IN RE ANNESSA J.*
(AC 44405)
(AC 44497)

Bright, C. J., and Alexander and Norcott, Js.

Syllabus

The respondent parents filed separate appeals to this court from the judgment of the trial court terminating their parental rights with respect to their minor child, A, and denying their motions for posttermination visitation with A. *Held*:

1. The respondent mother could not prevail on her unpreserved claims that the trial court violated her state and federal constitutional rights during the termination proceedings.

   a. The respondent mother could not prevail on her claims that that the trial court violated her rights under article fifth, § 1, and article first, § 10, of the Connecticut constitution by conducting the proceedings to terminate her parental rights over the Microsoft Teams platform, a collaborative computer meeting program, and her right to due process of law by denying her motion for permission to allow her expert witness to review certain information and conduct an independent evaluation, her claims being unpreserved and evidentiary, not of constitutional magnitude: she failed to establish that there exists a fundamental right under our state constitution to an in person, in court termination of parental rights trial; moreover, the court did not deny her the use of an expert but merely denied her late motion for release of confidential records and for permission to conduct an independent evaluation on the eve of trial; accordingly, the claims were not reviewable under the second prong of *State* v. *Golding* (213 Conn. 233).

   b. The respondent mother could not prevail on her unpreserved claim that the trial court violated her right to due process of law under the fourteenth amendment to the United States constitution by precluding her from confronting witnesses in person by conducting the termination of parental rights proceedings over the Microsoft Teams platform; although the mother requested an in person, in court trial, she did not argue on appeal that she had an absolute right to an in person, in court trial where she could physically confront witnesses, even if there was evidence of a need for a remote trial, rather, she contended that there was no evidence as to the need for a remote trial, and, because she did not ask the court to hold an evidentiary hearing on the need for such

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

a trial, the record was not adequate to review the claim, and the claim failed under the first prong of *Golding*.

2. The trial court did not err in terminating the respondent father's parental rights with respect to A.

a. This court declined to review the respondent father's claim that the trial court erred in concluding that the Department of Children and Families made reasonable efforts to reunite him with A as that claim was moot; the court also found that he was unable or unwilling to benefit from reunification efforts and, as the father failed to challenge that independent basis for the court's finding that the department made reasonable efforts to reunite him with A, this court could not afford him any practical relief.

b. The trial court's finding that the respondent father had failed to achieve a sufficient degree of personal rehabilitation as would encourage the belief that within a reasonable period of time, considering the age and needs of A, he could assume a responsible position in her life, as required by statute (§ 17a-112 (j) (3) (B) (i)), was supported by clear and convincing evidence in the record; although the father had made some progress in his rehabilitation, there was evidence showing that he was reluctant to cooperate with the department and that he had taken more than two years to begin addressing his problematic sexual behavior toward A, which was still a problem, thus, the record supported the conclusion that the father could not assume a role as a safe and responsible parent for A within a reasonable period of time.

c. The trial court's determination that the termination of the respondent father's parental rights was in the best interest of A was not clearly erroneous, as it was supported by the court's findings and conclusions with respect to the seven applicable statutory (§ 17a-112 (k)) factors, as well as the court's conclusion regarding A's need for permanency and stability; although A expressed a desire to stay in contact with her father, she also wanted to remain in the care of her foster mother, with whom she had been living for more than two years, and the father had failed to address the problem sexual behavior that was a significant factor in A's removal and had failed to make sufficient efforts to adjust his circumstances, conduct and conditions such that he could assume the role of the caregiver.

3. The trial court erred in denying the motions of the respondent mother and the respondent father for posttermination visitation with A, the court having failed to consider the appropriate standard under the applicable statute (§ 46b-121 (b) (1)) and our Supreme Court's holding in *In re Ava W.* (336 Conn. 545): in deciding the motions, the court was required to take a broad view of the best interest of A, including considering the factors set forth in *In re Ava W.*, such as the child's wishes, the birth parent's expressed interest, the frequency and quality of visitation between the child and the birth parent prior to termination of the parent's parental rights, the strength of the emotional bond between the child and the birth parent, and any impact on adoption prospects for the

child, to determine whether posttermination visitation was necessary or appropriate to secure the welfare, protection, proper care and suitable support of A; accordingly, the case was remanded for further proceedings on the respondents' posttermination motions for visitation.

Argued May 17—officially released August 3, 2021**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Hartford, Juvenile Matters, and tried to the court, *Olear, J.*; judgment terminating the respondents' parental rights; thereafter, the court denied the respondents' motions for posttermination visitation, and the respondents filed separate appeals to this court. *Affirmed in part*; *reversed in part*; *further proceedings*.

Albert J. Oneto IV, assigned counsel, for the appellant in Docket No. AC 44405 (respondent mother).

Sara Nadim, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Clare E. Kindall*, solicitor general, and *Evan O'Roark*, assistant attorney general, for the appellee in Docket No. AC 44405 (petitioner).

Joshua Michtom, assistant public defender, for the appellant in Docket No. AC 44497 (respondent father).

Sara Nadim, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Evan O'Roark*, assistant attorney general, for the appellee in Docket No. 44497 (petitioner).

Opinion

BRIGHT, C. J. In Docket No. AC 44405, the respondent mother (mother) appeals from the judgment of the trial court terminating her parental rights to, and

** August 3, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

denying her motion for posttermination visitation with, her minor child, Annessa J. On appeal, the mother claims that the trial court (1) violated her right to a "public civil trial at common law" by conducting proceedings over the Microsoft Teams platform,[1] rather than in court and in person, in violation of article fifth, § 1, and article first, § 10, of the Connecticut constitution, (2) violated her right to due process of law by precluding her from confronting witnesses in court and in person when it conducted proceedings over the Microsoft Teams platform, and (3) violated her right to due process of law when it denied her motion for permission to allow her expert witness to review certain information. We are not persuaded.

In Docket No. AC 44497, the respondent father (father) appeals from the judgment of the trial court terminating his parental rights to, and denying his motion for posttermination visitation with, his minor child, Annessa. On appeal, the father claims that the trial court improperly concluded that (1) the Department of Children and Families (department) had made reasonable efforts to reunify him with his daughter, (2) there was sufficient evidence to conclude that he was unable or unwilling to rehabilitate, and (3) termination of his parental rights was in the best interest of Annessa. We are not persuaded.

In addition, in Docket Nos. AC 44405 and AC 44497, the mother and the father, respectively, claim that the trial court applied an incorrect legal standard when it considered their posttermination motions for visitation

[1] Due to the COVID-19 pandemic, the Judicial Branch began holding remote hearings using the Microsoft Teams platform. For more information, see State of Connecticut, Judicial Branch, Connecticut Guide to Remote Hearings for Attorneys and Self-Represented Parties (November 13, 2020), available at https://jud.ct.gov/HomePDFs/ConnecticutGuideRemoteHearings.pdf (last visited July 29, 2021) ("Microsoft Teams is a collaborative meeting app with video, audio, and screen sharing features").

with Annessa. We are persuaded that the court employed an improper standard, and, accordingly, we reverse the judgment of the trial court as to the denial of the post-termination motions for visitation, and we remand the case to the trial court for further proceedings on those motions.

The following facts, as found by the trial court by clear and convincing evidence, and procedural history inform our review of both appeals.

On February 10, 2001, due to physical abuse at the hands of her mother, the mother was committed to the care and custody of the petitioner, the Commissioner of Children and Families, where she remained until reaching the age of eighteen. The mother also elected to receive additional voluntary services from the department until she reached the age of twenty-three. She has become a licensed professional nurse.

At the time of the trial in this matter, the mother and the father had been married for six to seven years but had been in a relationship for approximately twelve years. Their only child, Annessa, was born in 2006. In 2009, the department became involved with the mother and the father because they had failed to provide adequate supervision and care for Annessa. The department also had concerns about intimate partner violence. Annessa subsequently was committed to the care and custody of the petitioner, and the court ordered specific steps for the mother and the father. The mother and the father completed a parenting program through the Village for Families and Children, although the mother failed to comply with many of the specific steps that had been ordered. In July, 2010, Annessa was reunified with the father under protective supervision, which expired in December, 2010. By approximately December, 2010, the mother and the father had reunited and begun to cohabitate again; intimate partner violence also resumed.

"On November 17, 2017, the department's Careline received a report alleging sexual abuse by the father of Annessa and physical neglect of Annessa by the mother. The mother had reported that sometime in late fall/early winter of 2016, or as late as March, 2017, the father [had] disclosed to her that Annessa's foot touched his penis and he woke up with an erection. This matter was never addressed further by the mother or the father. Then, sometime in July, 2017, the father admitted to the mother that he had touched Annessa's genitals over her underpants in order to teach her a lesson. According to the mother, she asked the father to leave the house in August, 2017. The father has reported that he was not asked to leave until October, 2017. After the department was alerted to the incident, efforts were made to connect with the mother and specifically to have her place Annessa in therapy. The mother [however] would not commit to doing so."

On December 8, 2017, after the father left the home, he was arrested after he kicked in the door to the mother's apartment. Shortly thereafter, the first of four protective orders was issued against him in favor of the mother. The father pleaded guilty to numerous charges as a result of his December 8, 2017 arrest, and he received a sentence of one year of incarceration, execution suspended, with two years of probation.[2]

Annessa later reported that the mother would leave her alone for days at a time, that she would not know the whereabouts of the mother at those times, and that the apartment would have no heat or electricity. On December 4, 2017, during a forensic interview at Klingberg Children's Advocacy Center, Annessa reported that the father had touched her "bikini area" over her underwear.

"On January 16, 2018, the [petitioner] filed a petition of neglect. On April 5, 2018, the [petitioner] invoked a

[2] The father successfully completed his probation on May 3, 2020.

[ninety-six] hour administrative hold on [Annessa]. On April 9, 2018, the [petitioner] filed an ex parte motion for an order of temporary custody (OTC). The court issued the OTC on the same date, and it was sustained on May 7, 2018. On July 31, 2018, [Annessa] was adjudicated neglected and committed to the custody of the [petitioner] until further order of the court. She has remained committed to date." Annessa was placed in foster care with the woman who had been the foster mother to the mother. The mother and Annessa also had lived on the second floor of the foster mother's apartment house until shortly before Annessa was removed from the mother's care and custody. Annessa is bonded to the foster mother and has been clear in her desire to remain in the custody of the foster mother. Academically, she is excelling.

The mother and the father were given specific steps to facilitate reunification with Annessa, including addressing mental health issues, parenting deficiencies, and intimate partner violence; the father also was ordered to address the sexual abuse of his daughter. The mother neither kept appointments set by the department nor cooperated with the department. The father missed several administrative case review appointments, but he participated in counseling and made some progress. However, he falsely reported to the department that he had discussed with his therapist the sexual abuse of his daughter.

"On March 28, 2019, and February 6, 2020, the court approved a permanency plan of termination of parental rights and adoption. The trial on the [termination of parental rights] petition was conducted on September 2, 3, and 17, and October 6, 2020. The mother and the father appeared and were zealously represented by counsel."[3]

[3] "Due to the COVID-19 . . . pandemic, the trial was conducted virtually. The court made every reasonable effort to allow counsel and the parties to confer with each other during the proceedings and to address technical

In its October 23, 2020 memorandum of decision, the court found, in accordance with General Statutes §17a-112 (j) (1), that the department had made reasonable efforts to locate and identify the mother and the father, that the department had made reasonable efforts to reunify each of them with Annessa, and that neither the mother nor the father was able or willing to benefit from reunification efforts. The court also determined that such efforts at reunification no longer were appropriate. Additionally, in accordance with § 17a-112 (j) (3) (B), the court found that the petitioner had proven by clear and convincing evidence the "failure to rehabilitate" ground for termination of the respondents' parental rights. Next, in accordance with § 17a-112 (k),[4] the court considered each of the seven statutory factors

issues that arose from time to time. Using the virtual technology, the court was able to assess the demeanor and credibility of the witnesses."

[4] General Statutes § 17a-112 (k) provides: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

and concluded that termination of the parental rights of both the mother and the father was in the best interest of Annessa.

In its memorandum of decision, the court also considered the motions for posttermination visitation that the mother and the father each had filed, finding that "neither the mother nor the father have met their burden to prove posttermination visitation for such parent is necessary or appropriate to secure the welfare, protection, proper care and suitable support of [Annessa]." The court further concluded that the best interest of the child is not the proper standard for resolving motions for posttermination visitation. Finally, although noting that the father and Annessa have a good visiting relationship, the court found that posttermination visitation with the mother or the father was not *required* for Annessa's "well-being, welfare, protection, proper care or suitable support." Accordingly, the court denied each party's motion. These appeals followed.[5] Additional facts and procedural history will be set forth as appropriate.

We begin by setting forth the general legal principles relevant to the respondents' claims. "Proceedings to terminate parental rights are governed by § 17a-112. . . . Under [that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase." (Internal quotation marks omitted.) *In re November H.*, 202 Conn. App. 106, 116, 243 A.3d 839 (2020). Section 17a-112 (j) provides in relevant part: "The Superior Court . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of

[5] In both Docket Nos. AC 44405 and AC 44497, the attorney for Annessa has adopted the brief of the petitioner.

section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required, (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . .''

Additionally, our Supreme Court has determined that ''the trial court . . . [has] the authority to grant posttermination visitation'' when, during the proceedings to terminate parental rights, a respondent files a motion requesting such visitation. *In re Ava W.*, 336 Conn. 545, 577, 590 n.18, 248 A.3d 675 (2020). ''[T]he standard for evaluating posttermination visitation [derives] from the authority granted to [the trial court] under [General Statutes] § 46b-121 (b) (1)[6]—'the Superior Court shall

[6] General Statutes § 46b-121 (b) (1) provides in relevant part: ''In juvenile matters, the Superior Court shall have authority to make and enforce such orders directed to parents, including any person who acknowledges before the court paternity of a child born out of wedlock, guardians, custodians or other adult persons owing some legal duty to a child therein, as the court deems necessary or appropriate to secure the welfare, protection, proper care and suitable support of a child subject to the court's jurisdiction or otherwise committed to or in the custody of the Commissioner of Children and Families. . . . In addition, with respect to proceedings concerning delinquent children, the Superior Court shall have authority to make and enforce such orders as the court deems necessary or appropriate to provide individualized supervision, care, accountability and treatment to such child in a manner consistent with public safety, deter the child from the commission of further delinquent acts, ensure that the child is responsive to the

have authority to make and enforce such orders . . . necessary or appropriate to secure the welfare, protection, proper care and suitable support of a child . . . .' Even though . . . courts have broad authority in juvenile matters, that broad authority has been codified in § 46b-121 (b) (1), which defines the contours of the courts' authority to issue orders 'necessary or appropriate to secure the welfare, protection, proper care and suitable support of a child . . . .' General Statutes § 46b-121 (b) (1). . . . [W]hen evaluating whether posttermination visitation should be ordered . . . [the court should] adhere to the standard that the legislature expressly adopted—'necessary or appropriate to secure the welfare, protection, proper care and suitable support of [the] child . . . .' General Statutes § 46b-121 (b) (1) . . . .

"Whether [it is appropriate] to order posttermination visitation is, of course, a question of fact for the trial court, 'which has the parties before it and is in the best position to analyze all of the factors [that] go into the ultimate conclusion that [posttermination visitation is in the best interest of the child].' . . . Our dedicated trial court judges, who adjudicate juvenile matters on a daily basis and must make decisions that concern children's welfare, protection, care and support, are best equipped to determine the factors worthy of consideration in making this finding. As examples—which are neither exclusive nor all-inclusive—a trial court may want to consider the child's wishes, the birth parent's expressed interest, the frequency and quality of visitation between the child and birth parent prior to the termination of the parent's parental rights, the strength of the emotional bond between the child and the birth parent, any interference with present custodial arrangements, and any impact on the adoption prospects for

court process, ensure that the safety of any other person will not be endangered and provide restitution to any victim. The Superior Court shall also have authority to grant and enforce temporary and permanent injunctive relief in all proceedings concerning juvenile matters."

the child. . . . [The trial court] should, of course, evaluate those considerations independently from the termination of parental rights considerations."[7] (Citations omitted; footnote added.) *In re Ava W.*, supra, 336 Conn. 588–90. We now consider separately the appeals from the judgment terminating parental rights in AC 44405 and in AC 44497, followed by our consideration of the court's denial of the motions for posttermination visitation.

I

AC 44405

The mother claims that the trial court (1) violated her right to a "public civil trial at common law" by conducting proceedings over the Microsoft Teams platform, rather than in court and in person, in violation of article fifth, § 1, and article first, § 10, of the Connecticut constitution, (2) violated her right to due process of law by precluding her from confronting witnesses in court and in person when it conducted proceedings

[7] "To be clear, our holding and analysis in the present case are limited to the procedural posture by which the respondent sought posttermination visitation. Specifically, she requested posttermination visitation during a proceeding in which she was the respondent and the petitioner sought to terminate her parental rights. At that time, the trial court had the appropriate parties and evidence before it to consider her request as 'necessary or appropriate to secure the welfare, protection, proper care and suitable support of [the] child . . . .' General Statutes § 46b-121 (b) (1). We do not opine upon whether a trial court has authority to consider a request for posttermination visitation made after parental rights have been terminated. In that kind of case, we might be required to examine a variety of constitutional rights and statutory authority not implicated in the present case, namely, but not exclusively, whether the parent whose rights have been terminated has the right to pursue posttermination visitation and whether the trial court's authority to grant posttermination visitation has been abrogated by the visitation statute. See General Statutes § 46b-59 (b); see also *In re Andrew C.*, Docket No. H-12-CP11013647-A, 2011 WL 1886493, *11 (Conn. Super. April 19, 2011) (explaining that permitting parents whose rights have been terminated to file applications for visitation pursuant to § 46b-59 'could significantly impede what the law requires be an expeditious progress toward achieving permanency for a child')." (Emphasis omitted.) *In re Ava W.*, supra, 336 Conn. 590 n.18.

over the Microsoft Teams platform, and (3) violated her right to due process of law when it denied her motion for permission to allow her expert witness to review certain information.[8] We will consider each claim in turn.

A

The mother first claims that the court violated article fifth, § 1, and article first, § 10, of the Connecticut constitution[9] by conducting proceedings over the Microsoft Teams platform, rather than in court and in person. She argues that "[a]rticle [f]ifth, § 1, creates a duty on the part of the Superior Court to find facts by observing firsthand the parties and witnesses in physical proximity to each other [and] [a]rticle [f]irst, § [10], creates a right of the citizenry to a public civil trial of the kind that existed at common law in 1818." The mother concedes that she did not raise a constitutional claim before the trial court, although she did object to holding the hearing via Microsoft Teams, and, therefore, she requests review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[10] The

[8] The mother also claims that the court employed an improper legal standard when it considered her motion for posttermination visitation. We will consider this claim in part III of this opinion.

[9] Article fifth, § 1, of the Connecticut constitution, as amended by article twenty, § 1, provides: "The judicial power of the state shall be vested in a supreme court, an appellate court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish. The powers and jurisdiction of these courts shall be defined by law."

Article first, § 10, of the Connecticut constitution provides: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

[10] "Pursuant to the *Golding* doctrine, a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [respondent] of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness

petitioner argues that the mother's claim is not reviewable because the claim fails the second prong of *Golding* and that, even if the claim can be viewed as constitutional, it also fails under the third and fourth *Golding* prongs. We conclude that the mother has failed to establish that there exists a fundamental right under article fifth, § 1, or article fifth, §10, of our state constitution to an in court, in person trial, as opposed to a trial conducted over a virtual platform such as Microsoft Teams, during a termination of parental rights proceeding.[11] See *State* v. *Fuller*, 178 Conn. App. 575, 582, 177 A.3d 578 (2017) (procedural right does not "give rise in and of itself to a constitutional right" (internal quotation marks omitted)), cert. denied, 327 Conn. 1001, 176 A.3d 1194 (2018). Accordingly, her claim is not reviewable because it fails under *Golding*'s second prong. See footnote 10 of this opinion.

"With respect to the second prong of *Golding*, [t]he [respondent] . . . bears the responsibility of demonstrating that [her] claim is indeed a violation of a fundamental constitutional right. Patently nonconstitutional claims that are unpreserved at trial do not warrant special consideration simply because they bear a constitutional label." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 106 Conn. App. 238, 257, 941 A.2d 989, cert. denied, 287 Conn. 903, 947 A.2d 343 (2008).

of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the [respondent's] claim will fail. . . . The first two steps in the *Golding* analysis address the reviewability of the claim, while the last two steps involve the merits of the claim. . . . The appellate tribunal is free, therefore, to respond to the [respondent's] claim by focusing on whichever condition is most relevant in the particular circumstances." (Internal quotation marks omitted.) *State* v. *Turner*, 181 Conn. App. 535, 549–50, 187 A.3d 454 (2018), aff'd, 334 Conn. 660, 224 A.3d 129 (2020). In *In re Yasiel R.*, supra, 317 Conn. 781, our Supreme Court modified the third prong of *Golding* by eliminating the word "clearly" before the words "exists" and "deprived."

[11] The mother does not allege a violation of her right to due process of law under the fourteenth amendment to the United States constitution with regard to this claim.

In the present case, the mother contends that, at common law, there was a right to an in person, in court public trial in all civil cases. She argues that this right was codified in our state constitution. Although the mother agreed during oral argument before this court that a public trial is not constitutionally required in juvenile matters, she, nevertheless, contends that our state constitution requires that termination of parental rights proceedings be conducted in a physical courtroom with both the judge and the parents physically present. She contends that this is constitutionally required under our state constitution because the credibility and fact-finding determinations of the judge could be impacted by the judge's ability or inability to see the whole courtroom and the litigants in person.[12]

After reviewing the mother's arguments and considering the provisions of article fifth, § 1, and article first, § 10, and the common law she cites, we are not persuaded that she has established that there exists a fundamental right under our state constitution to an in person, in court termination of parental rights trial.

B

The mother next claims that the trial court violated her right to due process of law under the fourteenth

[12] Accepting the mother's argument essentially would mean that a sight impaired judge could not constitutionally preside over *any* bench trial because his or her inability to see the witnesses would violate the litigants' rights under the Connecticut constitution. Although we have been unable to locate any cases in Connecticut in which such an argument has been made, courts in other states have repeatedly rejected similar claims. See *People* v. *Hayes*, 923 P.2d 221, 225–26 (Colo. App. 1995) (hearing before blind judge does not deny due process); *Galloway* v. *Superior Court*, 816 F. Supp. 12, 17 (D.D.C. 1993) ("[I]n the United States, there are several active judges who are blind. Indeed, it is highly persuasive that . . . a blind person . . . served as a judge on the Superior Court of the District of Columbia and presided over numerous trials where he was the sole trier of fact and had to assess the credibility of the witnesses before him and evaluate the documentation and physical evidence."). Similarly, there is no question that a sight impaired individual may serve as a juror in Connecticut. See, e.g., *State* v. *Mejia*, 233 Conn. 215, 227–28, 658 A.2d 571 (1995).

amendment to the United States constitution by precluding her from confronting witnesses in court and in person when it conducted proceedings virtually over the Microsoft Teams platform. She argues that, "[a]lthough the trial court referenced the COVID-19 public emergency as the reason for conducting the trial virtually, there was no actual evidence before the court that the COVID-19 virus threatened the health or safety of any of the persons involved in this particular case. Under such circumstances, the risk of an erroneous deprivation of parental rights created by virtual fact-finding outweighed the court's concern for the health and safety of the participants in this matter under the applicable due process balancing test." Because this claim is unpreserved, the mother requests review under *State* v. *Golding*, supra, 213 Conn. 239–40. See footnote 10 of this opinion.

The petitioner argues that this claim is not reviewable for two reasons: first, because there is no evidentiary record regarding the health and safety procedures necessary for the participants in the proceedings and, second, because the mother has only a statutory right to confront witnesses in a termination of parental rights proceeding, not a constitutional right. The petitioner also argues, "[t]o the extent that [the mother] claims she has a general procedural due process right to confront and cross-examine witnesses in-person, it is subject to an analysis pursuant to *Mathews* v. *Eldridge*, 424 U.S. 319, [96 S. Ct. 893, 47 L. Ed. 2d 18] (1976) . . . [and] [s]he is unable to meet her burden [under that analysis]." We agree with the petitioner that the record is inadequate to review this unpreserved claim.

Although the mother requested an in person, in court trial, she did not ask the court to hold an evidentiary hearing on the need for a remote trial. It is important to note that the mother *does not argue* on appeal that she had the absolute right to an in person, in court trial

where she could physically confront witnesses, even if there was evidence of the need for a remote trial. Rather, she contends that she had such a right *because* there was no evidence as to the need for a remote hearing. Accordingly, we agree with the petitioner that the record is not adequate to review the claim made on appeal, and, accordingly, this claim fails under *Golding*'s first prong.

