UNITED CONCRETE PRODUCTS, INC. *v.* NJR CONSTRUCTION, LLC, ET AL.
(AC 42244)

Moll, Devlin and Flynn, Js.

Syllabus

The plaintiff subcontractor sought to recover damages for, inter alia, the breach of a contract it had entered into with the defendant N Co., the general contractor on a bridge construction project, which required the plaintiff to provide various concrete elements, including beams that would form the deck of the bridge. N Co. had contracted with the Department of Transportation to replace a bridge on Route 74 by August 31, 2016. To complete the work, N Co. was to detour traffic for no longer than eight weeks. The contract further specified that N Co. could earn incentive payments for each day Route 74 was reopened prior to the expiration of the eight week period. N Co. triggered the eight week period when it closed the bridge on June 13, 2016, which thereby required that Route 74 be reopened by August 8, 2016. To receive the maximum incentive payment, N Co. had to reopen Route 74 on or before July 19, 2016. Pursuant to statute (§ 49-41), N Co., as principal, also obtained from the defendant A Co., as surety, a bond that secured payment for labor and materials on the project, and made N Co. and A Co. jointly and severally liable for any unpaid balance on the subcontract. The plaintiff was required under the subcontract to deliver the concrete elements to N Co. at the jobsite on or before June 7, 2016, and N Co. was to pay the plaintiff the contract price. Relying on information the plaintiff provided about its production of the beams, N Co. scheduled delivery of the beams for June 29, 2016. On June 27, 2016, the plaintiff informed N Co. that the beams would not be ready for delivery as scheduled. The beams were thereafter delivered on July 26, 2016, and the project was completed on August 31, 2016. N Co. thereafter remitted partial payment to the plaintiff under the subcontract and refused to pay the remaining balance. In its complaint, the plaintiff alleged that N Co. breached the subcontract by failing to pay the remaining balance, and sought attorney's fees and interest pursuant to statute (§ 49-41a

(c)). The plaintiff also sought payment from A Co. under the bond pursuant to statute (§ 49-42). N Co. filed a two count counterclaim, alleging that the plaintiff breached the subcontract as a result of the delayed delivery of the beams and engaged in unfair trade practices in violation of the Connecticut Unfair Trade Practices Act (§ 42-110a et seq.). The trial court rendered judgment for the plaintiff on its breach of contract claim against N Co. The court found that the plaintiff was entitled to recover the contract amount because N Co. had ultimately accepted the beams. The court denied the plaintiff's claim under § 49-41a (c) for attorney's fees and interest from N Co., as well as its claim against A Co. for payment on the bond under § 49-42. The court reasoned that those claims were barred because the plaintiff materially breached the subcontract by virtue of its delayed delivery of the beams. The court also found that N Co. was entitled to damages and attorney's fees on its breach of contract counterclaim. It further determined that the plaintiff had not proven that N Co. failed to mitigate its damages. The court also determined that the plaintiff's false and misleading statements with respect to the readiness of the beams and the timing of their delivery constituted a violation of CUTPA. On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on its claim that the trial court's use of the June 7, 2016 delivery date to calculate N Co.'s damages on its breach of contract counterclaim was clearly erroneous; under the court's timeline, using June 7, 2016, as a start date, and combined with a thirty-six day period of completion pursuant to a nonaccelerated work pace, when construed as a worst case scenario, N Co. would have earned the maximum incentive payment by reopening Route 74 on or before July 19, 2016, as the court determined that N Co. was on track to earn the maximum incentive payment when it scheduled delivery on June 29, 2016, and was working at an accelerated pace at that time; moreover, the court determined, even if N Co. had worked at a nonaccelerated pace and had endured delays in rescheduling subcontractors and equipment rental, it would have reopened Route 74 by July 13, 2016, at the latest, had the beams been delivered on time; furthermore, as the beams necessarily were to be ready for delivery on or before June 7, 2016, to coincide with commencement of the road closure, the June 29, 2016 scheduled delivery date did not alter the plaintiff's contractual obligation to have the beams ready and available by June 7.
2. Contrary to the plaintiff's claim that the trial court improperly declined to find that N Co. failed to mitigate its damages by failing to work on the project at an accelerated pace once the beams were delivered, the record supported the court's finding that N Co. acted reasonably following delivery of the beams; N Co. already had lost the opportunity to earn any incentive payment and could not recover the expense of accelerating the work, it had lost its subcontractors in terms of when they would be able to come back to the project, and the acceleration

costs would have caused N Co. to sustain significant losses that may have been passed on to the plaintiff.

