guides contain the "average retail price/'[c]lean [r]etail [v]alue' " of the vehicles included therein. Furthermore, Heft's e-mail to the plaintiff states that the relevant NADA guides "do not list the average retail prices of vehicles," and, instead, list "clean retail value," which "has the same meaning as the term average retail price . . . ." On the basis of this information, we reasonably can infer that, for the 2018 tax year, municipal assessors used clean retail values to formulate assessments for *every* vehicle included in the NADA guides. Furthermore, on the basis of the excerpt from the NADA guides' website that the plaintiff provided in the complaint, we reasonably can infer that the clean retail values of every vehicle are calculated using the same criteria. Thus, accepting as true the plaintiff's allegation that "clean retail value" is different than "average retail price," he is unable to show how his injury is different than that of any other taxpayer whose vehicle is included in the NADA guides. Rather, the personal and legal interest that the plaintiff claims to have in the subject matter is one that is common to all of these taxpayers. Accordingly, we conclude that the plaintiff lacks standing to maintain the action as against the defendant because he has failed to establish classical aggrievement under the first prong of the test.

In light of our conclusion that the plaintiff failed to establish that he was aggrieved by the defendant's con-

duct, we conclude that the trial court lacked jurisdiction over the action as against the defendant and, thus, should have dismissed it on that ground.[18] See *Gershon* v. *Back*, 201 Conn. App. 225, 244, 242 A.3d 481 (2020) ("[w]henever a court finds that it has no jurisdiction, it must dismiss the case" (internal quotation marks omitted)). Accordingly, we affirm the judgment of the trial court.

The judgment is affirmed.

In this opinion the other judges concurred.

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[18] "It is axiomatic that, in resolving the issue of a party's standing to maintain a cause of action, we do not consider the merits of that action." *State Marshal Assn. of Connecticut, Inc. v. Johnson*, supra, 198 Conn. App. 424 n.16 (2020).