C

The mother next claims that the trial court violated her right to the due process of law when it denied her motion for permission to allow her expert witness to review certain information. Specifically, she argues that "she was without the adequate assistance of an expert in preparing her defense when the court denied her pretrial motion for permission to allow her expert to review documents in the court's file and to speak with the child's individual therapist. . . . Where the court precluded [the mother's] expert from reviewing the petitioner's documents filed with the court, or from talking with the child's therapist, it denied [the mother] a fundamentally fair proceeding by impeding her ability to have her expert effectively assess her defense, to include probing the state's case for weaknesses and identifying questions to ask the witnesses on cross-examination." (Citations omitted.) Because this claim was not preserved, the mother requests review pursuant to *Golding*. The petitioner responds that this claim is evidentiary in nature and that "the trial court properly exercised its discretion in denying [the mother's] untimely motion to release records to her private evaluator." We agree with the petitioner and, accordingly, conclude that review of the mother's unpreserved claim is inappropriate under *Golding*'s second prong. See footnote 10 of this opinion.

The following procedural history is informative. On August 4, 2020, the mother filed an ex parte motion

for the release of confidential court documents to her evaluator and for permission for the evaluator to conduct an independent evaluation of the child. In her motion, she contended that the information was "necessary in order for [her] to receive a fair trial . . . ." The petitioner objected to the mother's untimely motion on several grounds, including the lateness of the motion and that an independent evaluation, at this late date, would "unnecessarily delay the proceedings . . . ." The court denied the mother's motion on August 10, 2020.

Pursuant to General Statutes § 46b-124 (b), "[a]ll records of cases of juvenile matters . . . except delinquency proceedings . . . shall be confidential and for the use of the court in juvenile matters, and open to inspection or disclosure to any third party . . . only upon order of the Superior Court . . . ." The trial court's denial of a motion to release such confidential records rests squarely within the discretion of the court. See *In re Sheldon G.*, 216 Conn. 563, 577, 584, 583 A.2d 112 (1990).

"*In re Sheldon G.* involved a delinquency proceeding, but the principles of confidentiality embodied in § 46b-124 and discussed in *In re Sheldon G.* are analogous and applicable to confidential material in termination of parental rights cases. *In re Amy H.*, 56 Conn. App. 55, 62, 742 A.2d 372 (1999). Juvenile Court records pertaining to neglect proceedings and encompassing information from [the department] are confidential and subject to disclosure to third parties only upon court order. *State* v. *Howard*, 221 Conn. 447, 459 n.10, 604 A.2d 1294 (1992); *State* v. *Whitfield*, 75 Conn. App. 201, 210–13, 815 A.2d 233, cert. denied, 263 Conn. 910, 819 A.2d 842 (2003)." (Internal quotation marks omitted.) *State* v. *William B.*, 76 Conn. App. 730, 756–57, 822 A.2d 265, cert. denied, 264 Conn. 918, 828 A.2d 618 (2003). "Procedurally, our courts have devised a method for determining whether disclosure should be made by first requiring

counsel to lay a sufficient foundation." *State* v. *Whitfield*, supra, 212. "[O]nly a showing of compelling need can justify the disclosure of the confidential materials in a parental termination proceeding." *In re Amy H.*, supra, 62.

The mother attempts to avoid application of these principles to this case by trying to equate her situation to the situation presented to the Court of Appeals of Michigan in *In re Yarbrough Minors*, 314 Mich. App. 111, 885 N.W.2d 878, cert. denied, 499 Mich. 898, 876 N.W.2d 818 (2016), in which the court held that the trial court had employed an improper standard when it denied the respondents' motion for funding of an expert witness. Id., 114. Such a case is inapposite to the present situation. Here, the mother was not denied the use of an expert. Rather, her late motion for release of confidential records and for permission to conduct an independent evaluation, on the eve of trial, was denied. The mother's expert witness, in fact, did testify during the trial, and the mother was able to ask questions about the records that were in evidence. Although the mother now attempts to frame the denial of her motion as a constitutional due process claim under *Golding*, we conclude that her claim is evidentiary in nature. See *In re Sheldon G.*, supra, 216 Conn. 577, 584; *State* v. *William B.*, supra, 76 Conn. App. 756–57; *In re Amy H.*, supra, 56 Conn. App. 62; see also *In re Miyuki M.*, 202 Conn. App. 851, 860, 246 A.3d 1113 (2021) ("[t]he fact that this is a termination of parental rights case does not transform an evidentiary matter into a constitutional matter"). Accordingly, the claim fails under *Golding*'s second prong.

II

AC 44497

In AC 44497, the father appeals from the judgment of the trial court terminating his parental rights to, and denying his motion for posttermination visitation with,

Annessa. On appeal, the father claims that the trial court erred when it concluded that (1) the department had made reasonable efforts to reunify him with his daughter, (2) he was unlikely to be able to reunify with his daughter within a reasonable period of time or that he was unable or unwilling to rehabilitate, and (3) termination of his parental rights was in the best interest of Annessa.[13] We consider each of the father's claims in turn.

A

The father claims that the trial court erred in concluding, pursuant to § 17a-112 (j) (1), that the department had made reasonable efforts to reunify him with Annessa. The father states specifically that he does not challenge the factual findings of the trial court but challenges only the legal conclusions of the court. We conclude that this claim is moot.

The following additional facts and procedural history are relevant to this claim. In its memorandum of decision, the court found that the department had made reasonable efforts to locate the father and to reunify him with his daughter. The court further found that the father is "unable or unwilling *to benefit from reunification efforts* . . . [and] that it is no longer appropriate for the department to make further efforts to reunify the father with [Annessa]." (Emphasis added.) On appeal, the father claims that the court improperly concluded that the department had made reasonable efforts to reunify him with his daughter. The father does not claim, however, that the court's conclusion that he was "unable or unwilling *to benefit from reunification efforts*" was improper.[14] (Emphasis added.) Because the

[13] The father also claims that the court employed an improper legal standard when it considered his motion for posttermination visitation. We will consider this claim in part III of this opinion.

[14] Although the father challenges the court's finding under § 17a-112 (j) (3) (B) that he "has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering

father fails to challenge a separate independent basis for upholding the court's decision, we conclude that this claim is moot.

"Mootness raises the issue of a court's subject matter jurisdiction and is therefore appropriately considered even when not raised by one of the parties. . . . Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction. . . . [I]t is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the [petitioner] or [the respondent] in any way." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *In re Jorden R.*, 293 Conn. 539, 555–56, 979 A.2d 469 (2009).

"[Section] 17a-112 (j) (1) requires a trial court to find by clear and convincing evidence that the department made reasonable efforts to reunify a parent and child *unless* it finds instead that the parent is unable or unwilling to benefit from such efforts. In other words, *either finding*, standing alone, provides an independent basis for satisfying § 17a-112 (j) (1)." (Emphasis in original; internal quotation marks omitted.) *In re Angela V.*, 204 Conn. App. 746, 753, A.3d , cert. denied, 337 Conn. 907, 252 A.3d 365 (2021).

In *In re Angela V.*, this court explained that "in [*In re*] *Jorden R.*, our Supreme Court, sua sponte, vacated the judgment of this court after concluding that this court had lacked jurisdiction to review the merits of the respondent's appellate claim that the trial court had

the age and needs of the child, [he] could assume a responsible position in the life of the child," he has not challenged the court's finding under § 17a-112 (j) (1) that he is unwilling or unable to benefit from reunification efforts.

erred in concluding that she was unable or unwilling to benefit from reunification efforts. . . . Our Supreme Court determined that the respondent's claim was moot because she had failed to challenge on appeal a second alternative basis of the trial court's decision. . . . [T]he [trial] court found that the department had made reasonable efforts to reunify the respondent and [the child] *and* that the respondent was unwilling and unable to benefit from reunification services. . . . In light of the trial court's finding that the department had made reasonable efforts to reunify the respondent with [the child] and the respondent's failure to challenge that finding, the [decision of this court], which disturbed only the trial court's finding that reunification efforts were not required, [could not] benefit the respondent meaningfully [because there remained an undisturbed independent basis that supported the trial court's decision]. . . . Accordingly, our Supreme Court concluded that the respondent's claim was moot because the Appellate Court could not have afforded her practical relief." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 752–53.

In the present case, the father does not claim that the court erred in concluding that he was "unable or unwilling *to benefit from reunification efforts*." (Emphasis added.) Because the father fails to challenge a separate independent basis for upholding the court's decision, we conclude that this claim is moot.

B

The father next claims that that there was insufficient evidence for the trial court to conclude that he could not rehabilitate within a reasonable period of time given Annessa's needs.[15] We disagree.

[15] In footnote 4 of the father's appellate brief, he argues that "he was not fully rehabilitated at the time of trial, but . . . the evidence suggested he would likely rehabilitate within a reasonably foreseeable period. As such, the arguments concerning the trial court's ruling that he failed to rehabilitate and its ruling that he was unwilling or unable to do so are the same."

"Although the trial court's subordinate factual findings are reviewable only for clear error, the court's ultimate conclusion that a ground for termination of parental rights has been proven presents a question of evidentiary sufficiency. . . . That conclusion is drawn from both the court's factual findings and its weighing of the facts in considering whether the statutory ground has been satisfied. . . . On review, we must determine whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . To the extent we are required to construe the terms of § 17a-112 (j) (3) . . . or its applicability to the facts of this case, however, our review is plenary." (Citations omitted; internal quotation marks omitted.) *In re Egypt E.*, 327 Conn. 506, 525–26, 175 A.3d 21, cert. denied sub nom. *Morsy E.* v. *Commissioner, Dept. of Children & Families*, U.S. , 139 S. Ct. 88, 202 L. Ed. 2d 27 (2018).

One of the factors for termination for the court to consider is set forth in § 17a-112 (j) (3) (B) (i), which provides that the court may grant a petition for termination of parental rights if it finds by clear and convincing evidence that "the child . . . has been found by the Superior Court . . . to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

In this case, the court found that the father had "failed to achieve such a degree of rehabilitation as to encourage the belief that, within a reasonable period of time, [he] could assume a role as a safe and responsible parent for this child." The court cited the following evidence in support of its conclusion: the father's compliance with several of his specific steps was belated, he failed to have stable housing until very recently, he has gained only some insight into his sexual abuse of his daughter and how to control his urges, and he has "a long way to go" regarding the sexual abuse. The record demonstrates that, although the neglect petition in this matter was filed on January 18, 2018, and the petition for termination of parental rights was filed on November 15, 2019, the father did not begin to engage in therapy to address his inappropriate sexual behavior until December, 2019. The father argues that he knows he has not fully rehabilitated at this time, but, nonetheless, if given more time, perhaps six months, he could further resolve the issues related to his inappropriate sexual behavior and gain more understanding of its effect on Annessa. We are not persuaded.

Although we acknowledge, as did the trial court, that the father has made progress, that progress was a long time in the making. The father was reluctant to cooperate with the department, and he initially lied to the department about whether he was getting therapy for his sexual behavior. After the petitioner filed the neglect petition, it took more than two years for the father to begin addressing this very serious problem, which he readily admits is still a problem. Accordingly, we conclude that the evidence in the record supports the court's conclusion that the father failed to achieve the required degree of rehabilitation that would encourage the belief that, *within a reasonable period of time*, he could assume a role as a safe and responsible parent for his child.

C

The father next claims that the trial court erred in concluding that termination of his parental rights was in the best interest of Annessa. The father contends that he has a strong bond with Annessa and that his visits with her have been positive. In his appellate brief, the father has not examined each of the seven statutory factors delineated in § 17a-112 (k). Rather, his argument is that "there was absolutely no evidence adduced suggesting that continuing contact with her father while she remains in her relative foster placement was having any negative effect on her . . . [or that] the continuation of the father's legal rights would affect Annessa's well-being in any way." We are not persuaded.

"In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . It is well settled that we will overturn the trial court's decision that the termination of parental rights is in the best interest of the [child] only if the court's findings are clearly erroneous. . . . The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [his or her] environment. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven statutory factors delineated in [§ 17a-112 (k)]. . . . There is no requirement that each factor be proven by clear and convincing evidence. . . .

"On appeal, our function is to determine whether the trial court's conclusion was factually supported and

legally correct. . . . In doing so, however, [g]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling. . . .

"[T]he balancing of interests in a case involving termination of parental rights is a delicate task and, when supporting evidence is not lacking, the trial court's ultimate determination as to a child's best interest is entitled to the utmost deference." (Citation omitted; internal quotation marks omitted.) *In re Omar I.*, 197 Conn. App. 499, 583–84, 231 A.3d 1196, cert. denied, 335 Conn. 924, 233 A.3d 1091, cert. denied sub nom. *Ammar I.* v. *Connecticut*, U.S. , 141 S. Ct. 956, 208 L. Ed. 2d 494 (2020).

In the present case, the court considered each of the seven statutory factors delineated in § 17a-112 (k), and it concluded that termination of the father's parental rights was in Annessa's best interest. The court stated that it had considered the bond between the father and Annessa and the fact that Annessa had voiced an interest in remaining in contact with him. The court found, however, that the father had failed to address "the problem sexual behavior that was a significant factor in the removal of Annessa," and that he had failed to make "sufficient efforts to adjust his circumstances, conduct and conditions" such that he could "assume the role of the caregiver . . . ." Furthermore, the court stated that, "[i]n addition to considering the evidence presented in [the] case, [it had] also considered the totality of the circumstances surrounding [Annessa], including [her] interest in sustained growth, development, well-being, stability, continuity of her environment, length of stay in foster care, the nature of [her] relationship with the foster and biological parents and

the degree of contact maintained with the biological parents." Finally, in reaching its conclusion that termination of the father's parental rights was in Annessa's best interest, the court stated that it also had "balanced [her] intrinsic need for stability and permanency against the benefits of maintaining a connection with the father."

The record reveals that, although Annessa wanted to remain in contact with the father, she also stated that she wanted to continue to remain in the care of her foster mother, the person with whom she had a strong bond and with whom she had been living for more than two years. We conclude that there is evidence in the record to support the court's conclusion and that it is legally sound.

III

POSTTERMINATION MOTIONS FOR VISITATION IN AC 44405 AND AC 44497

In AC 44405 and AC 44497, the mother and the father, respectively, claim that the trial court applied the incorrect legal standard when it considered their posttermination motions for visitation with Annessa. The mother argues that "the trial court mistakenly believed that it could not consider the child's 'best interests' when deciding her motion for posttermination visitation brought pursuant to . . . § 46b-121 (b) (1). . . . Where the trial court erred . . . was in its belief that the standard involved a finding more exacting than whether the visitation was in the child's best interests—in the trial court's words, that the visitation was 'not required for [the child's] well-being.' " Similarly, the father argues in relevant part that "[i]n ruling on [his] motion for posttermination visitation, the trial court held that [although] he and Annessa did have a good visiting relationship, '[p]osttermination visitation by

[the] father with Annessa is not required for her well-being, welfare, protection, proper care or suitable support. . . .' The distinction between 'necessary or appropriate' and 'required' is crucial. . . . In articulating the standard as 'required,' the trial court elided the second part of the statutory definition of its powers: 'appropriate.' This was error." (Citations omitted; emphasis omitted.) We are persuaded by the respondents' arguments in each appeal.

The following additional facts and procedural history are relevant to our consideration of the claims. Both the mother and the father filed a motion for posttermination visitation with Annessa. In its October 23, 2020 memorandum of decision, the court ruled in relevant part that "neither the mother nor the father have met their burden to prove posttermination visitation for such parent *is necessary or appropriate* to secure the welfare, protection, proper care and suitable support of [Annessa]. The mother avers that it is in the best interest of Annessa for visitation to continue. That is not the standard under . . . § 46b-121 (b) (1). . . . Posttermination visitation by the mother with Annessa *is not required* for her well-being, welfare, protection, proper care or suitable support. The mother's motion is denied. . . . [T]he father likewise avers it is in the best interest of Annessa for visitation to continue. The father and Annessa do have a good visiting relationship. However, that does not equate to a finding that posttermination contact *is required* for Annessa. . . . Posttermination visitation by the father with Annessa *is not required* for her well-being, welfare, protection, proper care or suitable support. The father's motion is denied." (Emphasis added.) The mother and the father now claim that the court employed an improper standard because it specifically required them to prove that posttermination visitation *was necessary* to ensure Annessa's "well-being, welfare, protection, proper care or suitable support," which is not the standard set forth by

our Supreme Court in *In re Ava W.*, supra, 336 Conn. 588–90. We agree.

"The question of whether a trial court has held a party to a less exacting [or more exacting] standard of proof than the law requires is a legal one. . . . Accordingly, our review is plenary. . . . *Kaczynski* v. *Kaczynski*, 294 Conn. 121, 126, 981 A.2d 1068 (2009). Similarly, plenary review applies to a question of misallocation of a burden of proof. See *New Haven* v. *State Board of Education*, 228 Conn. 699, 714–20, 638 A.2d 589 (1994) (applying plenary review to challenge to allocation of burden of proof between parties in administrative appeal); *Zabaneh* v. *Dan Beard Associates, LLC*, 105 Conn. App. 134, 140, 937 A.2d 706 (applying plenary review to plaintiff's claim that the [trial] court improperly required that it, rather than the defendant, bear the burden of proof regarding the existence of permission), cert. denied, 286 Conn. 916, 945 A.2d 979 (2008); *Wieselman* v. *Hoeniger*, 103 Conn. App. 591, 596–97, 930 A.2d 768 (applying plenary review to claim that although the court applied the clear and convincing standard of proof required to establish a fraudulent transfer, it did so to the wrong party), cert. denied, 284 Conn. 930, 934 A.2d 245 (2007). *Braffman* v. *Bank of America Corp.*, 297 Conn. 501, 516, 998 A.2d 1169 (2010). Furthermore, if it is not otherwise clear from the record that an improper standard was applied, the appellant's claim will fail on the basis of inadequate support in the record. *Kaczynski* v. *Kaczynski*, supra, 131." (Internal quotation marks omitted.) *In re Jason R.*, 306 Conn. 438, 452–53, 51 A.3d 334 (2012).

The recent decision of our Supreme Court in *In re Ava W.*, supra, 336 Conn. 545, informs and controls our review of these claims. In *In re Ava W.*, our Supreme Court discussed the trial court's authority to order post-termination visitation in a termination of parental rights case. Id., 585–86, 588–89. The court expressly held that,

pursuant to § 46b-121 (b) (1),[16] the trial court has the broad authority to order posttermination visitation "within the context of a termination proceeding . . . [if it determines that] such visitation [is] necessary or appropriate to secure the welfare, protection, proper care and suitable support of the child." Id., 548–49. The court explained that it "was setting forth, for the first time, the standard and potential considerations for [the trial court] to consider when evaluating whether posttermination visitation should be ordered within the context of a termination proceeding." Id., 588.

The petitioner in the present case contends that the trial court correctly stated that our Supreme Court explicitly rejected the best interest standard in *In re Ava W.* We disagree. Our reading of *In re Ava W.* leads us to conclude that our Supreme Court, instead, held that, when considering a motion for posttermination visitation during a termination of parental rights case, the trial court's consideration of the traditional best interest of the child is only part of the consideration of whether such visitation is "necessary or appropriate to secure the welfare, protection, proper care and suitable support of [the] child." (Internal quotation marks omitted.) Id., 589. Our conclusion is supported by the court's explanation that, "[w]hether to order posttermination visitation is, of course, a question of fact for the trial court, which has the parties before it and is in the best position to analyze all of the factors which go into the ultimate conclusion that [*posttermination visitation is in the best interest of the child*]. . . . Our dedicated trial court judges, who adjudicate juvenile matters on a daily basis and must make decisions that concern children's welfare, protection, care and support, are best equipped to determine the factors worthy of consideration in making this finding. As examples—which are neither exclusive nor all-inclusive—a trial court may

[16] See footnote 6 of this opinion.

want to consider the child's wishes, the birth parent's expressed interest, the frequency and quality of visitation between the child and birth parent prior to the termination of the parent's parental rights, the strength of the emotional bond between the child and the birth parent, any interference with present custodial arrangements, and any impact on the adoption prospects for the child. . . . Trial courts should, of course, evaluate those considerations independently from the termination of parental rights considerations." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 589–90. Thus, in deciding whether to grant a parent's motion for posttermination visitation a court should consider the best interest of the child, but it should not limit its inquiry to the same analysis of best interest made during the dispositional phase of the termination of parental rights hearing. Instead, the court should take a broader view of best interest, including consideration of the factors set forth in *In re Ava W.*, to determine whether posttermination visitation is "necessary or appropriate to secure the welfare, protection, proper care and suitable support of [the] child." Id., 589.

The mother claims that the court expressly rejected any reliance on the best interest of Annessa in ruling on her motion for posttermination visitation. In addition, the mother and the father claim that the court in the present case improperly required each of them to establish that posttermination visitation *was required* for Annessa's well-being. On the basis of the clear language employed by the court in this case, we agree. Although the court cited to § 46b-121 (b) (1) and stated in relevant part that the mother and the father had not met their burden to prove that posttermination visitation was "necessary or appropriate to secure the welfare, protection, proper care and suitable support of the child," the court went on to explain that the best interest standard was "not the standard under . . .

§ 46b-121 (b) (1)" and that posttermination visitation was "*not required* for the child's well-being, welfare, protection, proper care or suitable support." (Emphasis added.)

On the basis of these statements by the court, we are persuaded that the court failed to consider the appropriate standard under § 46b-121 (b) (1) and *In re Ava W.*, namely, whether posttermination visitation is "*necessary or appropriate* to secure the welfare, protection, proper care and suitable support of [the] child," taking into account the traditional best interest analysis and the type of additional factors identified in *In re Ava W. In re Ava W.*, supra, 336 Conn. 589.

The orders of the trial court denying the motions for posttermination visitation by the mother and the father are reversed and the case is remanded for further proceedings on the respondents' motions; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

RONNA-MARIE GUILIANO *v.* JEFFERSON RADIOLOGY, P.C., ET AL.
(AC 42835)

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

Syllabus

The plaintiff sought to recover damages for the alleged medical malpractice of the defendants, a radiology practice and a physician, claiming that they were negligent in failing to timely diagnose a malignancy in her left breast, resulting in a delay in the diagnosis and treatment of her cancer. At trial, the plaintiff sought to offer the testimony of G, a radiologist, regarding the proper standard of care, and the testimony of L, a radiology oncologist who treated the plaintiff. The defendants' counsel objected to the form of certain questions posed to G by the plaintiff's counsel, many of which the trial court sustained, and the trial court imposed a time limitation on the length of the plaintiff's direct examination of L. The jury returned a verdict in favor of the defendants and the

court rendered judgment for the defendants, from which the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on her claim that the trial court abused its discretion by sustaining the objections of the defendants' counsel to the form of certain questions that were posed by her counsel to G because the court's evidentiary rulings were harmless; although the court did sustain objections to certain questions asked by the plaintiff's counsel concerning the standard of care and whether the defendants had breached that standard, the trial transcripts reflected that G testified to those matters later in the proceedings.
2. This court declined to review the plaintiff's claim that the trial court abused its discretion by placing a time limit on the presentation of L's testimony, the plaintiff having failed to preserve her claim; the plaintiff raised no objection to the court over the time limit imposed and did not identify any evidence that she was unable to elicit from L due to the time limit.
3. This court declined to review the plaintiff's claim that the time limit constituted a denial of her right of access to the courts and violated article first, § 10, of the Connecticut constitution, the plaintiff having failed to adequately brief her unpreserved claim; the plaintiff's brief contained no analysis as to why her unpreserved claim should be reviewed pursuant to *State* v. *Golding* (213 Conn. 233) or any substantive analysis as to why the time limit constituted a constitutional violation.

Argued April 14—officially released August 10, 2021

Procedural History

Action to recover damages for alleged medical malpractice, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the plaintiff withdrew the claims against the defendant Julie S. Gershon et al.; thereafter, the matter was tried to the jury before *Cobb, J.*; verdict and judgment for the named defendant et al., from which the plaintiff appealed to this court. *Affirmed.*

John R. Williams, for the appellant (plaintiff).

Kristin Connors, with whom was *Rebecca N. Brindley*, for the appellees (named defendant et al.).

Opinion

BRIGHT, C. J. The plaintiff, Ronna-Marie Guiliano, appeals from the judgment of the trial court, rendered after a jury trial, in favor of the defendants William S.

Poole, a physician, and Jefferson Radiology, P.C. (Jefferson Radiology).[1] On appeal, the plaintiff claims that the trial court abused its discretion by sustaining the objections of the defendants' counsel to the form of certain questions her counsel had posed to one of her expert witnesses. Additionally, the plaintiff claims that the trial court abused its discretion and violated her constitutional right of access to the courts by placing a time limit on her direct examination of a second expert witness. We disagree and affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the plaintiff's appeal. The plaintiff commenced the present action on April 21, 2014. In her operative complaint, the plaintiff alleged that she had a mammogram conducted by Jefferson Radiology in August, 2010. In December, 2010, the plaintiff complained to a physician of a lump in her left breast. In January, 2011, the plaintiff attended an appointment with her primary care physician, who ordered an ultrasound on her left breast. A few days after the appointment, Jefferson Radiology performed an ultrasound on the plaintiff's left breast. The reviewing physician noted that a "small, benign appearing intramammary lymph node is seen," and a routine mammographic follow-up was recommended for the plaintiff. In August, 2011, the plaintiff again complained of a lump in her left breast to a health-care provider. A bilateral mammogram was conducted and a routine follow-up was recommended.