3. The trial court erred in rendering judgment for A Co. on the plaintiff's payment bond claim, which was based on the court's determination that the plaintiff could not prevail on its claim for interest and attorney's fees under § 49-41a (c): no language in the payment bond or in §§ 49-41a or 49-42 prevented A Co. from being held jointly and severally liable for the amount that N Co. was liable, even though the court did not award the plaintiff interest and attorney's fees pursuant to § 49-41a (c) against N Co., the court, in analyzing the plaintiff's claims against both defendants under § 49-41a while making no mention of § 49-42, effectively made A Co.'s liability under § 49-42 dependent on the plaintiff's succeeding against N Co. under § 49-41a; moreover, although the express terms of the payment bond made A Co. jointly and severally liable with N Co., the court concluded that N Co. was liable for the unpaid contract price, and, in the absence of N Co.'s having made payment for all materials and labor used or employed, A Co.'s obligation remained in full force and effect; accordingly, the judgment was reversed as to the plaintiff's payment bond claim, and the case was remanded for a new trial on that claim.

4. This court declined to address the plaintiff's claim, which was raised for the first time on appeal, that the trial court erred by failing to award it attorney's fees and interest pursuant to § 49-41a (c) on the ground that it did not substantially perform under the subcontract; the plaintiff failed to raise at trial its assertion that, because the court failed to recognize that N Co. had implicitly waived the subcontract's time is of the essence provision, the plaintiff was not contractually required to deliver the beams by June 7, 2016, and, thus, substantially performed by delivering the beams on July 26, 2016.

5. The plaintiff's claim that the trial court incorrectly concluded that its actions constituted unfair trade practices was unavailing: contrary to the plaintiff's contention that it merely breached the subcontract, and that there was no evidence of aggravating circumstances or that its statements were made with ill intent, the record supported the court's factual findings that the plaintiff's unfounded assurances that beam fabrication was progressing on schedule, and, later, that the beams were fabricated and available so that a delivery date could be scheduled, constituted prevarications that were clearly immoral, unethical, and/or unscrupulous; moreover, the plaintiff's false information deterred N Co. from taking remedial action and caused it to incur additional expense by leading it into making unnecessary and/or premature plans and expenditures for labor allocation, equipment procurement and an inutile construction schedule.

6. The trial court's award of attorney's fees and expenses to N Co. was not erroneous in light of the court's finding that the plaintiff failed to supply the beams with promptness and diligence, the subcontract having

expressly stated that N Co. had the right to recover attorney's fees and other expenses it incurred as a result of that failure.

Argued January 15, 2020—officially released September 21, 2021

Procedural History

Action to recover damages for, inter alia, the named defendant's alleged breach of a construction contract, and for other relief, brought to the Superior Court in the judicial district of Tolland, where the named defendant filed a counterclaim; thereafter, the case was tried to the court, *Sferrazza*, *J.*; subsequently, the plaintiff withdrew the complaint in part as to the defendant Aegis Security Insurance Company; judgment in part for the plaintiff on the complaint and for the named defendant on the counterclaim, from which the plaintiff appealed to this court. *Reversed in part*; *further proceedings*.

Eric M. Grant, with whom, on the brief, was *Melissa A. Scozzafava*, for the appellant (plaintiff).

Robert J. O'Brien, with whom was *Andrea L. Gomes*, for the appellees (defendants).

Opinion

MOLL, J. This appeal arises out of the delayed construction of a bridge over the Hockanum River on Route 74 in Vernon. The plaintiff subcontractor, United Concrete Products, Inc., appeals from the judgment of the trial court, rendered as to certain claims in favor of the defendants, NJR Construction, LLC (NJR), as general contractor, and Aegis Security Insurance Company (Aegis), as surety.[1] On appeal, the plaintiff claims that the trial court improperly: (1) calculated its award of damages to NJR on the breach of contract count of NJR's counterclaim; (2) concluded that NJR did not fail to mitigate its damages; (3) failed to render judgment

[1] The trial court rendered judgment in favor of the plaintiff on its breach of contract claim against NJR in the amount of $178,597.75, plus costs. NJR has not cross appealed from that judgment.

against Aegis on the plaintiff's payment bond claim and award interest and attorney's fees pursuant to General Statutes § 49-42; (4) failed to render judgment against NJR on the plaintiff's claim for interest and attorney's fees pursuant to General Statutes § 49-41a; (5) concluded that the plaintiff's conduct violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.; and (6) awarded attorney's fees to NJR pursuant to the parties' purchase order agreement. Addressing these various contentions, we agree with the plaintiff's third claim and reverse the judgment of the trial court only with respect to count three of the complaint. We affirm the judgment in all other respects.