In September, 2012, the plaintiff again reported to her primary care physician that she had a lump in her left

[1] The complaint was withdrawn as to the defendants Jinnah A. Philips, Julie S. Gershon, Mandell & Blau, P.C., and Physicians for Women's Health, LLC, and they are not parties to this appeal. Stephen Reich, who was a fact witness before the trial court, filed an appearance for purposes of seeking a protective order regarding a notice of deposition. He is a named defendant, but is not involved in this appeal. Accordingly, for purposes of this opinion, we refer to Jefferson Radiology, P.C., and William S. Poole, collectively, as the defendants.

breast. Jefferson Radiology performed a bilateral mammogram and an ultrasound on her right breast.[2] Poole reviewed the mammograms and ultrasound. Poole noted that the "[n]odular density in the left breast is benign," the "palpable abnormality felt by the provider in the right breast at 12 o'clock is not seen on ultrasound," and "there is no sonographic evidence of malignancy." Poole recommended that the plaintiff return in one year for a screening.

In March, 2013, the plaintiff again complained of a lump or thickening of her left breast, and Jefferson Radiology conducted a mammogram and ultrasound on the plaintiff's left breast. Jefferson Radiology identified calcification, a mass, and an abnormal lymph node in the plaintiff's left breast. On March 8, 2013, the plaintiff underwent a biopsy of the lump and the abnormal lymph node. The tissue from the biopsy demonstrated that the plaintiff was suffering from infiltrating mammary carcinoma, and the left axillary lymph node biopsy showed a metastatic mammary carcinoma. In July, 2013, the plaintiff underwent bilateral mastectomies as well as removal of multiple lymph nodes.

In her operative complaint, the plaintiff set forth claims of negligence and vicarious liability. The plaintiff alleged, inter alia, that the defendants' negligence in failing to timely diagnose a malignancy in her left breast resulted in a delay in the diagnosis and treatment of her cancer. A jury trial commenced on March 19, 2019. During the trial, the plaintiff presented the testimony of two expert witnesses, Linda Griska and Kenneth Leopold. The testimony of both of these witnesses is at issue in this appeal. Griska, a diagnostic radiologist specializing in breast imaging, testified that Poole violated the relevant standard of care for a radiologist in

[2] The record contains conflicting evidence as to why an ultrasound was performed on the right breast and not the left breast.

2012 when he reviewed the results of the plaintiff's September, 2012 mammogram and ultrasound. In particular, she testified that Poole failed to take additional views of the left breast based on the results of the mammogram. She also testified that Poole should have conducted an ultrasound on the left breast at that time.

Leopold, the plaintiff's treating radiology oncologist, testified to the radiation treatment the plaintiff received and the effects that the defendants' delayed diagnosis of the plaintiff's breast cancer had on her treatment.

Despite the testimony of Griska and Leopold, on April 4, 2019, the jury returned a verdict in favor of the defendants. The court accepted the jury's verdict and rendered judgment for the defendants. This appeal followed. Additional facts will be set forth as necessary.

I

The plaintiff first claims that the trial court abused its discretion by sustaining the objections of the defendants' counsel to the form of certain questions that her counsel had posed to Griska. The plaintiff argues that the defendants' counsel engaged in a deliberate strategy to confuse the plaintiff's counsel and that the court "consciously participated in that strategy by prohibiting [the] plaintiff's attorney from consulting with anyone other than cocounsel in her attempt to comprehend the reasons why the court was excluding her proposed evidence and explicitly refusing to explain in what respects the court considered the questions to be objectionable." The plaintiff argues that it was clear to the court that the plaintiff's counsel did not comprehend the basis of the court's rulings sustaining the objections to her questions to Griska. The plaintiff further argues that she was precluded from presenting "critical expert evidence" in support of her claim as a consequence of the court's rulings and that she can only speculate as

to the court's grounds for sustaining the repeated objections to the plaintiff's questions.

The defendants argue that the plaintiff failed to preserve her claims concerning the court's evidentiary rulings as to Griska, the court's rulings were proper, and any errors in the court's rulings were harmless. We agree with the defendants that the court's rulings were harmless because they did not prevent the plaintiff from eliciting relevant expert testimony from Griska. Consequently, we do not address whether the plaintiff properly preserved her claim or the propriety of the court's rulings.

The following additional facts and procedural history inform our conclusion. In the section of the plaintiff's appellate brief titled "statement of the case," the plaintiff states that the trial court imposed unexplained limits on the presentation of her case and references the following colloquy that occurred during the direct examination of Griska on the afternoon of March 19, 2019:

"[The Plaintiff's Counsel]: Okay. And in a patient that presents with—with a nodular density, is taking one spot view the standard of care to explore that?

"[The Defendants' Counsel]: Objection to the form.

"The Court: Sustained.

"[The Plaintiff's Counsel]: Do you have an opinion as to whether Dr. Poole's imaging breached the standard of care?

"[The Defendants' Counsel]: Objection as to the form.

"The Court: Sustained.

"[The Plaintiff's Counsel]: When a radiologist observes a nodular density, how should they explore that?

"[The Defendants' Counsel]: Objection to the form.

"The Court: Okay. I'm going to allow that question. Go ahead.

"[The Witness]: Could you repeat the question?

"[The Plaintiff's Counsel]: Yes. If a—if a radiologist observes a nodular density, how—what steps should they take to explore that?

"[The Defendants' Counsel]: Objection to the form, Your Honor.

"The Court: All right.

"[The Defendants' Counsel]: May we approach?

"The Court: Yes.

(Sidebar)

"The Court: All right. The court's going to sustain the objection. All right. Counsel.

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

"[The Plaintiff's Counsel]: Dr. Griska, do you have an opinion based on medical certainty as to whether Dr. Poole breached the standard of care?

"[The Defendants' Counsel]: Objection to the form. If we could be heard, Your Honor.

"The Court: Yeah. You want to be heard outside—can we hear this outside the presence of the jury?

"[The Defendants' Counsel]: Yes, please.

"The Court: All right. I'm going to ask the jury to step into the jury room for a moment.

(Jury exits the courtroom)

"The Court: Okay.

"[The Defendants' Counsel]: Your Honor, if Dr. Griska could be excused while we have this argument outside the presence of her.

"The Court: Okay. Where is she? All right. Oh, there you are. If you just step in the hallway for me, please.

(Witness exits the courtroom)

"The Court: Okay. So, the objection has to do with now because you're getting into the critical part of your examination, asking questions related to the expert opinions—the expert's opinion on the very topic. And there's a series of questions that have to be asked in the proper way, in the proper format for you to get that in. So, do you need a break to figure that—I mean, I'm not going to tell you what to do.

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

"[The Defendants' Counsel]: Well, I would object to a break, Your Honor. This is the essence of the case.

"The Court: Okay.

"[The Defendants' Counsel]: I—that—I think that—

"The Court: Well.

"[The Defendants' Counsel]: This is a serious matter to both of the parties.

"The Court: I know it is. I know it is.

"[The Defendants' Counsel]: And so, there should not be a break for [the plaintiff's counsel] to figure out what should have been known before the lawsuit was filed.

"The Court: Well, and also before the case was brought, you know, what questions you're going to ask in what precise order at the key time in the examination. So, are you ready to go forward?

"[The Plaintiff's Counsel]: Your Honor, if I could have a ten minute break, I would appreciate it.

"The Court: But the problem is that with I think counsel is going to say is that—and I don't have any problem if you consult with [cocounsel], but I do have a problem

if you consult with the witness. So, if I give you a few minutes to talk to Mr.—to have your conversation with [cocounsel], that's fine, but I really think it would be best if the conversation occurs in the courtroom without the expert present. Would that be okay?

"[The Defendants' Counsel]: No, I would object to that, Your Honor, in that she did consult with [cocounsel] before asking that question. The witness is on. It's twenty of three.

"The Court: Hm-hm.

"[The Defendants' Counsel]: The witness should—also needs to be cross-examined today.

"The Court: Yes, I know.

"[The Defendants' Counsel]: So, the witness should be brought back out. The questioning should be continued. We should not take a break. We should not assist any party. We should not assist any party in doing what is an essential part of the case.

"The Court: Yes. I understand that's your position. We'll take a five minute break. [The plaintiff's counsel and cocounsel], please stay in the courtroom. Christie, I mean, Chelsea, is going to stay here to make sure that the expert stays in the hallway.

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

"The Court: Okay? Thank you. All right.

"The Clerk: All rise. Court is now in recess.

(Recess/Resume)

* * *

"[The Plaintiff's Counsel]: Dr. Griska, when we refer to the term of standard of care, what does that refer to?

"[The Witness]: Standard of care is that care that a similar radiologist who is competent would provide in

a similar circumstance as the one we're having under discussion.

"[The Plaintiff's Counsel]: Okay. And when a radiologist observes a nodular density upon mammography what is the steps that a reasonable radiologist would take?

"[The Defendants' Counsel]: Objection to the form.

"The Court: Okay. Is your—are you asking for an expert opinion right now, or are you asking for generalized factual—

"[The Plaintiff's Counsel]: I was, at this point, I was asking generalized factual information.

"The Court: And is—is that because you are trying to have her explain what the standard of care is?

"[The Plaintiff's Counsel]: It's on the road to explaining that. Yes, Your Honor.

"The Court: Okay. So, I guess my concern here is that, you know, you had previously been asking questions that were foundational. Is that what you're doing?

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

"The Court: I'm going to let you ask a few foundational questions, but you need to be very, very careful about whether this turns to the specific opinions in this case. Do you understand?

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

"The Court: So, I'll give you a little bit of leeway.

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

"The Court: And I would ask the witness to please try very carefully to just answer the question that is asked and not to expound on your answer because counsel will ask you the next question.

"[The Witness]: Yes, Your Honor.

"The Court: Do you understand? Okay.

"[The Witness]: Please repeat.

"[The Plaintiff's Counsel]: Yes.

"Court Monitor: Would you like me to repeat it?

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

(Question read by court monitor)

"[The Court Monitor]: And when a radiologist observes a nodular density upon mammography what is the steps that a reasonable radiologist would take?

"[The Witness]: When we see a nodular density, we need to—a radiologist needs to determine if there is something underlying that is potentially malignant . . . . So, additional views would need to be done to—to further evaluate that area.

"[The Plaintiff's Counsel]: Okay. And when you say additional views, can you explain that?

"[The Defendants' Counsel]: Objection to the form, Your Honor.

"The Court: Overruled. Go ahead.

"[The Witness]: The additional views are some of those that we discussed this morning and they could be compression spot views or views from a different direction or angle.

"[The Plaintiff's Counsel]: And in this case, what did Dr. Poole do?

"[The Witness]: He did one additional view.

"[The Plaintiff's Counsel]: Okay. And in your expert opinion was that one additional view sufficient to diagnose the nodular density?

"[The Defendants' Counsel]: Objection to the form, Your Honor.

"The Court: Sustained.

* * *

"[The Plaintiff's Counsel]: So, from this view can you determine where in the breast the calcifications are?

"[The Witness]: I can just say that they're in the top of the breast.

"[The Plaintiff's Counsel]: And how would—how would a radiologist determine a better location in the breast?

"[The Witness]: They need to—

"[The Defendants' Counsel]: Objection to the form, Your Honor.

"[The Plaintiff's Counsel]: I'll—I'll rephrase that.

"The Court: Okay. Thank you.

"[The Plaintiff's Counsel]: What would a radiologist have to do to better identify where in the breast the calcification was?

"[The Defendants' Counsel]: Objection to the form, Your Honor.

"The Court: Okay. Sustained.

"[The Plaintiff's Counsel]: If a patient presented to you with these calcifications, what steps would you take to determine where the calcifications were?

"[The Defendants' Counsel]: Objection to the form.

"The Court: Sustained."

The plaintiff's argument ignores the following additional direct testimony of Griska that took place after the portions of the examination on which the plaintiff relies. First, later in the afternoon of March 19, 2019, the following colloquy took place:

"[The Plaintiff's Counsel]: What is the standard of care in—in diagnosing micro calcifications?

"[The Defendant's Counsel]: Objection to the form.

"The Court: All right. I'll allow that one.

* * *

"[The Plaintiff's Counsel]: How is it that you are familiar with the prevailing standard of care?

"[The Witness]: Through my training and experience.

* * *

"[The Plaintiff's Counsel]: What is a standard of care for the physician confronting—confronted with—a similar area of concern?

"[The Defendant's Counsel]: Objection to the form.

"The Court: I'll allow it.

* * *

"[The Witness]: The standard of care would be first to identify the finding, and secondly, to locate the finding in two planes so that precise location could be identified. So, additional views would need to be performed, magnification views, and potentially other views with the breast and the machine, in a different location.

"[The Plaintiff's Counsel]: And when you say the machine at a different location you mean the mammography machine?

"[The Witness]: Yes.

"[The Plaintiff's Counsel]: Okay. And in this case, did Dr. Poole take additional films?

"[The Witness]: No.

* * *

"[The Plaintiff's Counsel]: Okay. And do you have an opinion within a reasonable medical certainty whether

his fail—Dr. Poole's failure to take additional views fell below the standard of care?

"[The Defendant's Counsel]: Objection to the form.

"The Court: All right. Overruled.

"[The Witness]: Yes.

"[The Plaintiff's Counsel]: In what way?

"[The Witness]: The failure to take additional views, well first, he didn't identify the micro calcifications, and secondly, the failure to take additional views precluded the ability to establish the diagnosis and the location of the micro calcifications."

Similarly, on the following day, March 20, 2019, during the continued direct examination of Griska,[3] the following colloquy occurred:

"[The Plaintiff's Counsel]: Okay. Now, in September of [2012, was] there a generally accepted—accepted procedure for radiologists to follow when a patient presents with micro calcifications?

* * *

"[The Witness]: The principles and documentation of the how to evaluate and—and the basics of micro calcification analysis are in—were standard in 2012.

"[The Plaintiff's Counsel]: Okay. And when you say that they're standard in 2012, what do you mean by that?

[3] As previously noted in this opinion, the plaintiff argues that during her March 19, 2019 direct examination of Griska the court improperly precluded the plaintiff's counsel from discussing the court's rulings on the objections of the defendants' counsel to her questions with anyone other than her cocounsel. In making this argument, the plaintiff ignores the fact that Griska was still on direct examination when court adjourned for the day on March 19, 2019. Thus, her counsel had the opportunity before Griska resumed her direct testimony on March 20, 2019, to discuss the court's prior evidentiary rulings and Griska's continued testimony with anyone she liked, including Griska.

"[The Witness]: I mean that the—the principles of how to evaluate the calcifications have not changed or what the possibility of [the calcifications are] representing has not changed.

"[The Plaintiff's Counsel]: Okay. And what is the accepted procedure for radiologists to follow when a patient presents with micro calcifications?

"[The Witness]: To do the magnification views and to view the calcifications in more than one direction.

"[The Plaintiff's Counsel]: And in 2012, did Dr. Poole follow that accepted procedure?

* * *

"[The Witness]: No he did not.

* * *

"[The Plaintiff's Counsel]: Okay. And did he meet the standard of care on September 21st, 2012, when he read the mammogram?

* * *

"[The Witness]: No.

"[The Plaintiff's Counsel]: In what way?

"[The Witness]: The findings needed additional imaging evaluation, which were not performed. He did not do the magnification spot views, and he did not evaluate the calcifications to locate them in more than one projection."

With this record in mind, we turn to the applicable standard of review. "[B]efore a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful. . . . In other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful. . . . Moreover, an evidentiary impropriety in a civil case is harmless only if we

have a fair assurance that it did not affect the jury's verdict. . . . A determination of harm requires us to evaluate the effect of the evidentiary impropriety in the context of the totality of the evidence adduced at trial." (Citation omitted; internal quotation marks omitted.) *Klein* v. *Norwalk Hospital*, 299 Conn. 241, 254–55, 9 A.3d 364 (2010).

As noted previously in this opinion, we need not address whether the evidentiary rulings of which the plaintiff complains were improper, because the plaintiff has failed to demonstrate that those rulings were harmful to the presentation of her case at trial. Significantly, the plaintiff has not identified any relevant evidence that the court precluded the plaintiff from presenting during Griska's testimony. During Griska's testimony, the court did sustain the objections of the defendants' counsel to the form of certain questions asked by the plaintiff's counsel concerning the applicable standard of care and whether the defendants breached that standard of care. As the trial transcripts reflect, however, Griska did testify on two occasions later in the proceedings, over the objections of the defendants' counsel, which objections the court overruled, to the applicable standard of care and that Poole breached the relevant standard of care. Simply put, the plaintiff's unsubstantiated claim that she "was precluded from presenting critical expert evidence in support of her claim" is contradicted by the record. Because the plaintiff has not shown any harm from the court's evidentiary rulings that are the subject of this appeal, her claim necessarily fails.

II

The plaintiff's second claim arises from the trial court's order limiting the time for direct examination and cross-examination of the plaintiff's expert witness, Leopold. The plaintiff's claim on appeal is twofold. First, the plaintiff claims that the trial court abused its discretion by placing a time limit on the presentation of Leo-

pold's testimony. Second, the plaintiff claims that the court's action constituted a denial of the right of access to the courts and, thus, violated article first, § 10, of the Connecticut constitution.[4] For the reasons that follow, we decline to review the plaintiff's claims.

The following additional facts and procedural history are relevant. During the trial proceedings on March 27, 2019, the following colloquy occurred:

"[The Defendants' Counsel]: So, it's [the plaintiff's] intention that he's a—a treating physician witness only?

"The Court: That's what I hear.

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

"The Court: Okay. All right. So, with respect to Dr. Leopold, he was disclosed by the plaintiff on June 12th, 2017 as a 'subpoena-only expert' to testify as to the facts and opinions set forth in his reports and records. The disclosure also states that Dr. Leopold will discuss the radiation treatment the plaintiff received, and I quote, 'as well as the result of the delayed diagnosis of the breast cancer on treatment for [the plaintiff].' This testimony is I quote, 'expected to be based on review of [the plaintiff's] records and his treatment of [the plaintiff].' Because Dr. Leopold was disclosed as a treating fact witness expert only, he will only be allowed to testify as to an opinion or facts to which fair notice is given to the—in the disclosed medical records, pursuant to Practice Book § 13-4 (b) (2). To the extent [that the plaintiff] seeks to ask Dr. Leopold opinion questions concerning opinions that are not in the medical records, the defendants are not on fair notice, and, therefore,

[4] The constitution of Connecticut, article first, § 10, provides: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

such questions should not be asked or elicited by counsel. Do you understand?

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

"The Court: Okay. So, anything on Dr. Leopold? Okay. All right. So, now, with respect to the remainder of the day, what is going to happen this morning, [the plaintiff's counsel]?

"[The Plaintiff's Counsel]: Your Honor, I plan on calling Alisa Houldcroft, who is I believe in the hallway. She was parking when we started this argument.

"The Court: Okay. So, you have one family witness today?

"[The Plaintiff's Counsel]: Yes.

"The Court: Only one?

"[The Plaintiff's Counsel]: Yes. And then—

"The Court: And that's it, and then Dr. Leopold?

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

"The Court: And Dr. Leopold isn't coming until two, correct?

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

"The Court: All right. So, here's what I want to say about Dr. Leopold. So, we only have Dr. Leopold for three hours today with a fifteen minute break, so it's really two hours and forty-five minutes.

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

"The Court: That time will be split evenly between the plaintiff and the defendants because Dr. Leopold isn't coming back because you have to rest so we can turn to the defendants' case, as has been our plan all along, and as I have repeatedly told you. So, I would recommend that both parties think carefully about their

direct and their cross-examination, and make sure that they don't waste any time on unnecessary questions. Like, do we have to spend a half an hour on his curriculum vitae, for example?

"[The Plaintiff's Counsel]: No, Your Honor.

"The Court: Okay. But if you do that, that will be on you because I will give you a deadline, and when that deadline comes, you will be done. We will take a break and I will turn to [the defendants' counsel], and I will say you get the rest of the time. And if she doesn't use the rest of the time, and there's time for rebuttal, then you'll have rebuttal. If not, we're done.

"[The Defendants' Counsel]: I—if I could, Your Honor. I think we need to shorten the amount of time that we're each given. Are you still having the show cause hearing at two?

"The Court: Oh, yeah, that's right.

"[The Defendants' Counsel]: And also we have a motion for directed verdict. So, I filed just a preliminary yesterday, because I don't want to give a roadmap to the plaintiff's counsel as to what they could possibly have done on their last day. So, we also need time for—

"The Court: Oh, I forgot about that.

"[The Defendants' Counsel]: —me to provide to you the motion for a directed verdict.

"The Court: Okay."

We now address each of the plaintiff's claims in turn.

A

The plaintiff first claims that the trial court abused its discretion by placing a time limit on the presentation of Leopold's testimony. The plaintiff makes this claim despite never raising to the trial court any objection to the time limit it imposed or identifying to the court any evidence she was unable to elicit from Leopold due to the time limit.

"As this court repeatedly has stated, we will not review an issue on appeal that was never properly raised in or decided by the trial court." *Billboards Divinity, LLC* v. *Commissioner of Transportation*, 133 Conn. App. 405, 411, 35 A.3d 395, cert. denied, 304 Conn. 916, 40 A.3d 783 (2012). "Practice Book § 60-5 provides in relevant part that [t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. . . . Indeed, it is the appellant's responsibility to present such a claim clearly to the trial court so that the trial court may consider it and, if it is meritorious, take appropriate action. That is the basis for the requirement that ordinarily [the appellant] must raise in the trial court the issues that he intends to raise on appeal. . . . For us [t]o review [a] claim, which has been articulated for the first time on appeal and not before the trial court, would result in a trial by ambuscade of the trial judge. . . . We have repeatedly indicated our disfavor with the failure, whether because of a mistake of law, inattention or design, to object to errors occurring in the course of a trial until it is too late for them to be corrected, and thereafter, if the outcome of the trial proves unsatisfactory, with the assignment of such errors as grounds of appeal." (Internal quotation marks omitted.) *Sturgeon* v. *Sturgeon*, 114 Conn. App. 682, 693, 971 A.2d 691, cert. denied, 293 Conn. 903, 975 A.2d 1278 (2009).

As previously noted, in the present case, the record shows that the plaintiff did not object to the court's imposition of a time limit before she started her examination of Leopold. Furthermore, at no time during or after Leopold's testimony did the plaintiff claim that the court's time limit prevented her from eliciting any evidence from Leopold. In fact, after Leopold concluded his testimony, the court inquired as to whether the plaintiff had any other evidence or testimony to present. In response, the plaintiff's counsel answered in the negative and did not claim that the court's imposition of

a time limit on Leopold's testimony in any way impacted the presentation of her case. Thus, because we conclude that the plaintiff failed to preserve her claim that the court abused its discretion by placing a time limit on the presentation of Leopold's testimony, we decline to review the plaintiff's claim.[5]

B

The plaintiff next claims that the court's imposition of the time limit constituted a denial of her right of access to the courts and, thus, violated article first, § 10, of the Connecticut constitution. We decline to review the plaintiff's claim because it has been inadequately briefed.

We begin by setting forth the plaintiff's entire argument in her appellate brief regarding the constitutionality of the time limit imposed by the court: "But the court's draconian limitation of the time allowed for presentation of the plaintiff's case went beyond a mere abuse of discretion. It amounted to denying the plaintiff the right to present her case in any meaningful way. As such it constituted a denial of the right of access to the courts guaranteed by [article first, § 10], of the Connecticut constitution. This is so because lawsuits seeking damages for personal injuries caused by negligence were recognized at the time the constitution was adopted in 1818 and have been recognized ever since that time, and neither the legislature nor the court has provided an alternative to the judicial remedy in such cases. See *Gentile* v. *Altermatt*, 169 Conn. 267, 284–86, 363 A.2d 1 (1975); *Daily* v. *New Britain Machine Co.*, 200 Conn. 562, 585, 512 A.2d 893 (1986); *Zapata* v. *Burns*, 207 Conn. 496, 514–16, 542 A.2d 700 (1988);

[5] Even if we were to assume that the court abused its discretion in imposing a time limit on the presentation of Leopold's testimony, we note that the plaintiff has failed to demonstrate any harm by failing to identify on appeal the relevant evidence that she would have sought to elicit during Leopold's testimony if additional time had been provided.

Ruben & Williams, *The Constitutionality of Basic Protection*, 1 Conn. L. Rev. 44, 46 n. 13 (1986). See generally, *Limiting the Length of Civil Trials?*, 2 No. 3 ABA J. E-Report 2 (2003)." (Footnote omitted.)

Initially, we note that the plaintiff raises this constitutional claim for the first time on appeal. It therefore was not properly preserved in the trial court. "We consider unpreserved claims of constitutional magnitude according to the requirements of [*State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 780–81, 120 A.3d 1188 (2015)] . . . ."[6] *Stacy B.* v. *Robert S.*, 165 Conn. App. 374, 381, 140 A.3d 1004 (2016). Nevertheless, the plaintiff's brief neither includes a *Golding* analysis nor requests extraordinary review of her claim under any other exception to the preservation rule. For this reason alone, the plaintiff has failed to adequately brief her constitutional claim and the claim is deemed abandoned. See, e.g., *State* v. *Tierinni*, 144 Conn. App. 232, 238, 71 A.3d 675 ("[A party's] failure to address the four prongs of *Golding* amounts to an inadequate briefing of the issue and results in the unpreserved claim being abandoned. . . . We will not engage in *Golding* . . . review on the basis of . . . an inadequate brief." (Internal quotation marks omitted.)), cert. denied, 310 Conn. 911, 76 A.3d 627 (2013).[7]

[6] "Under *Golding*, a [party] can prevail on a claim of constitutional error not preserved at trial only if the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [party] of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the [party's] claim will fail. The appellate tribunal is free, therefore, to respond to the [party's] claim by focusing on whichever condition is most relevant in the particular circumstances." (Internal quotation marks omitted.) *In re Riley B.*, 203 Conn. App. 627, 636, 248 A.3d 756, cert. denied, 336 Conn. 943, 250 A.3d 40 (2021).

[7] We further note that the plaintiff did not affirmatively request in her brief that her claim concerning the court's imposition of a time limit be

In addition, the plaintiff's appellate brief also does not provide any substantive analysis of why the court's action constituted a constitutional violation. Certainly, none of the cases on which she relies discusses time limits imposed by a trial court, let alone considers whether such limits violate our state constitution. In the end, the plaintiff's argument consists of little more than a bare assertion that the court's time limit deprived her of her "right to present her case in any meaningful way."

"Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where a claim receives only cursory attention in the brief without substantive discussion, it is deemed to be abandoned." (Internal quotation marks omitted.) *Billboards Divinity, LLC* v. *Commissioner of Transportation*, supra, 133 Conn. App. 412. Applying this principle, we conclude that the plaintiff has abandoned her unpreserved constitutional claim.

The judgment is affirmed.

In this opinion the other judges concurred.

KEYBANK, N.A. *v.* EMRE YAZAR ET AL.
(AC 42829)

Moll, Alexander and DiPentima, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendants. The plaintiff moved for summary judgment to which the defendant O objected, claiming that the plaintiff had failed to comply with the statutory (§ 8-265ee (a)) notice requirement of the

reviewed under the plain error doctrine. "[I]t is well established that this court [is not obligated to] apply the plain error doctrine when it has not been requested affirmatively by a party . . . ." (Internal quotation marks omitted.) *Gartrell* v. *Hartford*, 182 Conn. App. 526, 540 n.12, 190 A.3d 904 (2018).

Emergency Mortgage Assistance Program, which requires a mortgagee to provide certain specific notice to the mortgagor before it can commence a foreclosure of a qualifying mortgage. O claimed that this failure deprived the trial court of subject matter jurisdiction. The plaintiff claimed that this requirement was satisfied, relying on notice that had been sent prior to the commencement of a previous foreclosure action involving the defendants brought by the original lender. That previous foreclosure action was dismissed. The trial court concluded that the plaintiff had complied with its obligations to send notices of default and satisfied its EMAP obligations pursuant to § 8-265ee. The trial court granted the motion for summary judgment and rendered judgment of strict foreclosure, from which O appealed to this court. *Held* that the trial court lacked subject matter jurisdiction because the plaintiff, as the original plaintiff in the present action, failed to comply with the jurisdictional condition precedent of the notice requirements of § 8-265ee (a), and there was no dispute that the plaintiff did not mail the defendants EMAP notice in connection with the present action; moreover, a foreclosure action in which the EMAP notice requirement applies must stand on its own EMAP notice, and, when a mortgagee's initial in-court attempt to foreclose results in a dismissal of that foreclosure action, such that it must commence a foreclosure anew, § 8-265ee (a) requires the mailing of a new EMAP notice in order to commence the subsequent foreclosure action.

Submitted on briefs December 1, 2020—officially released August 10, 2021

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendants, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendants were defaulted for failure to plead; thereafter, the court, *Genuario*, *J.*, granted the plaintiff's motion for summary judgment as to liability only; subsequently, the court, *Genuario*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the defendant Ozlem Yazar appealed to this court. *Reversed*; *judgment directed.*

Ozlem Yazar, self-represented, the appellant (defendant).

Christopher J. Picard, for the appellee (plaintiff).

Opinion

MOLL, J. The defendant Ozlem Yazar,[1] a self-represented party, appeals from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, KeyBank, N.A. On appeal, the defendant claims, inter alia, that the plaintiff failed to comply with General Statutes § 8-265ee (a), the notice provision of the Emergency Mortgage Assistance Program (EMAP), General Statutes § 8-265cc et seq., and that such noncompliance left the court without subject matter jurisdiction to entertain the foreclosure action. We agree and conclude that the failure of the plaintiff (as the original plaintiff in the present action) to mail an EMAP notice to the defendant (as the mortgagor) in connection with the present action deprived the court of subject matter jurisdiction. Accordingly, we reverse the judgment of the trial court and remand the case with direction to dismiss the action.

The record reveals the following facts and procedural history relevant to the defendant's claims on appeal. On June 19, 2014, Emre Yazar executed and delivered a promissory note in the original principal amount of $580,000 to First Niagara Bank, N.A. (First Niagara). To secure the note, Emre Yazar and the defendant executed a mortgage on real property located at 25 Fresh Meadow Road in Weston (property), which mortgage deed was recorded on the Weston land records. Beginning in March, 2016, and each and every month thereafter, Emre Yazar failed to make payments on the note.

[1] The plaintiff also brought this action against Emre Yazar, who was defaulted for failure to plead and is not participating in this appeal. Therefore, our references to the defendant are only to Ozlem Yazar.

In addition, the record suggests that the defendants Emre Yazar and Ozlem Yazar are former spouses, having divorced pursuant to a Turkish divorce decree. The terms of any such decree and any postdissolution proceedings in Turkey or Connecticut relating to the Yazars' divorce are not relevant to our resolution of this appeal.

On August 22, 2016, First Niagara sent separate notices of default and the notices prescribed by EMAP to Emre Yazar and to the defendant, individually, to the property address. On or about October 8, 2016, the plaintiff acquired First Niagara. The plaintiff, through an agent, has possession of the note and is the mortgagee of record.

On January 16, 2017, the plaintiff commenced, in the judicial district of Fairfield, a foreclosure action against Emre Yazar and the defendant. See *KeyBank N.A.* v. *Yazar*, Superior Court, judicial district of Fairfield, Docket No. CV-17-6061930-S (prior foreclosure action). On April 26, 2017, however, the trial court dismissed the action on the basis of the plaintiff's failure to provide the foreclosure mediator with the forms and information required by General Statutes (Rev. to 2017) § 49-31*l* (c) (4), as well as its failure to comply with the court's order requiring the submission of same by a date certain.[2]

On August 22, 2017, the plaintiff commenced, in the judicial district of Stamford-Norwalk, the present foreclosure action against Emre Yazar and the defendant, bearing Docket No. CV-17-6033139-S, alleging that the note was in default and that the default had not been cured. The plaintiff sought, among other things, foreclosure of the mortgage and possession of the property. On April 25, 2018, the plaintiff filed a motion for default for failure to plead as to Emre Yazar and the defendant, which was granted on May 2, 2018.[3] Thereafter, the defendant filed an answer and special defenses. On September 13, 2018, the plaintiff filed a motion for summary judgment as to liability only (motion for summary judgment), arguing that it had established a prima facie case for foreclosure and that it had complied with the EMAP notice

[2] On May 4, 2017, the plaintiff filed a motion to open the judgment of dismissal. The trial court denied that motion.

[3] After being defaulted, Emre Yazar submitted no other filing in this action.

requirement set forth in § 8-265ee (a). For the latter proposition, the plaintiff exclusively relied on the August 22, 2016 EMAP notices sent by First Niagara in advance of the commencement of the prior foreclosure action.[4] In her memorandum in opposition to the plaintiff's motion for summary judgment, the defendant argued, in part, that she had not received any EMAP notices and that the plaintiff had not complied with the EMAP notice requirement with respect to the present action.

On November 21, 2018, having heard oral argument, the trial court granted the plaintiff's motion for summary judgment. The court determined that there was no genuine issue of material fact that the note was in default and that the plaintiff had complied with its obligations to send notices of default and acceleration to the mortgagors; the court further concluded that the plaintiff had satisfied its EMAP obligations under § 8-265ee. On April 1, 2019, the court rendered a judgment of strict foreclosure. This appeal followed.

On September 28, 2020, during the pendency of this appeal, this court ordered, sua sponte, the parties to submit supplemental briefs to address the impact of *MTGLQ Investors, L.P.* v. *Hammons*, 196 Conn. App. 636, 230 A.3d 882, cert. denied, 335 Conn. 950, 238 A.3d 21 (2020), on this appeal. The parties thereafter filed supplemental briefs in accordance with this court's order.

As a threshold matter, the defendant claims that the trial court lacked subject matter jurisdiction because the plaintiff failed to comply with the EMAP notice requirement of § 8-265ee (a). The plaintiff counters that § 8-265ee (a) was satisfied by virtue of the EMAP notices that were sent on August 22, 2016, by First Niagara before

[4] In addition, on January 24, 2019, the plaintiff filed in the present action an affidavit of compliance with EMAP, which also exclusively relied on the August 22, 2016 EMAP notices.

the commencement of the prior foreclosure action. We agree with the defendant.[5]

We begin by setting forth the language of the statute. Section 8-265ee (a) provides: "On and after July 1, 2008, a mortgagee who desires to foreclose upon a mortgage which satisfies the standards contained in subdivisions (1), (9), (10) and (11) of subsection (e) of section 8-265ff, shall give notice to the mortgagor by registered, or certified mail, postage prepaid at the address of the property which is secured by the mortgage. *No such mortgagee may commence a foreclosure of a mortgage prior to mailing such notice.* Such notice shall advise the mortgagor of his delinquency or other default under the mortgage and shall state that the mortgagor has sixty days from the date of such notice in which to (1) have a face-to-face meeting, telephone or other conference acceptable to the [Connecticut Housing Finance Authority (authority)] with the mortgagee or a face-to-face meeting with a consumer credit counseling agency to attempt to resolve the delinquency or default by restructuring the loan payment schedule or otherwise, and (2) contact the authority, at an address and phone number contained in the notice, to obtain information and apply for emergency mortgage assistance payments if the mortgagor and mortgagee are unable to resolve the delinquency or default." (Emphasis added.) Pursuant to § 8-265cc, the term mortgagee is defined, for purposes of General Statutes §§ 8-265cc through 8-265kk, as follows: "(4) 'Mortgagee' means the original lender under a mortgage, or its agents, successors, or assigns . . . ."

[5] The parties do not dispute that the EMAP notice requirement applies in the present action. Cf. *Washington Mutual Bank* v. *Coughlin*, 168 Conn. App. 278, 290, 145 A.3d 408 (under factual circumstances of case, i.e., secured property not principal residence, defendants were not entitled to notice pursuant to § 8-265ee), cert. denied, 323 Conn. 939, 151 A.3d 387 (2016). Rather, the issue is whether the plaintiff complied with that requirement. See *MTGLQ Investors, L.P.* v. *Hammons*, supra, 196 Conn. App. 644 n.9.

We next provide a review of this court's decision in *MTGLQ Investors, L.P.* v. *Hammons*, supra, 196 Conn. App. 636. In *Hammons*, the plaintiff mortgagee, MTGLQ Investors, L.P., brought a foreclosure action against the defendant, against whom a judgment of strict foreclosure ultimately was rendered. Id., 638. On appeal, the defendant argued that the plaintiff failed to comply with the EMAP notice requirement of § 8-265ee (a), leaving the trial court without subject matter jurisdiction over the foreclosure action. Id., 640–41. In response, the plaintiff contended that § 8-265ee (a) was satisfied by virtue of an EMAP notice sent in advance of a prior foreclosure action against the defendant, which had been commenced by a prior mortgagee (specifically, Federal National Mortgage Association (Fannie Mae), which assigned the mortgage to MTGLQ Investors, L.P., during the pendency of that prior action). Id., 639, 641. After examining the relevant statutory language, we agreed with the defendant, concluding, as a matter of first impression, that the EMAP notice requirement of § 8-265ee (a), when applicable, is subject matter jurisdictional and that the mailing of an EMAP notice in advance of a prior foreclosure action by a prior mortgagee does not satisfy that requirement with respect to a subsequent foreclosure action. Id., 638.

In *Hammons*, we reasoned: "The first sentence of § 8-265ee (a) creates a notice requirement applicable to any 'mortgagee who desires to foreclose upon a mortgage' that satisfies the standards in [General Statutes] § 8-265ff (e) (1), (9), (10), and (11). The second sentence then provides that '[*n*]*o such mortgagee* may commence a foreclosure of a mortgage prior to mailing such notice.' . . . General Statutes § 8-265ee (a). By its use of the phrase 'such mortgagee,' the second sentence necessarily refers to the particular mortgagee in the preceding sentence, i.e., the one that desires to foreclose upon a mortgage. Stated differently, the second

sentence makes clear that it is directed—not to *any* mortgagee in the chain of assignment but—to *the mortgagee* that wishes to 'commence a foreclosure' of an applicable mortgage. In other words, the second sentence is directed to the original plaintiff in a foreclosure action. Such statutory provision then provides that such mortgagee may not commence a foreclosure 'prior to mailing such notice,' namely, the notice described in the first sentence. In this regard, the second sentence makes clear that it is *the mortgagee* that wishes to commence a foreclosure that has the obligation of mailing an EMAP notice. These provisions are clear and unambiguous. Their plain terms indicate that, in applicable cases, a mortgagee may not commence a foreclosure action without first mailing the mortgagor the prescribed notice. In the absence of such notice, a foreclosure action may not be commenced." (Emphasis in original.) Id., 644–45. We went on to conclude that "the EMAP notice requirement set forth in § 8-265ee (a), when applicable, is a condition precedent to the commencement of a foreclosure action. As such, the failure to comply with the notice requirement deprives the trial court of subject matter jurisdiction. See *Lampasona* v. *Jacobs*, [209 Conn. 724, 729–30, 553 A.2d 175] (collecting cases for proposition that certain statutory notice requirements constitute jurisdictional conditions precedent to commencement of actions) [cert. denied, 492 U.S. 919, 109 S. Ct. 3244, 106 L. Ed. 2d 590 (1989)]." (Footnote omitted.) *MTGLQ Investors, L.P.* v. *Hammons*, supra, 196 Conn. App. 645.

We rejected the plaintiff's argument in *Hammons* that it had satisfied the EMAP notice requirement, stating: "There is nothing in the plain language of § 8-265ee (a) to support the plaintiff's argument that it may satisfy the statute by relying on a prior mortgagee's EMAP notice sent prior to [the commencement of] a previously dismissed foreclosure action. Moreover, in suggesting that it may rely on an EMAP notice sent by a prior mortgagee in connection with a separate foreclosure action,

the plaintiff's reliance on the definition of '[m]ortgagee,' which includes an original mortgage lender's 'agents, successors, or assigns'; General Statutes § 8-265cc (4); is misplaced, for it ignores the plain meaning of the text of § 8-265ee (a), which is carefully directed to a particular mortgagee in time." Id., 645–46.

The present case gives us occasion to hold explicitly what we recognized implicitly in *Hammons*, namely, that, a foreclosure action in which the EMAP notice requirement applies; see footnote 5 of this opinion; must stand on its own EMAP notice. Such a rule is implicit in the statutory provision that no mortgagee intending to foreclose on an eligible mortgage "may commence a foreclosure of [such] mortgage prior to mailing such notice." General Statutes § 8-265ee (a). Such a statutory condition aligns with the purpose of § 8-265ee (a), which is to provide a mortgagor with notice of the mortgagee's intent to foreclose and of certain mortgage relief that might assist him or her, in a prelitigation forum, in resolving the alleged delinquency or other default. In short, in the context of a case in which the EMAP notice requirement applies, when a mortgagee's initial in-court attempt to foreclose results in a dismissal of a foreclosure action, such that it must commence a foreclosure anew, § 8-265ee (a) requires the mailing of a new EMAP notice in order to commence a subsequent foreclosure action.[6]

Mindful of the foregoing principles, we turn to the relevant facts of the present case. According to the affidavit in support of the plaintiff's motion for summary

[6] We note that our articulation of this rule is consistent with footnote 11 of the *Hammons* decision, in which we stated: "It would be a wholly different matter had the plaintiff been substituted in the Fannie Mae action, in which case it would not have had to mail the defendant a new EMAP notice." *MTGLQ Investors, L.P.* v. *Hammons*, supra, 196 Conn. App. 646 n.11. This is because the Fannie Mae action, as the prior foreclosure action, would have remained standing on its own EMAP notice. That is, only the original plaintiff was required to mail an EMAP notice, which it did.

judgment, the original lender, First Niagara, had mailed an EMAP notice to the defendant prior to the commencement of an initial, separate foreclosure action that was subsequently dismissed.[7] Several months after the dismissal, the plaintiff commenced a *new* foreclosure action against the defendant, i.e., the present action. There is no dispute that the plaintiff—as the original plaintiff in the present action—did not mail the defendant an EMAP notice in connection with the present action. Because the plaintiff, as the original plaintiff in the present action, failed to comply with this jurisdictional condition precedent, the trial court lacked subject matter jurisdiction.[8]

The judgment is reversed and the case is remanded with direction to render judgment dismissing the action for lack of subject matter jurisdiction.

In this opinion the other judges concurred.

FRANCIS A. COCCHIA *v.* ROBERT TESTA
(AC 44026)

Moll, Cradle and Clark, Js.

Syllabus

The plaintiff sought to recover damages from the defendant T, who had agreed to indemnify the plaintiff from certain liability, following T's alleged default on that indemnification agreement. After T's death, the trial court granted the plaintiff's motion to substitute R, the trustee of a trust to which T had transferred certain real property, as a defendant. The plaintiff then filed an amended two count complaint, alleging in one count that T had breached the indemnification contract with the

[7] As to this specific point, the plaintiff did not submit any countervailing, admissible evidence.

[8] The plaintiff contends that *Hammons* is distinguishable because it is relying, not on an EMAP notice sent by a prior mortgagee but rather, on the EMAP notice sent by First Niagara, to which it is the successor by merger. This argument is unavailing in light of the rule expressly articulated herein, namely, that a foreclosure action in which the EMAP notice requirement applies must stand on its own EMAP notice.

plaintiff and, in the second count, that R, as trustee, had fraudulently accepted the conveyance of the real property to the trust, knowing that T was indebted to the plaintiff. The court defaulted R for failure to appear and rendered judgment in favor of the plaintiff, awarding him damages. The court thereafter denied R's motion to dismiss the action on the basis that the court lacked personal jurisdiction over him, and R appealed to this court. *Held* that the trial court properly denied R's motion to dismiss, as it had personal jurisdiction over R; although the court cited R into the case pursuant to the plaintiff's motion to substitute the defendant, that motion was effectively a motion to add R as a new and separate party under the theory of liability that R was a fraudulent transferee of T's assets, as the motion identified R by name and in his capacity as trustee and alleged that the trust received assets from T in order to place those assets beyond the plaintiff's reach, and the operative complaint, with which R was served, did not seek to recover from R for breach of the underlying indemnification agreement but alleged only that R was liable as a fraudulent transferee.

Argued April 7—officially released August 10, 2021

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Kavanewsky, J.*, granted the plaintiff's motion to substitute Robert J. Testa, Jr., trustee of the Karen M. Testa Separate Property Trust, as a defendant; thereafter, the plaintiff filed an amended complaint; subsequently, the defendant Robert J. Testa, Jr., trustee, was defaulted for failure to appear, and the court, *Genuario, J.*, after a hearing in damages, rendered judgment for the plaintiff; thereafter, the court, *Hon. Taggart D. Adams*, judge trial referee, denied the motion to dismiss filed by the defendant Robert J. Testa, Jr., trustee, and the defendant Robert J. Testa, Jr., trustee, appealed to this court. *Affirmed.*

Christopher D. Hite, for the appellant (defendant Robert J. Testa, Jr., trustee).

Todd R. Michaelis, with whom was *Stephen J. Conover*, for the appellee (plaintiff).

Opinion

CLARK, J. The defendant Robert J. Testa, Jr., trustee (trustee) of the Karen M. Testa Separate Property Trust (trust), appeals from the trial court's denial of his post-judgment motion to dismiss the action in which a default judgment had been rendered against him. On appeal, the defendant claims that the trial court lacked personal jurisdiction over him and, therefore, improperly denied his motion to dismiss. We affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to our disposition of this appeal. In April, 2016, the plaintiff, Francis A. Cocchia, commenced the present action against the now deceased defendant Robert Testa (Testa) to enforce an agreement between them. The plaintiff alleged that on June 30, 2009, Testa had agreed to indemnify him from liability on a mortgage and note the plaintiff had signed in favor of a bank. Testa allegedly owed the plaintiff $196,500 under that agreement, payable in monthly installments of $1444.76. The plaintiff alleged in a single count complaint that Testa failed to make payments in accordance with the agreement, and that when the plaintiff commenced the present action, Testa owed $165,298.67, plus interest, the costs of collection, and attorney's fees.

In April, 2017, while the case was pending, Testa and his wife, Karen Testa, were killed in a car accident in Arizona. Following Testa's death, no activity occurred in the case until February 6, 2018, when the plaintiff filed a request for leave to amend his complaint, seeking to add a count against the trust. The first count of the proposed amended complaint incorporated by reference the sole count in the original complaint. The newly added second count alleged a fraudulent transfer of assets between Testa and the trust. Specifically, in the second count, the plaintiff incorporated the allegations

of the first count and alleged that Testa had transferred real property he owned in Arizona to the trust in 2015, while indebted to the plaintiff, in a knowing effort to defraud the plaintiff and to deprive him of assets in the event he obtained a judgment against Testa. The plaintiff sought monetary damages and to set aside the conveyance of the real property to the trust.

One year later, on February 6, 2019, the plaintiff filed a motion titled "Motion to Substitute Defendant" in which he moved, pursuant to Practice Book § 9-18,[1] to "substitute [the trustee] of the [trust] as the [d]efendant." In his motion, the plaintiff claimed that Testa had fraudulently conveyed property to the trust in order to place it outside the plaintiff's reach, and further contended that (1) "[n]o estate has been opened in Connecticut,"[2] (2) the plaintiff had a pending action against "the various [d]efendants, including the [trustee]" in Arizona, and (3) "[t]he [d]efendants therein are attempting to avoid the [p]laintiff's debt by claiming the instant action in Connecticut is the controlling case or venue." The court, *Kavanewsky, J.*, granted the motion to substitute on February 19, 2019. The clerk's office removed

[1] Practice Book § 9-18 provides in relevant part: "The judicial authority may determine the controversy as between the parties before it, if it can do so without prejudice to the rights of others; but, if a complete determination cannot be had without the presence of other parties, the judicial authority may direct that they be brought in. If a person not a party has an interest or title which the judgment will affect, the judicial authority, on its motion, shall direct that person to be made a party. . . ."

[2] The record does not reflect that the plaintiff petitioned the Probate Court to open an estate pursuant to General Statutes § 45a-316. Section 45a-316 provides in relevant part: "Whenever, upon the application of a creditor or other person interested in the estate of a deceased person, it is found by the court of probate having jurisdiction of the estate that the granting of administration on the estate . . . will be delayed, or that it is necessary for the protection of the estate of the deceased, the court may, with or without notice, appoint a temporary administrator to hold and preserve the estate until the appointment of an administrator or the probating of the will. . . ."

Testa as a party from the court's docket sheet on February 25, 2019. After the motion to substitute was granted, the plaintiff filed an amended complaint on April 12, 2019, which became the operative complaint. The operative complaint incorporated by reference to the original complaint a breach of contract claim against Testa in count one. In addition, the operative complaint alleged a fraudulent transfer claim in count two, this time against the trustee rather than the trust.[3] Specifically, it alleged that the trustee, rather than the trust, was aware of Testa's debt and knowingly aided, abetted, and conspired with Testa in accepting the conveyance of the Arizona property for a fraudulent purpose. The return date for the operative complaint was April 23, 2019.

The plaintiff subsequently filed with the court a return of service indicating that the summons and operative complaint were served on the trustee in Arizona on March 27, 2019, by way of in hand personal service.[4] When the trustee did not file a timely appearance, the plaintiff filed a motion for default against him for failure to appear on April 26, 2019. The clerk granted the motion for default on May 14, 2019. Thereafter, the pleadings were closed, and the court, *Genuario*, *J.*, held a hearing in damages on July 18, 2019. On August 28, 2019, the court issued a memorandum of decision.