The following facts, as found by the trial court or as undisputed in the record, are relevant to our resolution of this appeal. On December 14, 2015, the Department of Transportation (department) contracted with NJR to replace a bridge over the Hockanum River on Route 74 in Vernon for a contract amount of $1,982,181 (contract).[2] On February 3, 2016, NJR and the plaintiff signed a purchase order for certain concrete elements that would be used to construct the bridge (subcontract).[3] Pursuant to the subcontract, the plaintiff was to provide NJR with various concrete elements, including ten prestressed deck beams. The beams measured approximately four feet wide, one and three-quarters feet tall, and forty-six feet long, and would form the deck of the bridge. NJR agreed to pay the plaintiff a total of $244,672.50. The subcontract further provided that the concrete elements were to be delivered at the jobsite

[2] Pursuant to General Statutes § 49-41, NJR procured a payment bond, with Aegis as surety, in the amount of $1,982,181.

[3] Because this appeal involves two contracts, one between the department and NJR, and one between NJR and the plaintiff, we will refer to the former as the "contract" and the latter as the "subcontract" throughout this opinion for clarity.

"on or before June 7, 2016," and included a provision that time was of the essence.[4]

NJR's contract with the department specified that the project was to be completed within 161 days and that the failure to do so would cause NJR to incur liquidated damages in the amount of $2000 per day for every day that completion was delayed thereafter. The contract further contained incentive and disincentive provisions. In order to complete the replacement of the bridge, NJR was to detour the traffic on Route 74 for a period lasting no longer than eight weeks. The eight week time frame began when NJR closed the bridge and the detour took effect. In order to incentivize NJR to open the road as promptly as possible, the contract specified that NJR could earn incentive payments in the amount of $3000 per day for each day Route 74 was reopened prior to the expiration of the eight week period, with a maximum total incentive payment of $60,000. Conversely, if NJR failed to open the road at the conclusion of the eight week detour period, it would incur a disincentive penalty in the amount of $3000 per day for every day that it exceeded that time frame. Therefore, in order for NJR to receive the maximum incentive payment of $60,000, it would have had to reopen Route 74 to traffic following the replacement of the bridge at least twenty days prior to the expiration of the eight week period.

The department approved NJR's March 24, 2016 baseline schedule for the project, as required by the contract, which provided an itemized description of the work that was to take place over the course of the 161 day

[4] A handwritten note adjacent to the delivery date term in the subcontract indicates "date dependent upon timely turn around of shop drawings." The trial court's memorandum of decision indicates that the shop drawings were promptly approved and caused no attributable delay beyond the June 7, 2016 delivery date. Neither party makes any claim on appeal with respect to that finding.

construction period, through August 31, 2016.[5] NJR was incentivized to complete the bridge work ahead of that deadline. NJR triggered the eight week detour period when it closed the bridge to traffic on June 13, 2016, thereby requiring a reopening of Route 74 by August 8, 2016. Accordingly, pursuant to the incentive provision of the contract with the department, NJR would receive the entire $60,000 payment if it were to reopen Route 74 at least twenty days before August 8, 2016, i.e., on or before July 19, 2016.

NJR believed the project would be completed sufficiently in advance of the August 8 date, such that NJR would earn the maximum $60,000 incentive payment. That finding was supported by the following evidence. In March, 2016, the plaintiff had indicated that it was ready to commence production of the beams.[6] On May 5, 2016, Ryan Giguiere, NJR's project manager, e-mailed Joe Tenedine, the plaintiff's vice president of production, to inquire about the "pour schedule." Tenedine responded that "[t]he prestress will be complete by [May 27] if all strip strengths are met each day."[7] On the basis of that information, Giguiere scheduled delivery of the beams for June 29, 2016.

[5] The court found that the department wanted the closure of Route 74 to "coincide with the school vacation period in [the] summer," as the project required the closure of a main school bus route.