In its decision, the court found that the plaintiff had testified credibly that Testa was indebted to him in the total amount of $206,348 pursuant to the indemnification agreement. The court recognized that the trustee

[3] "[A]s a general rule, the trustee is a proper person to sue or be sued on behalf of a trust." (Internal quotation marks omitted.) *Day* v. *Seblatnigg*, 186 Conn. App. 482, 499, 199 A.3d 1103 (2018), cert. granted, 331 Conn. 913, 204 A.3d 702 (2019).

[4] Although the trustee challenged the sufficiency of service of process in the trial court, on appeal he does not challenge the trial court's finding that there was "little evidentiary support for the argument that the return of service was not accurate . . . ."

was not a party to that agreement but found that, because the trustee had been defaulted, he had admitted the allegations of the operative complaint's second count, namely, that Testa had conveyed property to the trust for the purpose of placing assets out of the plaintiff's reach while indebted to the plaintiff, and that the trustee, knowing of the debt, accepted the conveyance on behalf of the trust for that fraudulent purpose. The court thus found that the Arizona property transfer was fraudulent and made for the purpose of concealing assets from the plaintiff. The court rendered judgment in favor of the plaintiff in the amount of $206,348 on the first count and in favor of the plaintiff and against the trustee on the second count.

On December 27, 2019, the trustee moved to dismiss the action.[5] In the motion to dismiss, the trustee claimed that the court lacked personal jurisdiction over him because he was not properly cited into the case pursuant to General Statutes §§ 52-107 and 52-108 and Practice Book § 9-22.[6] He contended that the motion to substitute was not a proper vehicle for making him a party

[5] The trustee also filed a motion to open, vacate, and set aside the judgment, in which he raised several procedural claims. The plaintiff objected on the merits of the trustee's procedural claims and on the ground that the motion to open was untimely under Practice Book § 17-4. The court, *Hon. Taggart D. Adams*, judge trial referee, summarily sustained the plaintiff's objection to the motion to open on January 22, 2020. The trustee has not appealed from that order, and it is not relevant to the present appeal.

[6] General Statutes § 52-107 provides: "The court may determine the controversy as between the parties before it, if it can do so without prejudice to the rights of others; but, if a complete determination cannot be had without the presence of other parties, the court may direct that such other parties be brought in. If a person not a party has an interest or title which the judgment will affect, the court, on his application, shall direct him to be made a party."

General Statutes § 52-108 provides: "An action shall not be defeated by the nonjoinder or misjoinder of parties. New parties may be added and summoned in, and parties misjoined may be dropped, by order of the court, at any stage of the action, as the court deems the interests of justice require."

Practice Book § 9-22 provides: "Any motion to cite in or admit new parties must comply with Section 11-1 and state briefly the grounds upon which it is made."

because he was not, and was not alleged to have been, a fiduciary for Testa, who was deceased at the time the motion was filed. He further argued that "attempting to add a new party by means of an [a]mended [c]omplaint and [s]ummons is simply insufficient and [Connecticut courts have] dismissed cases for failure to properly cite in an additional party defendant." Lastly, the trustee claimed that (1) the court had never granted the plaintiff leave to amend his complaint prior to filing the motion to substitute, (2) the summons and operative complaint that were served on him did not match the one attached to the plaintiff's request to amend, (3) the plaintiff had selected "a completely arbitrary return date," and (4) Testa's counsel did not receive notices from the court because he had been removed from the docket sheet by the clerk's office following Testa's death.[7]

The plaintiff objected to the motion to dismiss on the merits of the trustee's procedural claims but did not argue that the motion was untimely. The court, *Hon. Taggart D. Adams*, judge trial referee, summarily sustained the plaintiff's objection to the motion to dismiss on February 21, 2020. The trustee subsequently moved for an articulation. In response, the court explained: "[T]he court . . . sustained the objection of the plaintiff to the defendant's motion to dismiss after reading and considering the motion and objection and hearing oral argument on the subject on [February 10, 2020], because it found the order of Judge Kavanewsky granting the motion to substitute [the trustee] as [the] defendant to be appropriate as well as the order of default as to [the trustee] to be appropriate. The decision of Judge Genuario was also appropriate in implicitly finding the service of process on [the trustee] to be valid,

[7] Though the same lawyer represented both Testa and the trustee in the trial court, the trustee does not explain how he was prejudiced by the removal of Testa from the case prior to the time his lawyer appeared in the case on his behalf. The trustee is a separate party, was served in hand and had an independent responsibility to appear and defend.

and there is little evidentiary support for the argument that the return of service was not accurate . . . .'' This appeal followed.

On appeal, the trustee makes just one claim: the trial court improperly denied his postjudgment motion to dismiss for lack of personal jurisdiction because he was not properly cited in as a defendant.[8] Specifically, he claims that the court improperly added him to the case

[8] We note that the trustee has not appealed from the denial of the motion to open the judgment. See footnote 5 of this opinion. As a general matter, we cannot afford an appellant practical relief when the judgment has not been opened. The present case, however, is analogous to *Weinstein & Wisser, P.C.* v. *Cornelius*, 151 Conn. App. 174, 177–79, 94 A.3d 700 (2014), in which this court allowed an appeal to proceed under similar factual circumstances.

In that case, the defendant filed simultaneous postjudgment motions to dismiss and to open a default judgment. Id., 177. The trial court denied the motion to open and then denied the motion to dismiss on the ground that the case would have to be opened before that motion could be considered. Id., 177–78. The defendant appealed only from the denial of the motion to dismiss, to which the plaintiff raised a mootness challenge. Id., 178. The defendant argued that the appeal was not moot because the challenge he raised in the motion to dismiss would have rendered the judgment void and obviated the need for a motion to open. Id.

This court decided that the failure to appeal from the denial of the motion to open was not fatal, stating that ''[i]n this case . . . the issue of mootness is inextricably intertwined . . . with the issue raised by the defendant on appeal . . . . The motions asserted the same grounds and sought very similar relief. In order to avoid a mootness challenge, the defendant properly should have appealed from the denial of the motion to open. But in the unusual circumstances of this case, where the two grounds of decision are by no means independent . . . it would doubtlessly exalt form over substance to avoid considering the merits of the appeal because the defendant appealed from the wrong ruling.'' (Citations omitted; internal quotation marks omitted.) Id., 179; see also *Josephine Towers, L.P.* v. *Kelly*, 199 Conn. App. 829, 835, 238 A.3d 732 (''[a]lthough technically the court should have ruled on the motion to open before any other motion was entertained, the nearly simultaneous filing and consideration of the two motions in this case, together with the identity of issues presented . . . compel the conclusion that declining to address the merits of the motions would be a hypertechnical elevation of form over substance,'' citing *Weinstein*), cert. denied, 335 Conn. 966, 240 A.3d 281 (2020). On the basis of this precedent, we conclude that the trustee's failure to appeal from the denial of his motion to open is not fatal to his appeal in this case.

pursuant to the plaintiff's motion to substitute, rather than by way of a motion to cite in an additional party, and that the motion to substitute was effectively a nullity. As a result, he argues that the court never had personal jurisdiction over him.[9] For the reasons that follow, we disagree.

We begin by setting forth the applicable standard of review. "The standard of review for a court's decision on a motion to dismiss . . . is well settled. . . . A motion to dismiss tests . . . whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and

[9] The trustee also suggests in his brief that the plaintiff's failure to substitute Testa's estate at any point following his death "arguably" deprived the court of subject matter jurisdiction to enter any subsequent orders in the case. Following oral argument in this appeal, this court, sua sponte, ordered supplemental briefing on the issue of whether the trial court had subject matter jurisdiction to act on the plaintiff's motion to substitute the trustee in light of *Barton* v. *New Haven*, 74 Conn. 729, 730, 52 A. 403 (1902), and its progeny. Those cases hold that "[d]uring the interval . . . between the death and the revival of the action by the appearance of the executor or administrator, the cause has no vitality. The surviving party and the court alike are powerless to proceed with it." Id., 730–31; see also, e.g., *Burton* v. *Browd*, 258 Conn. 566, 571, 783 A.2d 457 (2001); *Worden* v. *Francis*, 170 Conn. 186, 188, 365 A.2d 1205 (1976); *Boucher Agency, Inc.* v. *Zimmer*, 160 Conn. 404, 407–408, 279 A.2d 540 (1971); *Negro* v. *Metas*, 110 Conn. App. 485, 498, 955 A.2d 599, cert. denied, 289 Conn. 949, 960 A.2d 1037 (2008); *Schoolhouse Corp.* v. *Wood*, 43 Conn. App. 586, 590, 684 A.2d 1191 (1996), cert. denied, 240 Conn. 913, 691 A.2d 1079 (1997); *Bomstein* v. *Boucher Agency, Inc.*, 5 Conn. Cir. 121, 122, 245 A.2d 296 (1968). Having received and considered the supplemental briefs, we conclude that the court had subject matter jurisdiction at the time it acted on the plaintiff's motion to substitute. *Barton* and the decisions that have followed hold that a "cause" by or against a single, deceased party is abated until such time as a proper fiduciary is substituted for the deceased party. They do not stand for the proposition that a court loses subject matter jurisdiction over an entire case for all purposes, including separate causes against parties other than the deceased, until a fiduciary is substituted for a deceased party. Such a rule would be wholly inconsistent, for example, with General Statutes § 52-600, which provides in relevant part: "If there are two or more plaintiffs or defendants in any action, one or more of whom die before final judgment, and the cause of action survives to or against the others, the action shall not abate by reason of the death. . . ."

resulting [determination] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Izzo* v. *Quinn*, 170 Conn. App. 631, 636, 155 A.3d 315 (2017). "A challenge to the personal jurisdiction of the trial court is a question of law, requiring that we employ a plenary standard of review." *Thompson Gardens West Condominium Assn., Inc.* v. *Masto*, 140 Conn. App. 271, 278, 59 A.3d 276 (2013).

On appeal, the trustee argues the trial court lacked personal jurisdiction over him because he was never properly cited into the case as a party. He points out that he was added pursuant to the plaintiff's "motion to substitute" and that he did not meet the criteria for a substituted party under General Statutes § 52-599.[10] The plaintiff counters that the motion to substitute was "inaptly titled" and was, in effect, a request to add the trustee as a new and distinct party defendant on the newly added second count of the operative complaint alleging a fraudulent transfer against the trustee. He urges us to look at the context and substance, not the name, of the motion. We agree with the plaintiff.

"In certain circumstances, this court previously has looked beyond the label of a motion to reclassify it when its substance did not reflect the label applied by the moving party." *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 351, 63 A.3d 940 (2013); see also *Whalen* v.

[10] General Statutes § 52-599 provides in relevant part: "(a) A cause or right of action shall not be lost or destroyed by the death of any person, but shall survive in favor of or against the executor or administrator of the deceased person.

"(b) A civil action or proceeding shall not abate by reason of the death of any party thereto, but may be continued by or against the executor or administrator of the decedent. . . . If a party defendant dies, the plaintiff, within one year after receiving written notification of the defendant's death, may apply to the court in which the action is pending for an order to substitute the decedent's executor or administrator in the place of the decedent, and, upon due service and return of the order, the action may proceed. . . ."

Ives, 37 Conn. App. 7, 17, 654 A.2d 798 (functional effect of motion was determinative), cert. denied, 233 Conn. 905, 657 A.2d 645 (1995). In the present case, it is plain from the content and substance of the "motion to substitute" that the plaintiff was asking the court to add the trustee as a defendant in this matter solely on the basis of his alleged liability as a fraudulent transferee of Testa's assets. The inaptly titled "motion to substitute" identified the trustee by name and in his capacity as trustee of the trust. It went on to allege that the trust had received assets from Testa "in order to place these assets beyond the reach of the plaintiff." The motion did not allege that the trustee was a party to the underlying indemnification agreement between the plaintiff and Testa or seek to "substitute" the trustee for Testa as the party liable to the plaintiff under the terms of that agreement. After the court granted the motion, the plaintiff filed and served the operative complaint on the trustee. Consistent with the substantive allegations in the inaptly titled "motion to substitute," the operative complaint did not seek to recover from the trustee for breach of the underlying indemnification agreement between the plaintiff and Testa. It alleged only that the trustee is liable to the plaintiff in count two as a fraudulent transferee.[11]

The trustee cites various cases in which parties improperly sought to add a party by simply amending a complaint. Those cases are inapposite because in each of those cases, and unlike the present case, a party failed to seek and to obtain from the court permission to

[11] Judge Genuario clearly recognized the nature of the trustee's involvement. The plaintiff filed a motion for reconsideration on September 6, 2019, contesting the monetary value of the judgment. In denying relief, the court stated in relevant part that "[*t*]*he defendant is not the maker of the note or the estate of the maker of the note.* To the extent the plaintiff is seeking payment from a fraudulent transferee of property, he is seeking payment from a tortfeasor and *not a contracting party*." (Emphasis added.)

add a new party prior to serving an amended complaint naming that party as a new defendant.

We conclude that the inaptly titled "motion to substitute" was, in effect, a motion to add the trustee as a new and separate party under a different theory of liability. Because the court granted that motion and the trustee was subsequently served with the operative complaint, the court had personal jurisdiction over him.

The judgment is affirmed.

In this opinion the other judges concurred.

BRIDJAY CAPONE ET AL. *v.* MICHELE NIZZARDO ET AL.
(AC 42867)

Alexander, Suarez and DiPentima, Js.

Syllabus

The plaintiff sought equitable distribution of certain real property containing residential and equestrian buildings that she and the defendant owned as tenants in common and payment of just compensation for her undivided 25 percent minimal interest in the property. The parties entered into an oral stipulation before the trial court but were unable to agree on the fair market value of the property. Both parties presented expert testimony to the court from real estate appraisers. The court agreed with the defendant's expert appraiser, determined the fair market value to be $1,110,000 and issued certain orders regarding payment to the plaintiff for her undivided minimal interest. Thereafter, the plaintiff appealed to this court, claiming that the trial court committed plain error and made clearly erroneous findings of fact in regard to the highest and best use of the property. *Held*:

1. The plaintiff could not prevail on her claim that the trial court committed plain error when it determined the highest and best use of the property without reviewing applicable zoning regulations because she did not meet either prong of the plain error doctrine: the plaintiff failed to demonstrate that the trial court made a plain and obvious error that affected the fairness and integrity of and public confidence in the judicial proceedings, as the parties stipulated that the plaintiff had only a minimal interest in the property and that a partition in kind or by sale would not better serve their interests, the hearing before the court was for the

sole purpose of having it determine the fair market value of the property, no evidence was submitted to the court regarding the possibility of obtaining any zoning variance and the court did not conclude that the current use of the property would not be permitted to continue, such that the court's determination of the highest and best use and fair market value of the property did not require the review of applicable zoning regulations; moreover, the plaintiff did not establish that the failure to grant relief would have resulted in a manifest injustice.

2. The trial court's determination that the highest and best use of the property, a residential use augmented by a supporting equestrian facility that had limited commercial viability, was not clearly erroneous: the court considered the testimony and written reports of both the plaintiff's and the defendant's appraisers, and concluded that the comparable sales offered by the defendant's appraiser were more similar to the subject property in size and location than those offered by the plaintiff's appraiser; moreover, the value determined by the plaintiff's appraiser was based in part on a price per horse stall method that included twenty-three stalls, but the evidence at trial supported the court's finding that only thirteen or fourteen stalls on the property were potentially functional; furthermore, the only evidence of income generated from the property was from residential rent and rent for two horse stalls, and the court considered the testimony from a witness offered by the defendant that the marketing of the property as a commercial equestrian facility was not successful.

Argued April 13—officially released August 10, 2021

Procedural History

Action, inter alia, seeking the equitable distribution of property, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant Bongiorno Children Red Barn, LLC, was cited in as an additional party; thereafter, the matter was withdrawn as to the named defendant et al.; subsequently, the matter was tried to the court, *Hon. Kevin Tierney*, judge trial referee; judgment for the defendant Bongiorno Children Red Barn, LLC, from which the plaintiff appealed to this court. *Affirmed.*

Danielle J. B. Edwards, with whom, on the brief, was *Peter V. Lathouris*, for the appellant (plaintiff).

Mark F. Katz, for the appellee (defendant Bongiorno Children Red Barn, LLC).

Opinion

ALEXANDER, J. The plaintiff Bridjay Capone appeals from the judgment of the trial court ordering the defendant Bongiorno Children Red Barn, LLC, to pay her $277,500 in just compensation for her 25 percent interest in the property owned by the parties.[1] Specifically, the plaintiff challenges the court's determination that the fair market value of the property is $1,110,000. On appeal, the plaintiff claims that the court (1) committed plain error when it determined the highest and best use of the property without considering the applicable zoning regulations, (2) made clearly erroneous factual findings in determining the highest and best use of the property, and (3) due to these errors, the court abused its discretion in determining the value of the property. We disagree with the plaintiff's claims[2] and, accordingly, affirm the judgment of the trial court.

[1] The original plaintiffs, Bridjay Capone and Red Barn Stables, LLC, filed their initial complaint against three defendants, Michele Nizzardo, John Bongiorno, and Frank Bongiorno (original three defendants). On February 2, 2018, the original three defendants transferred, by quitclaim deed, their combined 75 percent interest in the property to Bongiorno Children Red Barn, LLC. On February 9, 2018, the original three defendants moved to cite in Bongiorno Children Red Barn, LLC. The court granted this motion on February 28, 2018. On August 8, 2018, the plaintiff withdrew the action as to the original three defendants. The court was asked to disregard the status of the plaintiff Red Barn Stables, LLC. The third amended complaint contained one count with one plaintiff, Bridjay Capone, and one defendant, Bongiorno Children Red Barn, LLC. All references herein to the plaintiff are to Capone, and references to the defendant are to Bongiorno Children Red Barn, LLC.

[2] We do not address separately the plaintiff's third claim because it is premised on her first two claims. The plaintiff contends that the court's plain error in failing to consider applicable zoning regulations, coupled with its clearly erroneous factual findings in determining the highest and best use of the property, constituted an abuse of discretion. Because we conclude that the trial court did not commit plain error and that its determination of the highest and best use of the property was not clearly erroneous, we also conclude that the court did not abuse its discretion in determining the value of the property.

The following facts and procedural history are relevant to the disposition of this appeal. On January 17, 2017, the plaintiff filed a two count complaint seeking, inter alia, partition of real property located on Bangall Road in Stamford (property), owned by the plaintiff and the defendant as tenants in common. On August 7, 2018, the parties entered into an oral stipulation before the court. In that stipulation, the parties agreed, inter alia, that (1) the plaintiff is the owner of a 25 percent minimal interest in the property,[3] (2) a partition by sale or in kind would not promote the best interests of the parties, and (3) if the parties were unable to agree on the fair market value of the property, the court would decide the fair market value of the property and thereby determine the purchase price that the defendant would pay to the plaintiff in consideration for her delivery of a quitclaim deed. Thereafter, the plaintiff filed her third amended complaint, comprised of one count seeking equitable distribution of the property and payment of just compensation for her undivided 25 percent minimal interest in the property. A trial was held on February 20 and 21, 2019.

As a result of the parties' stipulation, the plaintiff and the defendant presented evidence to the court for it to make a determination of the fair market value of the property. It is undisputed that the property is comprised of two parcels. Parcel one is 3.32 acres and parcel two is 1.04 acres. On the basis of the evidence before it, the court found that parcel one contains a single-family

[3] General Statutes § 52-500 (a), pertaining to the sale or equitable distribution of real property owned by two or more persons, provides in relevant part that "[i]f the court determines that one or more of the persons owning such real . . . property have only a minimal interest in such property and a sale would not promote the interests of the owners, the court may order such equitable distribution of such property, with payment of just compensation to the owners of such minimal interest, as will better promote the interests of the owners."

house, an indoor arena/riding ring, a two-story apartment/office building that includes two three room apartments, a thirteen or fourteen stall horse barn, and an eight or nine stall horse barn. The single-family house and two apartments are rented to tenants. Two stalls in the thirteen or fourteen stall horse barn are rented to tenants. None of the horse stalls in the eight or nine stall barn is in use. The court further found that parcel two is located directly across from parcel one on the other side of Bangall Road, and that it contains two equestrian riding rings, an outdoor storage facility, and a parking lot.

Each party presented expert testimony from a real estate appraiser. The plaintiff's expert, Eric Michel, opined in his appraisal report that the highest and best use of the property is as "an equestrian facility as it is currently improved."[4] Michel appraised the value of parcels one and two together, and testified that the fair market value of the property was $3,000,000. In arriving at this value, Michel utilized both the cost approach[5] and the sales comparison approach[6] to determine the

[4] We note that, in its decision, the court stated that Michel determined "that the highest and best use is as a vacant residential lot . . . ." However, the court also stated that Michel characterized the property as a "commercial equestrian center," and in its articulation, stated that it did not give weight to the "site as though vacant" method used by Michel. (Internal quotation marks omitted.) In his appraisal report, Michel determined the highest and best use of the property "as though vacant" prior to determining the highest and best use "as improved." His report states that the highest and best use of the property as improved is "an equestrian facility as it is currently improved." In addition, Michel testified that the highest and best use of the property is "to continue its use for an equestrian facility."

[5] "Under the cost approach, the appraiser estimates the current cost of replacing the subject property with adjustments for depreciation, the value of the underlying land and entrepreneurial profit." *Sun Valley Camping Cooperative, Inc.* v. *Stafford*, 94 Conn. App. 696, 702 n.10, 894 A.2d 349 (2006).

[6] "The comparable sales approach is also known as the market data approach or sales comparison approach. . . . It is a process of analyzing sales of similar recently sold properties in order to derive an indication of the most probable sales price of the property being appraised. The reliability of this technique is dependent upon (a) the availability of comparable sales

value of the property, and then reconciled those two figures. Using the cost approach, he determined that the value of the land unimproved was $1,525,000 and the value of the improvements less depreciation was $1,099,296, for a total rounded value of $2,625,000. Using the sales comparison approach, Michel compared the property to five other recently sold properties and made adjustments to determine the value of the property. Only one of his comparable properties was located in Fairfield County, where the property is located, and the remaining four were located in the state of New York. The properties ranged from 15.82 acres to 286.23 acres in size and each of the properties had equestrian facilities. The nature of some of the improvements differed from those on the property, such that one of the comparable properties had a twenty stall barn with a veterinary room, viewing room, tack room, indoor and outdoor riding areas, breeding stalls, and wash stalls, and another had direct riding trail access and bordered a large preservation area. Michel used a price per stall figure in comparing the property and the comparable properties, determining that the property had twenty-three stalls and the adjusted price per stall was $139,130, for a total rounded value of $3,200,000. He testified that the property is commercial because "historically it had been operated as a commercial operation and its physical characteristics show that it still has the ability to operate that way." When asked how much research he had done into the historical operation of a commercial equestrian facility at the property, he replied, "[n]one." Further, Michel's report described the property's condition and quality as "average" and "poor to average."

data, (b) the verification of the sales data, (c) the degree of comparability or extent of adjustment necessary for time differences, and (d) the absence of [nontypical] conditions affecting the sales price. . . . After identifying comparable sales, the appraiser makes adjustments to the sales prices based on elements of comparison." (Citations omitted; internal quotation marks omitted.) *Sun Valley Camping Cooperative, Inc.* v. *Stafford*, 94 Conn. App. 696, 702 n.8, 894 A.2d 349 (2006).

The defendant's expert, Adam Hardej, opined that the highest and best use of the property is continuation of its current use as "residential/office/equestrian" property. Hardej appraised the value of the parcels separately, and testified that the fair market value of parcel one was $865,000 and parcel two was $245,000, for a total fair market value of $1,110,000. Like Michel, Hardej used both the cost approach and the sales comparison approach. Under the cost approach, he determined the value of the land on parcel one to be $370,000, and the value of improvements less depreciation to be $491,902, for a total rounded value for parcel one of $860,000. Under the sales comparison approach, Hardej compared the property to six recent land sales. Each comparable property was located in Fairfield County and the size of the properties ranged from 1.12 acres to 10.89 acres. Four of Hardej's comparable properties were rated residential/equestrian, and two had no equestrian component. Under the sales comparison approach, he determined that after adjustments the value of parcel one was $870,000. Hardej testified that "there hasn't been any viable equestrian facility, going concern operation on the subject property, for as long as anybody can remember. And when I say that, I've heard people say ten plus years . . . ." In his appraisal report, he described the improvements on the property as in "average" condition. Further, Hardej testified that the small barn on the property containing nine horse stalls was "in a dilapidated condition" and was "beyond its economic life" and therefore had no contributory value to the property. He stated that these nine stalls are "absolutely nonoperational . . . ."

The defendant also presented testimony from Frank Bongiorno, who is a manager and member of the defendant. He testified that there are thirteen stalls in the big barn and nine stalls in the small barn. Bongiorno explained that the stalls in the small barn are not usable

because they are "crumbling and falling apart. The roof itself is shot. The stalls–in between–the partitions in between are shot." Further, he testified that his sister has advertisements out to attract boarders but that they "haven't been very successful, no one will come in" due to the "dilapidated condition, the size of the stalls."

The court issued a memorandum of decision on April 17, 2019. The court determined that the highest and best use of the property is "continuation as a residential use augmented by a supporting equestrian facility that has limited commercial viability." The court further described the property as a "residential use with some older equestrian facilities as additional improvements to the residential status." Although each appraiser used both the cost method and the sales comparison method, the court ultimately credited the sales comparison approach used by Hardej. It found that Michel's comparable properties involved much larger parcels of land than the property, and that these land sales did not support Michel's opinion of value. The court found Hardej's sales comparables to be closer in location and size to the property, and the sale price of these lots revealed that the immediate neighborhood of the property was not likely to support Michel's opinion of value. The court determined the value of parcels one and two together, not as separate lots, and concluded that the fair market value of the property was $1,110,000. The court ordered the defendant to pay the plaintiff $277,500, representing the plaintiff's 25 percent interest. The plaintiff filed an appeal from that decision.

Thereafter, the plaintiff filed a motion for articulation of the court's decision. In its articulation dated February 4, 2020, the court stated that it had considered both appraisers' reports in determining the fair market value of the property, gave greater weight to the sales comparison method used by both appraisers, and did not give weight to the " 'site as though vacant' " method used

by the plaintiff's real estate appraiser. Further, the court considered the relevant comparable sales used by the parties' appraisers and the testimony from Bongiorno regarding the marketing of the property.

I

The plaintiff first claims that the court committed plain error when it determined the highest and best use, and ultimately the fair market value of the property, without reviewing applicable zoning regulations. We disagree.

The following additional information is relevant to our resolution of this issue. The court found, and each appraiser's report stated, that both parcels of land are in the RA-2 zone, which is Stamford's two acre residential zone. No expert testimony was presented to the court concerning the possibility of obtaining a variance or zoning permission for the use of a one acre parcel in a two acre zone, so the court did not consider parcel two to be a separate buildable lot. Further, the court determined that the use of the property as an equestrian facility appeared to comply with the zoning regulations as a nonconforming use, and no additional evidence of the Stamford zoning regulations concerning horses and equestrian facilities was presented to the court.

The plaintiff did not argue before the court that a review of zoning regulations was necessary to determine the highest and best use or fair market value of the property, and neither party introduced any zoning regulations at trial. In her brief, the plaintiff admits that "the trial court did not receive, review, or rely upon any of the applicable zoning regulations. Neither of the appraisal reports submitted by the parties' experts include the applicable zoning regulations . . . ." (Emphasis omitted.) However, on appeal, the plaintiff

asserts that the trial court's failure to consider the zoning regulations, sua sponte, should be reviewed under the plain error doctrine.

"[The plain error] doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . . [Thus, an appellant] cannot prevail under [the plain error doctrine] . . . unless [she] demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice. . . .

"[Our Supreme Court has] clarified the two step framework under which we review claims of plain error. First, we must determine whether the trial court in fact committed an error and, if it did, whether that error was indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . [T]his inquiry entails a relatively high standard,

under which it is not enough for the [plaintiff] simply to demonstrate that [her] position is correct. Rather, [to prevail] the party [claiming] plain error [reversal] must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal. . . .

"In addition, although a clear and obvious mistake on the part of the trial court is a prerequisite for reversal under the plain error doctrine, such a finding is not, without more, sufficient to warrant the application of the doctrine. Because [a] party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice . . . under the second prong of the analysis we must determine whether the consequences of the error are so grievous as to be fundamentally unfair or manifestly unjust. . . . Only if both prongs of the analysis are satisfied can the appealing party obtain relief." (Internal quotation marks omitted.) *DeChellis* v. *DeChellis*, 190 Conn. App. 853, 864–66, 213 A.3d 1, cert. denied, 333 Conn. 913, 215 A.3d 1210 (2019).

In the present case, the plaintiff has failed to demonstrate that the court made a plain and obvious error by determining the highest and best use or fair market value of the property without consulting the zoning regulations. The plaintiff has cited no authority that places a duty on the trial court to consult zoning regulations prior to determining the highest and best use of real property when zoning regulations are not provided to the court by the parties and are not required for the court's findings. Instead, she argues that "[i]t was incumbent upon the court to require their submission by counsel or obtain them independently." In support thereof, the plaintiff cites to *Delfino* v. *Vealencis*, 181 Conn. 533, 436 A.2d 27 (1980).

The plaintiff's reliance on *Delfino* is misplaced. In that case, the trial court granted the plaintiffs a partition by sale of property owned by the plaintiffs and the

defendant as tenants in common. Id., 534. In *Delfino*, the defendant claimed that the trial court had improperly determined that a partition by sale, as opposed to a partition in kind, best promoted the rights of the parties. Id., 538. The court's conclusion that a partition in kind was not in the best interests of the parties was based, in part, on its findings that operation of the defendant's garbage removal business on the property would make it difficult for the plaintiffs to obtain approval for a subdivision on their part of the property and that the defendant's use of the property for such a business violated existing zoning regulations, making it unlikely that the defendant would be able to continue her business in the future. Id., 539–40. On appeal, our Supreme Court determined that the trial court's inferences were unfounded, as neither party had submitted the applicable zoning regulations to the court. Id., 541–42. The present case is readily distinguishable from *Delfino*. Here, the parties stipulated that the plaintiff had only a minimal interest in the property and that a partition in kind or by sale would not better serve the interests of the parties. The hearing before the court was for the sole purpose of having it determine the fair market value of the property. No evidence was submitted to the court regarding the possibility of obtaining any zoning variance and the court did not conclude that the current use of the property would not be permitted to continue.

We conclude that the plaintiff has not met either prong of the plain error doctrine. The plaintiff has failed to demonstrate that the court made a plain and obvious error that affected "the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *DeChellis* v. *DeChellis*, supra, 190 Conn. App. 865. Because of the parties' stipulation, the court's determination of the highest and best use and fair market value of the property did not require the review of applicable zoning regulations. Further,

the plaintiff has not established that the failure to grant relief will result in a manifest injustice. Therefore, we are not persuaded that plain error exists.

II

The plaintiff next argues that the court made clearly erroneous findings of fact when it determined that the highest and best use of the property was residential, rather than as a commercial equestrian center.[7] The defendant counters that the evidence presented at trial supported the court's determination that the highest and best use of the property is "the continuation as a residential use augmented by a supporting equestrian facility that has limited commercial viability." We agree with the defendant.

We first set forth the relevant legal principles and standard of review. "A property's highest and best use is commonly accepted by real estate appraisers as the starting point for the analysis of its true and actual value. . . . [U]nder the general rule of property valuation, fair [market] value, of necessity, regardless of the method of valuation, takes into account the highest and best value of the land. . . . A property's highest and best use is commonly defined as the use that will most likely produce the highest market value, greatest financial return, or the most profit from the use of a particular piece of real estate." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *United Technologies Corp.* v. *East Windsor*, 262 Conn. 11, 25, 807 A.2d 955 (2002).

[7] In her reply brief, the plaintiff argues that the defendant failed to respond adequately to the issues raised in her claims, and therefore the defendant has abandoned its defense. We disagree. "There is no rule . . . that an appellee's failure to reply in its brief to an issue raised by the appellant is an implicit concession that the appellant's claim is meritorious and that the claim should be decided in the appellant's favor. Abandonment of a claim for failure of a party to brief that claim typically occurs when the *appellant* fails to brief properly the claim that is raised on appeal." (Emphasis in original.) *Harris* v. *Commissioner of Correction*, 271 Conn. 808, 842 n.24, 860 A.2d 715 (2004).

"The highest and best use determination is inextricably intertwined with the marketplace because fair market value is defined as the price that a willing buyer would pay a willing seller based on the highest and best possible use of the land assuming, of course, that a market exists for such optimum use. . . . The highest and best use conclusion necessarily affects the rest of the valuation process because, as the major factor in determining the scope of the market for the property, it dictates which methods of valuation are applicable. Finally, a trier's determination of a property's highest and best use is a question of fact that we will not disturb unless it is clearly erroneous." (Internal quotation marks omitted.) *Sakon* v. *Glastonbury*, 111 Conn. App. 242, 253–54, 958 A.2d 801 (2008), cert. denied, 290 Conn. 916, 965 A.2d 554 (2009). "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *United Technologies Corp.* v. *East Windsor*, supra, 262 Conn. 23. "It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Internal quotation marks omitted.) Id., 26.

In the present case, the court considered the testimony and written reports of both the plaintiff's and the defendant's expert appraisers, and determined that the highest and best use of the property "is the continuation

as a residential use augmented by a supporting equestrian facility . . . .” The court found that the major difference in the appraiser’s values was a result of their choice of comparable sales, which was in turn affected by their different classifications of the highest and best use of the property. After examining the evidence, the court concluded that Hardej’s comparable sales were more similar to the property in size and location than were Michel’s. In addition, Michel determined the value based, in part, on a price per stall method that included twenty-three horse stalls, but the evidence at trial supported the court’s finding that only thirteen or fourteen horse stalls on the property were potentially functional. The only evidence of income generated from the property was rent for the single-family home and two apartments, as well as rent for two horse stalls in the larger barn. In reaching its decision, the court considered the testimony from Bongiorno that “the marketing of the property as a commercial equestrian facility was not successful.” After a thorough review of the record, we conclude that the court’s determination that the highest and best use of the property, a residential use augmented by a supporting equestrian facility that has limited commercial viability, was not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

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

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

Syllabus

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

1. The defendant could not prevail on his claim that the state failed to prove that he caused the victim serious physical injury and, thus, that the evidence was insufficient to support his conviction of assault in the first degree: the jury reasonably could have found that the defendant caused the victim to suffer either serious disfigurement or a serious loss or impairment of the function of any bodily organ and, thus, a serious physical injury, as the victim and C, a medical center staff member, testified consistently with one another as to the extensive bruising that covered much of the victim's body, the noticeable injuries to her head and face, and that the victim had lost consciousness during one of the defendant's beatings of her, which the jury was free to credit or to disregard; moreover, C testified that the bruising was literally everywhere on the body of the victim, who had a subconjunctival hemorrhage in her left eye, and a police officer who took the victim's statement at the medical center saw that she was missing hair and had a swollen face and a bloodshot eye.

* This opinion supersedes the opinion of this court in *State* v. *Morlo M.*, 198 Conn. App. 748, 234 A.3d 1137 (2020), which was officially released on July 7, 2020. See footnote 2 of this opinion.

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

2. The defendant's claim that the evidence was insufficient to support his conviction of risk of injury to a child was unavailing; the jury reasonably could have inferred that the defendant put the children at risk of impairment of their health or morals, as the children had no access to parental care during the three nights when he beat the victim in the basement and did not permit her to leave the basement until the morning, the jury was free to credit a psychologist's testimony that the children may have been traumatized as a result of having observed the extensive physical injuries to the victim, and the state did not have to prove actual harm to the children, as the defendant was charged under the portion of the risk of injury statute (§ 53-21 (a) (1)) that required that he have the general intent to perform an act that created a situation that put the children's health and morals at risk of impairment.
3. The evidence was sufficient to support the defendant's conviction of unlawful restraint in the first degree, as the defendant's intent to unlawfully restrain the victim was independent from his intent to assault her: the jury reasonably could have found that the defendant evinced an intent to restrict the victim's liberty to move freely within the house when he seized her by her hair and dragged her into the basement and separately could have reasonably found that he evinced an extreme indifference to human life on the basis of his independent acts of kicking, punching and choking the victim in the basement for three consecutive nights; moreover, the jury reasonably could have found that the defendant's act of dragging the victim down a full flight of stairs by her hair subjected her to a substantial risk of injury, as it presented a real or considerable opportunity for her to have suffered an impairment to her physical condition or to have suffered pain.
4. The trial court did not abuse its discretion in admitting prior misconduct evidence pertaining to two other incidents in which the defendant was alleged to have assaulted the victim, as that evidence was relevant to the charges of unlawful restraint and tampering with a witness, and its probative value was not outweighed by its prejudicial impact: the prior misconduct evidence was relevant to and probative of the defendant's intent to restrain the victim and to tamper with a statement she had given to the police, as both unlawful restraint in the first degree and tampering with a witness are specific intent crimes, and the prior misconduct evidence was not likely to arouse the jurors' emotions and sympathy toward the victim, and was not distracting in terms of its severity and the amount of time and focus that it involved; moreover, the two incidents of prior misconduct did not involve gruesome details, facts or photographs, whereas the crimes of which the defendant was convicted involved conduct and injuries that were substantially more gruesome in nature, and the court provided a limiting instruction to the jury on the first day of evidence, coincident with the admission of the prior misconduct evidence, which restricted the parameters of the state's use of the evidence to limit its prejudicial effect.

Considered April 1—officially released August 10, 2021

Procedural History

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

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

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

Opinion

ALVORD, J. The defendant, Morlo M., appeals from the judgments of conviction, rendered following a jury trial, of one count of assault in the first degree in violation of General Statutes § 53a-59 (a) (3), five counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (1), one count of unlawful restraint in the first degree in violation of General Statutes § 53a-95 (a), and one count of tampering with a witness in violation of General Statutes § 53a-151.[1] On appeal, the

[1] The defendant was found not guilty of one count of strangulation in the first degree in violation of General Statutes § 53a-64aa (a) (1) (B).

defendant claims that the evidence was insufficient to support his conviction of (1) assault in the first degree, (2) risk of injury to a child (3) and unlawful restraint in the first degree, and that (4) the trial court abused its discretion in admitting evidence of his prior misconduct.[2] We affirm the judgments of the trial court.

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

[2] On October 13, 2020, following briefing, oral argument, and decision in this appeal; see *State* v. *Morlo M.*, 198 Conn. App. 748, 234 A.3d 1137 (2020); the defendant filed a motion to open the judgments, and companion motions to file an additional transcript and for supplemental briefing. He claimed that "[t]he transcripts that were received, reviewed, filed, and upon which briefing and argument were based, were incomplete." Specifically, the basis for the defendant's motions was his discovery of "a portion of [his] trial transcript, recording a hearing held on the afternoon of September 20, 2017, [which] had never been transcribed or delivered" to this court (September transcript). The defendant characterized the September transcript as "the record of a motion in limine hearing that had not previously been provided to counsel, relating to admission of prior misconduct evidence." In his motions, the defendant argued that he "is entitled to have the transcript reviewed by this court and have an additional issue raised and briefed on appeal: whether the probative value of prior misconduct evidence outweighed its prejudicial tendencies," because the newly discovered transcript "memorializes trial counsel's arguments and objections to the introduction of prior misconduct evidence and the basis for the court's ruling on the motion." On October 20, 2020, this court granted the defendant's motions to open the judgments, to file an additional transcript and for supplemental briefing. Thereafter, the parties submitted supplemental briefs addressing the admission of prior misconduct evidence.

the house[3] and, thus, did not witness the victim being dragged down into the basement by the defendant. The victim could not leave the basement until the defendant ceased beating her. Subsequently, in the morning of November 28, the victim and the defendant emerged from the basement and sat on their living room couch. The victim remained on the couch throughout the daytime hours of November 28 because of the injuries she sustained from the defendant's beating of her. While the victim remained on the couch, her older children were at school, and her sixteen year old nephew assisted her by caring for her young children. Following the older children's return from school, all of the children were fed and went upstairs.

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

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

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

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

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

The victim told medical center staff that over the last few days she had been kicked, punched, dragged by her hair, choked, and that she lost consciousness. Initially, the victim did not disclose who caused her injuries to medical center staff. Eventually, however, the

victim did tell the staff that the defendant caused her injuries. The police and the Department of Children and Families (department) were summoned to the medical center and, upon their arrival, took sworn, written statements from the victim. Officer Jonathan Simmons, of the Bridgeport Police Department, who took the victim's statement at the medical center, observed the victim as having parts of her hair missing, a swollen face, and a bloodshot eye.

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

Contrary to the medical advice given to her, the victim did not seek further evaluation at the hospital and discharged herself from the medical center. The victim did not seek further evaluation at the hospital because she could not take her children with her. Following her discharge from the medical center, the victim received assistance from a battered women's shelter that enabled

her, her children, and her nephew to stay at a hotel. On December 5, 2016, they all checked out of the hotel and rode a bus to the home of the victim's foster mother in Georgia.

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

Following this conversation, the defendant drove to Georgia. After arriving at the home of the victim's foster mother in Georgia, the defendant picked up the victim and five children and proceeded to drive back to Connecticut.[4] They arrived in Connecticut on December 20, 2016, and stayed at the apartment of the defendant's sister. On December 21, the defendant drove the victim to the police station, where she changed her statement to the police at the defendant's behest. The victim changed her statement to allege that another male was the cause of her injuries. The victim and the defendant then returned to the apartment.

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

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

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

Subsequently, the defendant was charged in two consolidated informations with assault in the first degree, unlawful restraint in the first degree, strangulation in the first degree, five counts of risk of injury to a child, and tampering with a witness. The jury found the defendant guilty of all counts with the exception of strangulation in the first degree, of which he was found not guilty. The defendant received a total effective sentence of fifteen years of incarceration, execution suspended after ten years, followed by five years of probation.[5] This appeal followed. Additional facts will be set forth as necessary.

I

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

At the outset, we set forth the following established review principles relevant to each of the defendant's insufficiency of the evidence claims raised in this

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

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

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

"Additionally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [jury], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is reasonable view of the evidence that supports the [jury's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Taupier*, 330 Conn. 149, 186–87, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019).

Section 53a-59 (a) provides in relevant part that "[a] person is guilty of assault in the first degree when . . .

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

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

We conclude that there was sufficient evidence to support the jury's finding that the defendant caused serious physical injury to the victim. The jury reasonably could have concluded that the defendant caused the victim either serious disfigurement or serious loss or impairment of the function of any bodily organ.

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

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

dispositive." Id., 689–90. On the basis of the evidence in the *Barretta* record, this court could not conclude that the jury unreasonably found that the victim suffered serious physical injury, namely, serious disfigurement. Id., 690.

In this case, the victim and Chen testified consistently with one another as to the extensive bruising that covered the victim's body. The victim's scalp, face, chest, back, legs, arms, and left side were all bruised. Chen testified that the victim's bruising was "literally everywhere . . . ." Moreover, the victim had a subconjunctival hemorrhage in her left eye, had portions of her hair torn out, and experienced tenderness in various parts of her body. Simmons corroborated the visibility of the victim's injuries, noting that when he met with her at the medical center, he observed her as having missing hair, a swollen face, and a bloodshot eye. In addition, photographs of the victim's injuries were admitted into evidence for the jury to view during its deliberations. Although there was no evidence that the victim's injuries left permanent scarring, there was ample evidence as to the visibility of the bruising that covered much of the victim's body and of the noticeable injuries to her head and face. Under the factors set forth in *Petion*, and in light of the guidance of *Barretta*, we cannot conclude that there was insufficient evidence from which the jury could find that the victim suffered serious disfigurement and, thus, serious physical injury.[7]

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

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

We now turn to whether the jury reasonably could have concluded that the defendant caused the victim serious loss or impairment of the function of any bodily organ.[8] In *State* v. *Rumore*, 28 Conn. App. 402, 613 A.2d 1328, cert. denied, 224 Conn. 906, 615 A.2d 1049 (1992), this court held that the jury reasonably could have concluded that the victim suffered serious impairment of the function of any bodily organ on the basis of evidence that the victim became unconscious after the defendant grabbed her by her ankles, causing her to fall to the ground. Id., 405, 415. More specifically, the court stated that § 53a-3 (4) "does not require that the impairment of the organ be permanent. The jury could properly interpret the evidence to prove that the victim's brain was not functioning at a cognitive level when she was unconscious and thus was impaired." Id., 415. In this case, the victim testified that, during one of the three nights when she was beaten by the defendant in the basement, she lost consciousness. The victim's testimony was corroborated by Chen, who testified that the victim informed medical center staff that she lost consciousness at some point during the defendant's repeated beating of her. The jury was free to credit or disregard this testimony.[9] See id. ("[i]t is axiomatic that

State v. *Petion*, supra, 322 Conn. 497. The court was not convinced, however, that the appearance of the victim's injury prior to its healing was sufficient to constitute serious disfigurement. Id.

Although *Barretta*'s viability in the wake of *Petion* has not been examined, we conclude that there was sufficient evidence in this case from which the jury reasonably could find that the victim's injuries persisted throughout her head and body and, thus, were sufficient to constitute serious disfigurement under the *Petion* factors.

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

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

it is the function of the jury to consider the evidence, draw reasonable inferences from the facts proven and to assess the credibility of witnesses"). On the basis of this testimony, we conclude that there was sufficient evidence from which the jury reasonably could have found that the victim suffered a serious loss or impairment of the function of any bodily organ and, thus, a serious physical injury.[10] See id.

II

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

Section 53-21 (a) provides in relevant part that "[a]ny person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of (A) a

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

class C felony for a violation of subdivision (1) . . . .'' ''The general purpose of § 53-21 is to protect the physical and psychological well-being of children from the potentially harmful conduct of adults. . . . Our case law has interpreted § 53-21 [a] (1) as comprising two distinct parts and criminalizing two general types of behavior likely to injure physically or to impair the morals of a minor under sixteen years of age: (1) deliberate indifference to, acquiescence in, or the creation of situations inimical to the minor's moral or physical welfare . . . and (2) acts directly perpetrated on the person of the minor and injurious to his moral or physical well-being. . . . Thus, the first part of § 53-21 [a] (1) prohibits the creation of *situations* detrimental to a child's welfare, while the second part proscribes injurious *acts* directly perpetrated on the child. . . .

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

In a substitute information, the state charged the defendant with five counts of risk of injury to a child in connection with conduct "beginning on or about November 27, 2016 through December 22, 2016," that "wilfully and unlawfully cause[d] a child under sixteen (16) years of age . . . to be placed in a situation that his health and morals were likely to be impaired."[11] The information thus reflects that the state charged the defendant under the "situation" portion of § 53-21 (a) (1). Accordingly, the state did not have to prove actual harm to the children but, rather, that the defendant had the general intent to perform an act that created a situation putting the children's health and morals at risk of impairment. We conclude that there was sufficient evidence from which the jury reasonably could have found the defendant guilty of five counts of risk of injury to a child.

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

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

defendant's conviction of risk of injury to child for leaving seventeen month old infant unattended in car between 8 and 9 p.m.).[12]

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

III

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

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

Under § 53a-95 (a), "[a] person is guilty of unlawful restraint in the first degree when he restrains another person under circumstances which expose such other person to a substantial risk of physical injury." " 'Restrain' means to restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent." General Statutes § 53a-91 (1). "Physical injury" is defined as "impairment of physical condition or pain . . . ." General Statutes § 53a-3 (3). "Merriam-Webster's Collegiate Dictionary (10th Ed. 1999) defines 'substantial' as 'real' and 'considerable,' and courts often have defined the word 'substantial' in that way." *State* v. *Dubose*, 75 Conn. App. 163, 174–75, 815 A.2d 213, cert. denied, 263 Conn. 909, 819 A.2d 841 (2003).

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

We reject the defendant's argument that, under the circumstances of this case, the intent to commit unlawful restraint under § 53a-95 (a) was one and the same with the intent to commit the assault in the first degree under § 53a-59 (a) (3). Our appellate guidance reflects that the requisite mental states for each crime are distinct from one another. Compare *State* v. *Colon*, 71 Conn. App. 217, 226, 800 A.2d 1268 (concluding that § 53a-59 (a) (3) requires that the defendant "must be shown to have had *the general intent to engage in conduct evincing an extreme indifference to human life*" (emphasis added)), cert. denied, 261 Conn. 934, 806 A.2d 1067 (2002), with *State* v. *Jackson*, supra, 184 Conn. App. 433 ("[a] jury cannot find a defendant guilty of unlawful restraint unless it first [finds] that he . . . restricted the victim's movements with *the intent to interfere substantially with her liberty*" (emphasis added; internal quotation marks omitted)). The victim testified that, in the early morning hours of November 28, 2016, the defendant seized her by her hair and dragged her down into the basement, where he proceeded to beat her. On the basis of this evidence, the jury reasonably could have found that the defendant evinced an intent to restrict the victim's liberty, namely, her liberty to move freely within the house. Separately, the jury reasonably could have found that the defendant evinced an extreme indifference to human life on the basis of his independent acts of kicking, punching, and choking the victim in the basement for three consecutive nights after dragging her down the stairs.[13]

We further reject the defendant's argument that there was insufficient evidence of a substantial risk of injury

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

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

IV

The defendant's final claim is that the trial court abused its discretion in admitting evidence of his prior misconduct on the ground that it was relevant and that its probative value outweighed its prejudicial tendencies. In response, the state maintains that the trial court acted well within its discretion in admitting the prior misconduct evidence after finding it relevant and not unduly prejudicial. We agree with the state.