One hundred and sixty-one days from March 24, 2016, was August 31, 2016.

[6] The court explained: "It takes about one week to set up the mold for the beams. Then, prestressed steel strands and other items are inserted and inspected. Next, concrete is poured. This takes about two days. A crane removes the hardened beams and stores them until a dry fit is performed. Then, [the plaintiff] schedules delivery. The eight interior beams are identical and can be formed using the same mold. The two end beams require assembly of a different mold. . . . A dry fit seeks to ensure that all the beams match up correctly before shipment so that adjustments can be made at the fabrication yard rather than at the job site during attempts at installation."

[7] NJR states that the term "prestress" necessarily refers to the ten bridge beams because they were the only products supplied by the plaintiff that were prestressed. The only items in the subcontract that were delineated as "prestressed" were the ten beams. In addition, the plaintiff's briefing refers to the beams as "prestressed concrete beams."

On or about June 13, 2016, the date on which NJR closed Route 74, Giguiere had a telephone conversation with Chris Borkowski, the plaintiff's sales representative, who assured Giguiere that the beams were ready for a so-called dry fit test. As of that date, however, the beams had yet to be poured. On June 27, 2016, two days before the scheduled delivery, Giguiere received a telephone call from Brian McCutcheon, the plaintiff's dispatcher, who relayed to Giguiere that none of the ten beams would be ready for delivery on June 29, 2016. In response to this development, NJR obtained an emergency meeting with the department, which was attended by both Tenedine and Borkowski on behalf of the plaintiff. As it turned out, the first three beams cast by the plaintiff, on June 21, 25 and 28, 2016, respectively, failed state inspection and had to be recast—information that NJR claimed was not provided until the emergency meeting. On July 26, 2016, the plaintiff delivered the beams to the jobsite. The project was ultimately completed on August 31, 2016. The court concluded that the delay in delivering the beams caused NJR to lose the full amount of its potential incentive payment, to incur an adjusted disincentive penalty of $64,205,[8] incur additional expenses for the rescheduling of subcontractors and the rental of equipment, and to complete the project on August 31, well behind its proposed schedule. NJR remitted $66,074.75 under the subcontract to the plaintiff in November, 2016, and then refused to pay the remaining balance.

The plaintiff thereafter commenced this action against the defendants on February 6, 2017, by way of a four count complaint. Against NJR, the plaintiff asserted one count of breach of contract for NJR's alleged failure to pay the remaining balance of $179,500

[8] Because the project was completed twenty-three days after August 8, 2016, the court found that NJR incurred a disincentive penalty of $69,000. An amount of $4795 was later excused by the department.

on the subcontract (count one), and one count seeking attorney's fees and interest pursuant to § 49-41a (c) (count two). With respect to Aegis, the plaintiff asserted one count alleging entitlement to payment under the payment bond issued by Aegis on behalf of NJR, as principal, pursuant to § 49-42 (count three), and one count of breach of the covenant of good faith and fair dealing contained in the payment bond (count four).[9] In response, NJR, in addition to numerous special defenses, asserted a two count counterclaim against the plaintiff, alleging one count of breach of contract related to damages sustained as a result of the delayed delivery of the beams (count one), and one count of an alleged violation of CUTPA (count two). The plaintiff answered NJR's counterclaim and asserted as a special defense, inter alia, that NJR failed to mitigate its damages.

The matter was tried to the court on June 5, 6 and 7, 2018. Thereafter, the parties submitted posttrial briefs. Subsequently, the court rendered judgment in favor of the plaintiff on its breach of contract claim against NJR (count one of the complaint), in favor of NJR on the plaintiff's § 49-41a claim (count two of the complaint), in favor of Aegis on the plaintiff's § 49-42 claim (count three of the complaint), and in favor of NJR on its breach of contract and CUTPA claims (counts one and two of NJR's counterclaim). In its memorandum of decision, the court addressed the parties' various claims as follows: With respect to the plaintiff's claims against NJR, the court first applied the factors set forth in § 241 of the Restatement (Second) of Contracts[10] and

[9] At the start of trial, the plaintiff withdrew count four of its complaint against Aegis.