The following additional facts and procedural history are relevant to the defendant's claim. On September 20, 2017, pursuant to § 4-5 of the Connecticut Code of Evidence, the state filed a notice of misconduct evidence regarding its intent to offer evidence of other crimes, wrongs or acts involving the defendant and the victim.[14] In its September 20, 2017 notice of misconduct evidence, the state set forth specific incidents of prior misconduct involving the defendant and the victim, as well as its intent to offer additional evidence with respect to the "violent and abusive nature of [their] relationship . . . ." The specific incidents of prior misconduct included (1) "[a]n assault by the defendant,

[14] The state filed an initial notice of misconduct evidence on September 11, 2017. On September 19, 2017, the defendant filed a "motion in limine for an evidentiary hearing to determine whether the misconduct evidence described in the state's notice filed on September 11, 2017 is admissible in the trial of this case."

which caused injuries to [the victim] as well as her sister . . . [that] included a broken neck in December of 2011" (first assault),[15] and (2) "[a]n assault by the defendant on [the victim] wherein he hit [her] in the head with a dog chain, causing [an] injury to [her] head" (second assault).[16] The state argued that the prior misconduct evidence was admissible because it was "relevant to each of the offenses charged"—assault in the first degree, unlawful restraint in the first degree,[17] strangulation in the first degree, five counts of risk of injury to a child, and tampering with a witness.[18]

Thereafter, on September 20, 2017, the court heard arguments on the defendant's motion in limine. See footnote 14 of this opinion. In support of his argument that the prior misconduct evidence is inadmissible, defense counsel contended that, when the prior misconduct is extrinsic, namely, separate and distinct from the crime charged, the use of uncharged misconduct

[15] In its September 20, 2017 notice of misconduct evidence, the state disclosed that "[t]hese [injuries] [pertaining to the first assault] were the subject matter of the defendant's conviction for assault in the second and third degree in 2013."

[16] In its notice, the state also stated its intent to offer evidence of "[a]n assault in the street in Bridgeport sometime in the course of the defendant's relationship with [the victim]" (third assault), and "[a]n assault wherein the defendant hit [the victim] in the mouth, causing bleeding" (fourth assault).

[17] With respect to the charge of unlawful restraint in the first degree, the state argued that "[t]he evidence is relevant to the defendant's intent, identity, malice, motive, absence of mistake, element of the crime and completing the prosecution story." Specifically pertaining to the elements of the crime of unlawful restraint in the first degree, the state argued that the evidence demonstrates the victim's "fear of the defendant," which is relevant to its proof "that [the victim] did not consent to the restraint."

[18] With respect to the charge of tampering with a witness, the state argued that "[t]he evidence is relevant to the defendant's intent, identity, malice, motive, absence of mistake, element of the crime and completing the prosecution story. Specifically with respect to the elements of the crime of tampering with a witness, the state argued that the evidence is relevant to its proof "that the defendant induced or attempted to induce the witness to testify falsely/withhold testimony/elude legal process."

to prove intent is practically indistinguishable from prohibited propensity evidence. Defense counsel further maintained that the state offered the prior misconduct evidence as being relevant to its proof of the defendant's intent with respect to "all but one of the charges," and that the other grounds of relevance posited by the state do not apply. Given the alleged "problems with the probative value" and "the inflammatory nature of this type of evidence," defense counsel argued, each incident of prior misconduct should be excluded from evidence because "the probative value . . . is far outweighed by [its] prejudicial tendency . . . ."

In response to the defendant's arguments, the prosecutor maintained that the prior misconduct evidence demonstrates the defendant's "ongoing abusive relationship" with the victim, which is "threaded through all of these particular charges" at issue in this case and tends to demonstrate "the reasons for [the victim's] actions." Specifically, the prosecutor argued that the prior misconduct evidence is relevant to "the coercive nature" of the defendant's relationship with the victim, "[the victim's] fear of whether or not she was consenting to going down in the basement and being restrained by the defendant," "whether or not [the victim is going] to try and recant her statement," as well as other "significant and essential elements that the state needs to prove," such as the "fear of [the defendant] and [his] coercive nature that this victim was suffering from" and the defendant's "malice, motive [and] intent."

Citing § 4-5 of the Connecticut Code of Evidence, the court stated that, "for evidence of prior misconduct to fall within the exception of the general rule prohibiting the admission—so again, I do acknowledge that the general rule is to prohibit such admission—the evidence must first be relevant and material to at least one of

the circumstances encompassed by the exceptions.[19] And second, the probative value of such evidence must outweigh its prejudicial effect. And so we have a two part test that needs to be addressed." (Footnote added.) Moreover, the court "agree[d] with the defen[dant] that certainly evidence of wrongful acts or uncharged misconduct [is] not relevant to try to suggest that because a defendant has done something in the past that . . . therefore, he has done [it] in this case as well. And, therefore, it is necessary to find this nexus in terms of the intent, identity, malice, motive aspect with regard to the admission of [the] misconduct."

The court first concluded that the prior misconduct evidence was not relevant to the charges of risk of injury to a child or assault in the first degree. Next, the court concluded that the prior misconduct evidence was relevant to the charges of unlawful restraint in the first degree, tampering with a witness and strangulation in the first degree. Specifically, the court stated that, "the tampering, the unlawful restraint and the strangulation all involve different levels of intent. They . . . are specific intent crimes. And the intents go to different things. And those intents, in this court's opinion, do make the misconduct [evidence] relevant and probative." The court further indicated that, with respect to each of these counts, the state could offer the prior misconduct evidence for "multiple purposes from going to intent, identity, malice, motive, absence of mistake or accident and certainly knowledge and a system of criminal activity." Moreover, the court noted that the prior misconduct evidence "also corroborates evidence

[19] Previously in its decision, the court noted the exceptions to the general rule prohibiting misconduct evidence as follows: "[The prior misconduct evidence] has to go to prove intent. Again, any malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity or an element to the crime or, finally, to corroborate prosecution testimony."

that's going to be coming in throughout the course of the trial."

Finally, the court concluded that "the probative value [of the prior misconduct evidence] does outweigh any prejudicial impact." In making this determination, the court stated: "I will give an instruction to the jury talking about the [para]meters that they may use as misconduct and talking about the fact that it does not apply to certain counts. And I will ask the defense to let [the court] know if [he] want[s] that done at the time that the testimony is given specifically. And again, it's probably going to be multiple times. Or to save it for the end of the day or to save it for the jury charge in total."[20]

[20] After the court admitted evidence of the defendant's prior misconduct, it instructed the jury as follows: "I know you heard in my initial instructions this morning that there might be times when evidence is admitted for what is known as a limited purpose. And so my instruction specifically relates to that because there's evidence that was admitted through the course of [the victim's] testimony which was admitted for a limited purpose and so I'm going to instruct you on that right now.

"The state has offered evidence of what is known as other acts of misconduct of the defendant. And I'm going to specifically reference you . . . to the testimony and the questioning that related to prior acts of assaultive behavior and conduct by the defendant upon [the victim], specifically the chain that was referenced and the broken neck, all right. This is not being admitted to prove the bad character, the propensity or the criminal tendencies of the defendant.

"Such evidence is being admitted solely to establish an element of the crime such as the intent, the identity, motive or commission of the crime, absence of mistake or accident and or to complete the story that is being presented by the prosecution. So it specifically goes to those items; intent, identity, motive, absence of mistake or knowledge. You may not consider such evidence as establishing a predisposition on the part of the defendant to commit any of the crimes charged or to demonstrate a criminal propensity.

"You may consider such evidence if you believe it and further find that it logically, rationally and conclusively supports the issues for which it is being offered by the state, but only as it may bear upon those issues; so to establish an element of the crime, to go towards intent, identity, motive, absence of mistake or accident or to complete the story that the prosecution is providing.

"You may consider such evidence if you believe it and further again if you find that it is logically and rationally conclusive of those aspects. On the other hand, if you do not believe that such evidence or even if you do

Moreover, in support of this determination, the court stated that "there's nothing that is coming in right now that I'm necessarily finding to be so prejudicial in and of itself that it outweighs the probative value [of the prior misconduct evidence]. Again, I'm not hearing that it involves a knife, that it's gruesome, that it involves facts or pictures that are going to be so prejudicial to this jury that they will not be able to properly evaluate it and properly adhere to the instructions that I give to them, which is to limit it to the [para]meters of the specific charges and the specific purpose of its admission." Accordingly, the court concluded that "the misconduct [evidence] is relevant and probative, and that the probative value outweighs the prejudicial impact as to the counts relating to the unlawful restraint in the first degree, strangulation in the first degree and tampering" with a witness.

At trial, the state offered, and the court admitted, prior misconduct evidence pertaining to the first assault and the second assault.[21] During the prosecutor's direct

believe it but you find that it does not logically, rationally and conclusively support those issues for which it is being offered by the state you may not consider that testimony for any other purpose.

"You again may not consider evidence of other misconduct of the defendant for any purpose other than the ones that I have just told you, because it may predispose your mind critically to believe that the defendant may be guilty of the offense here charged merely because of the alleged other misconduct. For this reason you may consider this evidence only on the issues again that I told you—motive, intent, malice, to complete the story, to prove an element of the crime to show an absence of mistake and only for those purposes and for no other.

"Now I'm going to add to that by telling you this. This evidence of misconduct does not apply to some of the counts, but does apply to others. It does not apply to count one, assault in the first degree, and it does not apply to any of the risk of injury counts, okay. But it does apply to the unlawful restraint in the first degree, strangulation in the first degree and the count of tampering with a witness, okay.

"So that is again a limiting instruction with regard to how you can use certain pieces of evidence."

[21] In its supplemental brief, the state notes that, "[a]lthough [its] notice of misconduct evidence . . . indicated its intent to offer evidence of other prior misconduct, the record demonstrates that [it] only elicited testimony

examination of the victim, the victim testified specifically with respect to the first assault that her "neck was broken" by the defendant, and, with respect to the second assault, that the defendant "beat [her] with a dog chain . . . ." In her closing arguments, the prosecutor referenced specifically the prior misconduct evidence, and referenced generally the history of domestic violence between the victim and the defendant. Of the counts for which the prior misconduct evidence was admitted, the jury found the defendant guilty of unlawful restraint in the first degree in violation of § 53a-95 (a) and tampering with a witness in violation of § 53a-151,[22] and not guilty of strangulation in the first degree.[23]

We begin by setting forth the applicable standard of review and principles of law that guide our analysis. "We review the trial court's decision to admit evidence, if premised on a correct view of the law . . . for an abuse of discretion. . . .

"As a general rule, evidence of prior misconduct is inadmissible to prove that a defendant is guilty of the crime of which he is accused. . . . Nor can such evidence be used to suggest that the defendant has a bad character or a propensity for criminal behavior. . . . In order to determine whether such evidence is admissible, we use a two part test. First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the

concerning [the first assault] and [the second assault]." See footnote 16 of this opinion.

[22] General Statutes § 53a-151 (a) provides: "A person is guilty of tampering with a witness if, believing that an official proceeding is pending or about to be instituted, he induces or attempts to induce a witness to testify falsely, withhold testimony, elude legal process summoning him to testify or absent himself from any official proceeding."

[23] In light of the defendant's acquittal of the charge of strangulation in the first degree, the propriety of the court's admission of evidence of the defendant's prior misconduct with respect to that charge is not at issue in this appeal.

probative value of [the prior misconduct] evidence must outweigh [its] prejudicial effect . . . . The primary responsibility for making these determinations rests with the trial court. We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . .

"Under the first prong of the test, the evidence must be relevant for a purpose other than showing the defendant's bad character or criminal tendencies. . . . Recognized exceptions to this rule have permitted the introduction of prior misconduct evidence to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony. Conn. Code Evid. § 4-5 [c]. . . .

"The official commentary to § 4-5 (c) states in relevant part: Admissibility of other crimes, wrongs or acts evidence is contingent on satisfying the relevancy standards and balancing test set forth in Sections 4-1 and 4-3, respectively. For other crimes, wrongs or acts evidence to be admissible, the court must determine that the evidence is probative of one or more of the enumerated purposes for which it is offered, and that its probative value outweighs its prejudicial effect. . . . The purposes enumerated in subsection (c) for which other crimes, wrongs or acts evidence may be admitted are intended to be illustrative rather than exhaustive. Neither subsection (a) nor subsection (c) precludes a court from recognizing other appropriate purposes for which other crimes, wrongs or acts evidence may be admitted, provided the evidence is not introduced to prove a person's bad character or criminal tendencies, and the probative value of its admission is not outweighed by any of the Section 4-3 balancing factors. . . . Conn. Code Evid. § 4-5 (c), commentary." (Citations omitted;

emphasis omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Gerald A.*, 183 Conn. App. 82, 106–107, 191 A.3d 1003, cert. denied, 330 Conn. 914, 193 A.3d 1210 (2018).

On appeal, the defendant claims that the trial court abused its discretion in admitting evidence of his prior misconduct for the state's proof of unlawful restraint in the first degree and tampering with a witness because "[t]he probative value of the prior misconduct evidence on the unlawful restraint and tampering with a witness charges is at best tenuous, if not nonexistent, and is not sufficient to survive the balancing test with its prejudicial tendencies." Specifically, with respect to the probative value of the prior misconduct evidence, the defendant contends that the evidence was not probative of intent, identity, absence of mistake or motive because the prior misconduct and the charges of unlawful restraint in the first degree and tampering with a witness were not factually similar enough in nature. We are not persuaded.

We first consider the probative value of the prior misconduct evidence with respect to the count of unlawful restraint in the first degree. The court found that the prior misconduct evidence was relevant to, inter alia, the defendant's intent to restrain the victim. In admitting the prior misconduct evidence for this purpose, the court relied on *State* v. *Franko*, 142 Conn. App. 451, 64 A.3d 807, cert. denied, 310 Conn. 901, 75 A.3d 30 (2013).

In *Franko*, the defendant appealed from his conviction of one count of kidnapping in the second degree in violation of General Statutes § 53a-94 (a), claiming that "the trial court abused its discretion in denying his motion in limine to exclude certain evidence of prior uncharged misconduct." Id., 453. On appeal, this court determined that prior misconduct evidence of the

defendant's "verbal and physical abuse [of the victim] starting three months into their relationship"; id., 455–56; was relevant to the defendant's "intent to abduct the victim, and thereby restrain the victim's movement on the date of the kidnapping." Id., 461. Specifically, this court determined that, "[a]lthough there is no element in the kidnapping statutes that explicitly requires proof of the victim's state of mind, [our Supreme Court] has stated that evidence that is probative of the victim's state of mind may be admissible . . . when that state of mind is independently relevant to other material issues in the case. . . . Thus, when a defendant . . . is charged with [second] degree kidnapping and the jury is instructed on the meaning of abduct, which requires a finding that the defendant restrained the victim with intent to prevent his liberation by . . . using or threatening to use physical force or intimidation . . . the trial court may allow the jury to consider evidence that the victim reasonably believed that force would be used if he or she tried to escape as proof that the defendant intended to prevent the victim's liberation by threats or intimidation. . . . Because intent is almost always proved, if at all, by circumstantial evidence, prior misconduct evidence, where available, is often relied upon." (Citations omitted; internal quotation marks omitted.) Id., 461.

In the present case, the court correctly noted that unlawful restraint in the first degree is a specific intent crime. In accordance with the state's burden to prove the essential element of unlawful restraint in the first degree that the defendant restrained the victim, the state was required to prove that the defendant "restrict[ed] [the victim's] movements *intentionally and unlawfully* in such a manner as to interfere substantially with [the victim's] liberty . . . *without consent*." (Emphasis added.) General Statutes § 53a-91 (1). As in *Franko*, the

court in the present case found that the prior misconduct evidence, which tended to demonstrate that the victim reasonably believed that the defendant would use force if she tried to escape, was probative of whether the defendant intended to restrict the victim's movements in such a manner as to interfere substantially with the victim's liberty. In relying on *Franko*, the court properly determined that the prior misconduct evidence was probative of the defendant's intent to restrain the victim and, thus, was relevant to the count of unlawful restraint in the first degree.

Next, we consider the probative value of the prior misconduct evidence with respect to the count of tampering with a witness. The court found that the prior misconduct evidence was relevant to, inter alia, the defendant's intent to tamper with the victim's statement to the police. In admitting the prior misconduct evidence for this purpose, the court relied on *State* v. *Kantorowski*, 144 Conn. App. 477, 72 A.3d 1228, cert. denied, 310 Conn. 924, 77 A.3d 141 (2013).

In *Kantorowski*, this court determined that prior misconduct evidence of the defendant's two prior assaults of the victim was relevant to the defendant's intent in making subsequent harassing and threatening phone calls. Id., 483, 487. Specifically, this court determined that, "[t]o obtain a conviction for [harassment in the second degree in violation of General Statutes § 53a-183 (a) (3)], the state had the burden to prove, beyond a reasonable doubt, the defendant's intent to harass, annoy or alarm the victim; as to the latter offense [of threatening in the second degree in violation of General Statutes § 53a-62 (a) (2)], the state had to prove the defendant's intent to terrorize the victim . . . [which] means to scare or to cause intense fear or apprehension. . . . Because intent is almost always proved, if at all, by circumstantial evidence, prior misconduct evidence, where available, is often relied upon. . . . When

instances of a criminal defendant's prior misconduct involve the same victim as the crimes for which the defendant presently is being tried, those acts are especially illuminative of the defendant's motivation and attitude toward that victim, and, thus, of his intent as to the incident in question. . . . [T]he defendant's . . . telephone calls need to be understood in [the] context of [the defendant's and the victim's] entire relationship. The uncharged misconduct evidence that the defendant previously had choked the victim and had broken her nose by slamming her face into the floor provided context as to whether he actually intended to cause her to be harassed, annoyed, alarmed or terrorized by his verbal threat." (Citations omitted; internal quotation marks omitted.) Id., 488–89.

In the present case, the court correctly noted that tampering with a witness is a specific intent crime. As our Supreme Court has stated, "[§] 53a-151 (a) applies to any conduct that is *intended* to prompt a witness to testify falsely or refrain from testifying in an official proceeding that the perpetrator believes to be pending or imminent. . . . It is important to note that [i]ntent may be, and usually is, inferred from the defendant's verbal or physical conduct. . . . Intent may also be inferred from the surrounding circumstances. . . . The use of inferences based on circumstantial evidence is necessary because direct evidence of the accused's state of mind is rarely available. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Citations omitted; emphasis altered; internal quotation marks omitted.) *State* v. *Lamantia*, 336 Conn. 747, 756–57, 250 A.3d 648 (2020). As in *Kantorowski*, the court in the present case found that the prior misconduct evidence, which contextualized the defendant's instruction that the victim "fix" her statement to the police and tended to

demonstrate that the victim reasonably believed that the defendant would use force if she did not comply, was probative of the defendant's intent with respect to his actions. In relying on *Kantorowski*, the court properly determined that the prior misconduct evidence was probative of the defendant's intent to tamper with the victim's testimony. Thus, the court properly determined that the prior misconduct evidence was relevant to the count of tampering with a witness.

Finally, we consider the trial court's determination that the probative value of this evidence outweighed its prejudicial effect. "Section 4-3 of the Connecticut Code of Evidence . . . provides that [r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. [T]he determination of whether the prejudicial impact of evidence outweighs its probative value is left to the sound discretion of the trial court judge and is subject to reversal only where an abuse of discretion is manifest or injustice appears to have been done. . . . [Our Supreme Court] has previously enumerated situations in which the potential prejudicial effect of relevant evidence would counsel its exclusion. Evidence should be excluded as unduly prejudicial: (1) where it may unnecessarily arouse the [jurors'] emotions, hostility or sympathy; (2) where it may create distracting side issues; (3) where the evidence and counterproof will consume an inordinate amount of time; and (4) where one party is unfairly surprised and unprepared to meet it." (Internal quotation marks omitted.) *State* v. *Gerald A.*, supra, 183 Conn. App. 108–109.

The defendant contends that "[t]he probative value of the prior misconduct evidence was not so strong as to outweigh the significant prejudicial tendencies and

their effects on the jury." In support of this argument, the defendant maintains that the misconduct evidence was "unduly prejudicial because the history [of domestic violence] noted by the state on numerous occasions was likely to arouse the jurors' emotions and sympathy towards [the victim]." Furthermore, the defendant argues that the misconduct evidence "was distracting in the severity and the amount of time and focus it took in the case," and that "it did not apply to over half the counts . . . ." The defendant's arguments are unavailing.

In the present case, the court admitted evidence of two incidents of prior misconduct. With respect to the evidence of the defendant's first assault of the victim, the victim testified specifically that her "neck was broken" by the defendant. With respect to the evidence of the defendant's second assault of the victim, the victim testified specifically that the defendant "beat [her] with a dog chain . . . ." Our review of the record indicates that no additional evidence was adduced that further elaborated on the details of the first assault and the second assault. As the court correctly noted, the two incidents of prior misconduct did not involve gruesome details, facts or photographs.

In contrast, the crimes of which the defendant was convicted in the present case, although similar to the incidents of prior misconduct, involved conduct and injuries that were substantially more gruesome in nature. Specifically, in light of the evidence presented at trial, the prosecutor described in her closing argument the nature of the defendant's conduct and the victim's injuries as follows: "[B]eginning in November of 2016, [the victim] described to you a series of days where she indicated that [the defendant] beat her. He brought her down the basement where he repeatedly beat her. . . . She described how she was restrained by her hair, dragged down there for a period of three

consecutive evenings. . . . In the course of the beating, [the defendant] ripped out large portions of her hair . . . kicked her in the head, choked her to the point of loss of consciousness, beat her by her legs, her back. And as you saw in the photographs that the [s]tate showed and that were taken at the [veterans administration] [h]ospital of her injuries, she had quite a few as described by the doctor. . . . Dark bruises the doctor indicated from head to toe." The prosecutor further argued that "you'll see these photos again of the external injuries that are going on, there's also internal injuries that she's describing; a broken rib, this hemorrhage that you can see in the photograph to her eye. She also described some blurriness and loss of vision and problems with her eye."

Given the limited scope of the prior misconduct evidence and the particularly violent nature of the crimes at issue in the present case, we cannot conclude that the prior misconduct evidence was likely to arouse the jurors' emotions and sympathy toward the victim or that it was distracting in the severity, amount of time and focus that it involved.

Furthermore, the court provided a limiting instruction to the jury on the first day of evidence, coincident with the admission of prior misconduct evidence. The instruction restricted the parameters of the state's use of the prior misconduct evidence to limit its prejudicial effect. See footnote 20 of this opinion. In his principal appellate brief, the defendant acknowledges the court's limiting instruction to the jury and that "the jurors are presumed to have followed such instruction."

For the aforementioned reasons, the court properly determined that the probative value of the prior misconduct evidence is not outweighed by its prejudicial impact. Accordingly, the court did not abuse its discretion in admitting the prior misconduct evidence pertaining to the first assault and the second assault for

the state's proof of unlawful restraint in the first degree and tampering with a witness.

The judgments are affirmed.

In this opinion the other judges concurred.

WENDALL HASAN *v.* COMMISSIONER OF CORRECTION (AC 43433)

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

Syllabus

The petitioner, who had been convicted of the crimes of felony murder and burglary in the first degree, sought a third petition for a writ of habeas corpus. The respondent Commissioner of Correction filed a request for an order to show cause why the petition should be permitted to proceed. Following a hearing, at which the petitioner raised for the first time a claim of actual innocence based on purported newly discovered DNA evidence, the habeas court dismissed the third habeas petition as untimely pursuant to the applicable statute (§ 52-470 (d) and (e)), concluding that the petitioner failed to establish good cause for the delay in filing the petition three years after the October 1, 2014 deadline. Thereafter, the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court properly dismissed the petitioner's third habeas petition pursuant to § 52-470 (d) and (e), the petitioner having failed to overcome the rebuttable presumption that he lacked good cause for filing his petition beyond the statutory deadline; contrary to the petitioner's contention, the petitioner's assertion of a claim of actual innocence and reference to new evidence for the first time at the show cause hearing were not sufficient to overcome the presumption that the delay in filing the petition was without good cause, as they were irrelevant to the habeas court's determination of good cause, the petition having contained only a claim of ineffective assistance of counsel.

Argued May 25—officially released August 10, 2021

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson*, *J.*, rendered judgment dismissing

the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Naomi T. Fetterman, for the appellant (petitioner).

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *Paul J. Ferencek*, state's attorney, and *Jo Anne Sulik*, senior assistant state's attorney, for the appellee (respondent).

Opinion

PELLEGRINO, J. Following the granting of his petition for certification to appeal, the petitioner, Wendall Hasan, appeals from the judgment of the habeas court dismissing his third petition for a writ of habeas corpus. The petitioner claims that the court improperly dismissed his petition as untimely under General Statutes § 52-470 (d) and (e). We disagree and affirm the judgment of the habeas court.