[10] Section 241 of the Restatement (Second) of Contracts provides: "In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

"(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

"(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

concluded that the plaintiff failed to substantially perform its contractual obligations to NJR and, consequently, materially breached the subcontract by virtue of its delayed delivery of the beams.[11] Although a material breach by one party to a contract ordinarily excuses the nonbreaching party from performance thereunder; see *Bernstein* v. *Nemeyer*, 213 Conn. 665, 672–73, 570 A.2d 164 (1990); the court found that, because NJR had ultimately accepted the beams by using them to complete the project, the plaintiff was entitled to recover the contract amount pursuant to article 2 of the Uniform Commercial Code (UCC).[12] Whereupon, the court awarded the plaintiff $178,597.75 plus costs on its breach of contract claim against NJR. Second, turning to the Little Miller Act claims, asserted against NJR and Aegis pursuant to §§ 49-41a and 49-42, respectively, the court concluded that the plaintiff's material breach barred its recovery under that statutory framework.

The court next addressed NJR's counterclaim. First, in light of the damages caused by the plaintiff's breach

"(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

"(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

"(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing." 2 Restatement (Second), Contracts § 241, p. 237 (1981).

[11] A fair reading of the court's memorandum of decision indicates that it concluded that the plaintiff materially breached its contract with NJR. "[S]ubstantial performance is the antithesis of material breach; if it is determined that a breach is material, or goes to the root or essence of the contract, it follows that substantial performance has not been rendered . . . ." (Internal quotation marks omitted.) *21st Century North America Ins. Co.* v. *Perez*, 177 Conn. App. 802, 815, 173 A.3d 64 (2017), cert. denied, 327 Conn. 995, 175 A.3d 1246 (2018).

[12] Specifically, the court applied General Statutes § 42a-2-607, which provides in relevant part: "(1) The buyer must pay at the contract rate for any goods accepted. . . ." NJR does not challenge the determination that it was required to pay the balance of the subcontract amount because it accepted the untimely delivery of the beams.

in failing to deliver the beams by June 7, 2016, the court concluded that NJR was entitled to recover on its breach of contract count in the amount of $138,900.44,[13] plus attorney's fees pursuant to the subcontract to be determined at a later date by agreement of the parties.[14] The court also concluded that the plaintiff had not proven that NJR failed to mitigate its damages because, after it was determined that NJR could not realize the full potential of the incentive payments, NJR was required only to employ reasonable efforts to mitigate its damages, which it had done. Second, the court concluded that Tenedine's and Borkowski's false and misleading statements with respect to the readiness of the beams and the timing of their delivery constituted a violation of CUTPA, whereupon the court awarded NJR compensatory damages in the amount of $14,700, which it considered to be reflected in its award on the breach of contract count of NJR's counterclaim. The court declined to award additional attorney's fees under CUTPA in light of its award of fees pursuant to the subcontract. This appeal followed. Additional facts and procedural history will be set forth as necessary.

Before addressing the merits of the plaintiff's claims, we note that several claims involve challenges to the trial court's factual findings. Therefore, we set forth the standard of review generally applicable to our review of those types of challenges. "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

[13] This amount included a disincentive penalty of $64,205, the loss of a $60,000 incentive payment, and additional equipment rental fees of $14,695.44.

[14] Following the entry of judgment and the plaintiff's filing of this appeal, NJR filed a motion for attorney's fees. The plaintiff filed a motion to stay the adjudication of the motion for attorney's fees pending the resolution of this appeal, which was granted by the trial court.

is left with the definite and firm conviction that a mistake has been committed. . . . Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Proctor*, 324 Conn. 245, 258–59, 152 A.3d 470 (2016).

I

The plaintiff's first claim, which relates to the breach of contract count of NJR's counterclaim, presents a challenge to the trial court's factual finding that the plaintiff's failure to deliver the beams to NJR by June 7, 2016, caused a delay in the completion of the project until August 31, 2016. Specifically, the plaintiff contends that the court's use of the date June 7, 2016—rather than June 29, 2016 (the date the beams were actually scheduled for delivery)—to measure damages was clearly erroneous and overinflated NJR's damages award on count one of its counterclaim by including the maximum incentive payment of $60,000. In response, NJR contends that the use of June 7, 2016, was not clearly erroneous because the subcontract specified a delivery date of June 7, 2016, and, in the alternative, it argues that any error was harmless because the evidence demonstrated that, had the plaintiff delivered the beams on June 29, 2016, NJR would have been able to reopen the road by July 19, 2016, in order to earn the maximum incentive payment. For the reasons that follow, we conclude that the court's use of June 7, 2016, inasmuch as it underpins the court's damages calculation, was not clearly erroneous.