After being convicted of felony murder and burglary in the first degree, on August 1, 1986, the petitioner filed his first petition for a writ of habeas corpus as a self-represented party, claiming ineffective assistance of trial counsel. The petitioner thereafter was appointed counsel and amended his petition on March 6, 1990. After holding an evidentiary hearing, the habeas court denied the petitioner's first habeas petition. Following the granting of certification to appeal, the petitioner appealed from the denial of his first habeas petition, and this court affirmed the judgment of the habeas court. *Hasan* v. *Warden*, 27 Conn. App. 794, 799, 609 A.2d 1031, cert. denied, 223 Conn. 917, 614 A.2d 821 (1992). On June 29, 2005, the petitioner filed his second petition for a writ of habeas corpus, claiming ineffective assistance of habeas counsel. The petitioner again was appointed counsel, and the habeas court denied the petitioner's second habeas petition. The petitioner then appealed, and this court dismissed the petitioner's

appeal. *Hasan* v. *Commissioner of Correction*, 124 Conn. App. 906, 4 A.3d 1282, cert. denied, 299 Conn. 917, 10 A.3d 1051 (2010).

On October 2, 2017, the self-represented petitioner filed his third petition for a writ of habeas corpus, which is the subject of this appeal.[1] In that petition, he claimed that his counsel in his first habeas proceeding provided ineffective assistance. The petitioner was assigned counsel. On December 21, 2018, the respondent, the Commissioner of Correction, filed a request for an order to show cause pursuant to General Statutes § 52-470 (d) and (e),[2] arguing that the petitioner's third habeas petition was untimely and should therefore be dismissed. Specifically, the respondent claimed that the petitioner was required to file any challenge to his 1986 conviction on or before October 1, 2014, and that his

[1] We note that the petitioner also filed a petition for a writ of habeas corpus in federal court on April 5, 2011. The petitioner's federal habeas petition was dismissed by the District Court; *Hasan* v. *Alves*, United States District Court, Docket No. 3:11-CV-524 (GWC) (D. Conn. May 27, 2016); and the petitioner's motion for the issuance of a certificate of appealability was denied. *Hasan* v. *Alves*, United States District Court, Docket No. 3:11-CV-524 (GWC) (D. Conn. August 9, 2016), appeal dismissed, United States Court of Appeals, Docket No. 16-2961 (2d Cir. January 10, 2017). In this opinion, we refer to the petitioner's October 2, 2017 petition as the third habeas petition because it was the third state petition filed by the petitioner.

[2] General Statutes § 52-470 provides in relevant part: "(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; [or] (2) October 1, 2014 . . . .

"(e) In a case in which the rebuttable presumption of delay under subsection . . . (d) of this section applies, the court, upon request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. . . ."

third habeas petition, which was filed nearly seven years after the judgment in his second habeas petition became final and three years after October 1, 2014, was not timely filed and, thus, had to be presumed to be delayed without good cause under § 52-470 (d). After a show cause hearing for the petitioner to present evidence of good cause for his untimely filing, during which the petitioner raised for the first time a claim of actual innocence, the habeas court determined that the petitioner had failed to establish good cause and dismissed the petition.[3] The habeas court made the following findings in dismissing the petitioner's third habeas petition pursuant to § 52-470 (d) and (e): "The petitioner has presented no reason why he failed to file this petition by the October 1, 2014 deadline. Even if the court were to accept counsel's argument that the Connecticut Innocence Project has discovered information through the reexamination of DNA . . . that would support an actual innocence claim, the petitioner has failed to provide any 'good cause' for a delay of three years before filing the present petition, which, for the record, is notably absent of any mention of DNA or actual innocence."

The petitioner filed a motion for reconsideration, which was denied by the habeas court. The petitioner then filed a petition for certification to appeal, which the habeas court granted, and this appeal followed.

On appeal, the petitioner claims that the habeas court erroneously dismissed his third habeas petition pursuant to § 52-470 (d) and (e).[4] In support of this claim,

[3] As an alternative ground for dismissal, the habeas court also determined that the petitioner's third habeas petition was barred by the doctrine of res judicata pursuant to Practice Book § 23-29 (3).

[4] The petitioner also claims that the habeas court erroneously dismissed the third habeas petition pursuant to Practice Book § 23-29. See footnote 3 of this opinion. Because we conclude that the habeas court properly dismissed the petitioner's third habeas petition pursuant to § 52-470 (d) and (e), we need not address the petitioner's claim that the court erred in dismissing the petition pursuant to Practice Book § 23-29.

the petitioner argues that § 52-470 (f)[5] permits him to pursue his habeas claim, "regardless of the time limitations delineated in . . . § 52-570 (d)," because he asserted a claim of actual innocence at the show cause hearing.

We begin by setting forth the applicable standard of review. The petitioner's argument that the court should not have dismissed his third habeas petition pursuant to § 52-470 (d) and (e) because he had raised a claim of actual innocence "presents an issue of statutory interpretation over which we exercise plenary review in accordance with the plain meaning rule codified in General Statutes § 1-2z."[6] (Internal quotation marks omitted.) *Antonio A.* v. *Commissioner of Correction*, 205 Conn. App. 46, 63, A.3d (2021).

The petitioner claims that, because he asserted a claim of actual innocence before the habeas court in the show cause hearing, "the rebuttable presumption of untimeliness does not apply and [he] should be permitted to pursue his claims." More specifically, the petitioner argues that, "[i]nstead of dismissing [his] petition based on an erroneous statutory interpretation, the habeas court should [have been] concerned that evidence . . . that [may] lead to . . . [an] overturned . . . [conviction] . . . was . . . presented . . . ." We disagree.

The circumstances of the present case are remarkably similar to those of *Antonio A.*, in which the petitioner argued that, "because of the representation of

[5] General Statutes § 52-470 (f) provides in relevant part: "Subsections (b) to (e), inclusive, of this section shall not apply to (1) a claim asserting actual innocence . . . ."

[6] General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

his counsel that it was possible that she would pursue an actual innocence claim in an amended petition in the future, the court was obligated to delay the timing of the [good cause] hearing and to afford counsel sufficient time to determine whether they have a good faith basis to present such a weapon to survive possible dismissal." (Internal quotation marks omitted.) *Antonio A.* v. *Commissioner of Correction*, supra, 205 Conn. App. 63. In addressing the petitioner's argument in *Antonio A.*, this court held: "By its terms, § 52-470 (d) applies [i]n the case of *a petition filed* subsequent to a judgment on a prior petition challenging the same conviction, and it gives rise to a rebuttable presumption that the filing of *the subsequent petition* has been delayed without good cause if *such petition* is filed after the occurrences specified therein. . . . Pursuant to § 52-470 (e), [i]n a case in which the rebuttable presumption of delay under subsection . . . (d) of this section applies, the court, upon the request of the respondent, shall issue an order to show cause why *the petition* should be permitted to proceed. . . . Moreover, the statute provides that, [i]f . . . the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss *the petition*. . . .

"As the emphasized language reflects, once the respondent relies on the rebuttable presumption in § 52-470, the court's good cause inquiry is properly focused not on a hypothetical petition that the petitioner may file in the future but on the petition that has been filed by the petitioner." (Citation omitted; emphasis in original; internal quotation marks omitted.) Id., 64.

In the present case, it is undisputed that the petitioner's third habeas petition alleging ineffective assistance of counsel was not timely filed. For this reason, the respondent requested, and the habeas court held, a hearing to determine whether the petitioner had good cause for filing his petition beyond the October 1, 2014 statutory deadline. At this hearing, the petitioner, for

the first time, asserted a claim of actual innocence and argued that his assertion of this claim and the discovery of new evidence was enough to overcome the presumption that he lacked good cause for filing his third habeas petition beyond the deadline. The petitioner's third habeas petition, however, does not contain a claim of actual innocence, nor does it contain any reference to such a claim or to new evidence. As this court held in *Antonio A.*, the habeas court's "inquiry is properly focused not on a hypothetical petition that the petitioner may file in the future but on the petition that *has been filed* by the petitioner." (Emphasis added.) Id. Accordingly, the petitioner's assertion of a claim of actual innocence and reference to new evidence for the first time at the show cause hearing were irrelevant to the habeas court's determination of good cause in the present case because the third habeas petition contained only a claim of ineffective assistance of counsel.[7] Therefore, we conclude that the petitioner failed to overcome the rebuttable presumption that he lacked good cause for filing his petition beyond the statutory deadline and that the court properly dismissed the petitioner's third habeas petition pursuant to § 52-470 (d) and (e).

The judgment is affirmed.

In this opinion the other judges concurred.

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[7] We acknowledge, and the respondent agrees, that the petitioner is not precluded from filing an additional habeas petition to pursue a claim of actual innocence. See *Kelsey* v. *Commissioner of Correction*, 329 Conn. 711, 720 n.4, 189 A.3d 578 (2018) (holding that "§ 52-470 (f) . . . creates an exception to subsections (c) through (e) for petitioners asserting [claims of] actual innocence" (internal quotation marks omitted)).

LAUREL B. BELLERIVE *v.* THE GROTTO, INC., ET AL.
(AC 44138)

Cradle, Suarez and Bear, Js.

Syllabus

The defendant employer G Co. appealed to this court from the decision of the Compensation Review Board, which reversed the decision of the Workers' Compensation Commissioner concluding that G Co.'s workers' compensation insurance policy, issued by the defendant L Co., was still in effect on March 1, 2016, the date on which the plaintiff sustained a compensable injury while at work. In September, 2015, L Co. issued G Co. a workers' compensation insurance policy. In October, 2015, L Co. issued a cancellation notice with an effective cancellation date of November 3, 2015, and filed the cancellation notice with the National Council on Compensation Insurance. In February, 2016, L Co. sent G Co. an endorsement to the insurance policy. In April, 2016, G Co. was sent a prorated portion of its previously paid premium. The plaintiff filed a workers' compensation claim against G Co. in May, 2016, and L Co. denied coverage. After a hearing, the commissioner found that coverage was in place on the date of the plaintiff's injury and that the cancellation notice did not comply with certain statutory (§ 31-321) requirements. L Co. appealed to the board, which reversed the commissioner's decision. *Held* that the board properly determined that the insurance policy was cancelled effectively on November 3, 2015, and that there was no insurance coverage on the date of the plaintiff's injury: L Co.'s electronic notice of the cancellation to NCCI was sufficient to comply with the requirements that insurance companies notify the chairman of the Workers' Compensation Commission of cancellations pursuant to statute (§ 31-248), as § 31-248 authorized the commission to utilize NCCI to collect notices electronically of policy cancellations and was what the legislature intended when it amended § 31-248; moreover, the fact that G Co. may have believed that it still had insurance because L Co. did not refund the premium until after the date of the plaintiff's injury and sent inconsistent letters stating that the policy may be cancelled if it did not receive certain information, did not support a conclusion that the coverage under the policy continued notwithstanding the cancellation notice, as an employer's belief or understanding as to when coverage is terminated is irrelevant, and the fact that an endorsement was issued in February, 2016, was not inherently inconsistent with the termination of coverage as of November 3, 2015, because coverage remained in effect for any claims that may arise for injuries occurring prior to November 3, 2015.

Argued April 19—officially released August 10, 2021

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Fifth District finding that a certain insurance policy issued by the defendant Liberty Mutual Insurance Company provided coverage for the plaintiff's compensable injury, brought to the Compensation Review Board, which reversed the commissioner's decision, and the named defendant appealed to this court. *Affirmed.*

James P. Brennan, for the appellant (named defendant).

Christopher J. Powderly, for the appellee (defendant Liberty Mutual Insurance Company).

Opinion

BEAR, J. In this workers' compensation matter, the defendant employer, The Grotto, Inc. (Grotto), appeals from the finding and decision of the Compensation Review Board (board), reversing the decision of the Workers' Compensation Commissioner (commissioner), who had determined that Grotto's workers' compensation insurance policy, which was issued by the defendant Liberty Mutual Insurance Company (Liberty), was still in effect on March 1, 2016 (date of loss), the date on which the plaintiff, Laurel B. Bellerive, an employee of Grotto, sustained a compensable injury while at work. On appeal, Grotto claims that (1) Liberty's notice of cancellation of the policy pursuant to General Statutes § 31-348[1] was ineffective because it did not meet

[1] General Statutes § 31-348 provides in relevant part: "Every insurance company writing compensation insurance or its duly appointed agent shall report in writing or by other means to the chairman of the Workers' Compensation Commission, in accordance with rules prescribed by the chairman, the name of the person or corporation insured, including the state, the day on which the policy becomes effective and the date of its expiration, which report shall be made within fifteen days from the date of the policy. The cancellation of any policy so written and reported shall not become effective until fifteen days after notice of such cancellation has been filed with the chairman."

the requirements of General Statutes § 31-321,[2] (2) the board erred in its narrow reading of *Yelunin* v. *Royal Ride Transportation*, 121 Conn. App. 144, 994 A.2d 305 (2010), by adopting the rule that, "after the expiration of the fifteen day period following notice of cancellation only unequivocal evidence of an intent to continue or reinstate coverage would be sufficient to support the commissioner's conclusion that [Liberty's] coverage remained in force on March 1, 2016," (3) the commissioner concluded properly that he had the authority to determine common-law issues when they were incidentally necessary to the resolution of a claim arising under the Workers' Compensation Act (act), General Statutes § 31-275 et seq.,[3] and (4) common-law principles including negligence, misrepresentation, waiver, and estoppel, support the commissioner's finding that coverage was in place on the date of loss. We conclude that the policy was effectively cancelled on November 3, 2015, and, accordingly, we affirm the decision of the board.

The following undisputed facts are relevant to our resolution of this matter. On or about September 15, 2015, Grotto and Liberty entered into a contract for workers' compensation insurance (policy 045), which was scheduled to expire on August 20, 2016. Grotto paid an estimated premium when the policy was issued. On October 13, 2015, Liberty issued a cancellation notice with an effective cancellation date of November 3, 2015, accounting for the fifteen day waiting period required by § 31-348. Liberty's stated reason for the cancellation

[2] General Statutes § 31-321 provides in relevant part: "Unless otherwise specifically provided, or unless the circumstances of the case or the rules of the commission direct otherwise, any notice required under this chapter to be served upon an employer, employee or commissioner shall be by written or printed notice, service personally or by registered or certified mail addressed to the person upon whom it is to be served at the person's last-known residence or place of business."

[3] For the reasons set forth in part II of this opinion, we do not reach this issue.

was Grotto's failure to provide certain self-audit materials. That cancellation notice was filed electronically with the National Council on Compensation Insurance (NCCI).[4] After the November 3, 2015 cancellation date had passed, Liberty continued to send Grotto letters requesting the audit materials that had been the basis of the policy cancellation. Some of those letters indicated that policy 045 "may" be cancelled if the audit material was not promptly received, but others indicated that policy 045 had been cancelled on November 3, 2015. Additionally, on February 18, 2016, Liberty issued an endorsement to policy 045, noting that other than the endorsement changes to policy 045, all other terms and conditions of the policy remained unchanged.

On the March 1, 2016 date of loss, the plaintiff suffered a traumatic injury to her right hand that resulted in the amputation of her index, middle, and ring fingers. That injury was compensable and arose out of and in the course of her employment with Grotto. Subsequent to the claimant's injury, Grotto forwarded incomplete audit material to Liberty, which notified Grotto on March 15, 2016, that the audit materials remained incomplete. Thereafter, Grotto sent Liberty the rest of the necessary audit documentation. Grotto was ultimately sent a prorated portion of its previously paid premium on April 5, 2016.

The plaintiff filed a workers' compensation claim against Grotto on May 6, 2016. Liberty denied coverage for the March 1, 2016 date of loss on the basis of its NCCI cancellation dated November 3, 2015. Grotto had no other workers' compensation insurance. The Second Injury Fund (fund) was made a party to the claim pursuant to General Statutes § 31-355. The commissioner held

[4] The NCCI acts as the insurer's "duly appointed agent" pursuant to § 31-348 for the purpose of notice to the chairman of the Workers' Compensation Commission of policy cancellations.

a formal hearing and, by way of a finding and decision dated May 24, 2019, found that Liberty had coverage in place on the date of loss. The commissioner subsequently granted Grotto's motion to correct, making an additional finding that the cancellation notice to NCCI had not been made in accordance with § 31-321, and denied Liberty's motion to correct.

Liberty appealed to the board, which, by way of a June 10, 2020 decision, reversed the commissioner's decision, finding that there was no coverage in place on the date of loss. Grotto filed a motion for articulation. The board thereafter issued an articulation of its decision with an accompanying memorandum of law dated August 26, 2020. Grotto appealed to this court, but the fund did not appeal the board's decision. Additional facts will be set forth as necessary.

I

Grotto argues that Liberty's notice of cancellation to the NCCI pursuant to § 31-348 was ineffective because it did not meet the requirements of § 31-321. Specifically, Grotto argues that, although the board, in its memorandum of law in support of its ruling on the motion for articulation, "notes lengthy discussions by [the] Workers' Compensation Commission [commission] about § 31-348 . . . it does not state that any 'rules prescribed by the chairman' were adopted. Since the chairman prescribed no rule to overrule the § 31-321 service requirements . . . the [board] erred in failing to hold that the failure to send the notice of cancellation by certified mail rendered the cancellation ineffective." We disagree.

"As a threshold matter, we set forth the standard of review applicable to workers' compensation appeals. The principles that govern our standard of review in workers' compensation appeals are well established. The conclusions drawn by [the commissioner] from

the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board. . . . A state agency is not entitled, however, to special deference when its determination of a question of law has not previously been subject to judicial scrutiny." (Internal quotation marks omitted.) *Yelunin* v. *Royal Ride Transportation*, supra, 121 Conn. App. 148.

In *Yelunin*, this court stated that "[c]ancellation of a workers' compensation insurance policy occurs in accordance with § 31-348. *Dengler* v. *Special Attention Health Services, Inc.*, 62 Conn. App. 440, 459, 774 A.2d 992 (2001). Section 31-348 provides in relevant part that '[t]he cancellation of any [workers' compensation insurance policy] shall not become effective until fifteen days after notice of such cancellation has been filed with the chairman [of the commission].' The only precondition to effective cancellation contained in § 31-348 is that an insurer provide notification to the chairman of the . . . commission. Although notification to the chairman is surely governed by the mandate of § 31-321, there is no independent requirement within the workers' compensation statutory scheme that a workers' compensation insurer provide notification directly to an insured that would serve to trigger the mandate of § 31-321. Indeed, § 31-348 has been interpreted as protecting employees or anyone examining coverage records in the commissioner's office. In that regard, an employer's understanding as to when coverage terminated is largely irrelevant . . . . *Dengler* v. *Special Attention Health Services, Inc.*, supra, 461." (Emphasis omitted; internal quotation marks omitted.) *Yelunin* v. *Royal Ride Transportation*, supra, 121 Conn. App. 149.

Because Liberty was not required to notify Grotto before cancelling its workers' compensation policy, the only pertinent issue with respect to the effectiveness of Liberty's cancellation is whether Liberty's electronic notice to the NCCI pursuant to § 31-348 was sufficient in light of the requirements of § 31-321. We conclude that Liberty's electronic notice to the NCCI was sufficient.

In its memorandum of law in support of its ruling on Grotto's motion for articulation, the board provided a detailed history of No. 90-116 of the 1990 Public Acts (P.A. 90-116), which amended § 31-348 to address the possibility of electronic reporting of policy initiation and cancellation. The board found that it is clear from the legislative history of P.A. 90-116, which was adopted unanimously, that the commission may receive "certain information from the companies and/or their duly appointed agents by writing or other means which technically could mean electronic means, computer or otherwise," and that our legislature had the NCCI in mind when it referenced "duly appointed agents" in § 31-348. Indeed, the board noted that "[a] contract between the commission and NCCI to 'facilitate the exercise of its responsibilities under [§] 31-348' went into effect September 10, 1990," that "[s]ection [two], subsection [four] of this contract directed all insurers to provide notice of policy coverage and termination required under § 31-348 to NCCI, effective January 1, 1991, and that such notice requirements could be met by submission of a computer tape."[5]

We agree with the board that "the commission's longstanding policy of utilization of NCCI to collect notices electronically of compensation policy coverage and

[5] The board further noted that "[i]t is our understanding that NCCI has subsequently modified the manner in which it receives electronic data to conform with the advances in technology."

cancellations is entirely authorized by statute and, indeed, what the General Assembly voted unanimously to have th[e] commission implement." Grotto contends that the policy cancellation in this case was ineffective because there is no "rule prescribed by the chairman," pursuant to § 31-348, that expressly authorizes electronic submission of policy coverage and termination notices. We conclude that Grotto's argument is inconsistent with the intended meaning of § 31-348 as demonstrated by the legislative history set forth by the board. Accordingly, the board properly determined that policy 045 was cancelled effectively on November 3, 2015, and that there was no coverage in place on the date of loss.

II

Grotto argues both that the commissioner has "authority to determine a common-law issue when incidentally necessary to the resolution of a claim arising under the act," and that common-law principles, including negligence, misrepresentation, waiver, and estoppel, "support the commissioner's finding that policy 045 was in effect on March 1, 2016."[6] We conclude that because policy 045 was cancelled effectively prior to the date of loss, and because "an employer's understanding as to when coverage terminated is largely irrelevant"; (emphasis omitted; internal quotation marks omitted) *Yelunin* v. *Royal Ride Transportation*, supra, 121 Conn. App. 149; common-law theories cannot support a finding that coverage was in place on the date of loss under the facts of this case.[7]

[6] Additionally, Grotto argues that the commissioner had jurisdiction to consider evidence outside the records kept pursuant to § 31-348 when determining whether policy 045 was still in effect on the date of loss. That argument responds to one made by Liberty during the proceedings before the commissioner, but the board rejected Liberty's argument, and Liberty does not challenge that aspect of the board's decision in this appeal. Accordingly, we need not consider that claim.

[7] With that conclusion in mind, we need not determine whether the commissioner had jurisdiction to determine common-law issues under the facts of this case.

The board noted in its memorandum of decision that "[t]he commissioner did not specifically articulate the basis for his conclusion that the policy remained in force. He did, however, cite several factors which we must assume formed the factual basis for his conclusion: (1) that [Liberty] did not return any of the premium until after the work injury; (2) that [Liberty] issued an endorsement in February, 2016; and (3) that [Liberty] sent letters saying the policy 'may' be cancelled if [Grotto] did not provide certain information." We conclude that the board determined correctly that none of those facts supports a finding that coverage remained in place on the date of loss.

With respect to Liberty's return of the premium after the date of loss, the board stated that "for the failure to refund the premium to be evidence that Liberty intended its coverage to continue after November 3, 2015, the delay in making the refund would have to be inherently inconsistent with the claimed cancellation. We can find no evidence in the record to suggest that [Liberty] had an obligation to return the unused portion of the premium prior to completion of the various audits." We agree with the board and note that, although the finding that Liberty did not return any portion of the premium until after the date of loss could be relevant to Grotto's claim that it *believed* it still had insurance, "an employer's understanding as to when coverage terminated is largely irrelevant . . . ." (Emphasis omitted; internal quotation marks omitted.) *Yelunin* v. *Royal Ride Transportation*, supra, 121 Conn. App. 149.

With respect to the endorsement to the policy issued on February 28, 2016, we likewise agree with the board that, "[w]hile the receipt of an endorsement from [Liberty] may well have supported the employer's subjective belief that the policy was still in force, it could only be evidence that the policy actually was still in place if the issuance of such an endorsement was logically or

legally inconsistent with the notion that the policy had previously been cancelled. Since the cancellation of this policy did not render it void ab initio, [Liberty's] coverage remains in force and effect for any claims that might arise for injuries occurring prior to November 3, 2015. For the time prior to November 3, 2015, [Liberty] and [Grotto] still have a contractual relationship, with ongoing mutual obligations. As such, the mere fact an endorsement was issued in February, 2016, is not inherently inconsistent with termination of coverage as of November 3, 2015."

Finally, we are not persuaded that the allegedly inconsistent letters sent by Liberty in the months following the notice of cancellation could support a conclusion that the coverage under the policy actually did continue, notwithstanding the November cancellation notice. *Yelunin* is clear that the employer's subjective belief is immaterial, and the record lacks sufficient evidence that Liberty intended to continue or reinstate coverage after November 3, 2015.[8]

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

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[8] Grotto argues that the board erred by "adopting the rule" that "after the expiration of the fifteen day period following notice of cancellation only unequivocal evidence of an intent to continue or reinstate coverage would be sufficient to support the commissioner's conclusion that [Liberty's] coverage remained in force on March 1, 2016." Grotto argues that "[t]he burden of proof in workers' compensation cases is a preponderance of the evidence, not unequivocal evidence of intent." We conclude that, in light of *Yelunin*, Liberty's conduct would not support a finding that coverage remained in place on the date of loss even under the preponderance of the evidence standard.