The following additional factual findings are relevant to our resolution of this claim. At the outset of its

memorandum of decision, the court emphasized the time sensitive nature of the project, referring to the 161 day completion requirement and the time restricting provision of the contract regarding the road closure. The court observed that, with respect to the incentive provision of the contract, NJR was "[o]bviously" eager to earn the maximum amount. NJR devised a fast-track work schedule to achieve this goal—a goal of which the plaintiff was distinctly aware. The court recognized that the subcontract specified a delivery date of no later than June 7, 2016. NJR ultimately scheduled delivery of the beams for June 29, 2016. With that delivery date scheduled, NJR anticipated earning the maximum $60,000 incentive payment and reopening Route 74 "well ahead" of the August 8, 2016 deadline. The plaintiff did not deliver the beams until July 26, 2016, and NJR completed the work on August 31, 2016.

The court found that, once the delay in delivery from June 7, 2016, to July 26, 2016, occurred, NJR reasonably abandoned its costly fast-track approach because it would no longer be able to earn any incentive payment.[15] In determining damages, the court explained that, "[e]ven working at the nonaccelerated pace and enduring delays by having to reschedule subcontractors and equipment rental, NJR would have reopened Route 74 by July 13, 2016, at the latest, had [the plaintiff] delivered the beams on time." That time frame was calculated by utilizing June 7, 2016, as a start date and adding thirty-six days, representing the actual time of completion once the beams were delivered.

The plaintiff argues that the court's reliance on June 7, 2016, in its calculation of damages was clearly erroneous because NJR scheduled the beams' actual delivery

[15] The court found that NJR had "sustained losses by virtue of [the] rescheduling of other subcontractors and added equipment rental costs" totaling $22,320. The court also stated that the fast-track approach required NJR to provide added manpower and overtime wages, expenditures that NJR reasonably did not make following the seven week delay in delivery.

for June 29, 2016, which would necessitate a finding that Route 74 would not reopen until August 4, 2016 (i.e., thirty-six days later)—a date well after July 19, 2016, the date by which NJR would have had to reopen Route 74 in order to earn the full incentive payment. We disagree.

Applying the principles articulated previously in this opinion governing our review of this claim, we highlight the following facts in evidence. NJR and the plaintiff signed the subcontract on February 3, 2016. Paragraph 4 thereof, titled "TIME," provides: "Supplier shall immediately begin work to insure that delivery of the Products shall be made in accordance with the requirements of the Schedule. Time is of the essence of this Purchase Order, and it is essential that the Products be provided to Purchaser in a manner and in accordance with the Schedule so as to permit Purchaser to complete construction of the Project in the fastest and most efficient manner possible. The dates indicated in Exhibit A may be modified only in accordance with the written consent of the Purchaser." This provision expressly referred to the delivery schedule set forth in exhibit A, which provided in part that the department "has scheduled the closure of Route 74 for the period from June 7, 2016 to August 26, 2016. Accordingly, Supplier's products are to be delivered to the jobsite on or before June 7, 2016."

Construing the subcontract's provisions together, we conclude that the beams necessarily were to be *ready for delivery* on or before June 7, 2016, to coincide specifically with the commencement of the scheduled closure of Route 74, which the subcontract indicated was scheduled by the department for the period June 7, 2016, to August 26, 2016. That NJR ultimately requested delivery of the beams for June 29, 2016, instead of June 7, 2016, did not alter the plaintiff's contractual obligation to have the beams ready and available for NJR by June 7, 2016, ergo any date requested after June 7, 2016. For that reason, the plaintiff improperly focuses its argument

on the date NJR ultimately requested for the actual delivery of the beams, rather than the language of the subcontract, the intentions and expectations of the parties, and the practical realities of the project that led to the scheduling of the June 29, 2016 delivery date. The trial court utilized June 7, 2016, as the starting date to conclude that, "[e]ven working at the nonaccelerated pace and enduring delays by having to reschedule subcontractors and equipment rental, *NJR would have reopened Route 74 by July 13, 2016, at the latest*, had [the plaintiff] delivered the beams on time." (Emphasis added.)

On the basis of our careful review of the evidence, we construe the court's timeline using June 7, 2016, as a start date, combined with a thirty-six day period of completion pursuant to a *nonaccelerated* working pace, as an ostensible worst case scenario.[16] Under that scenario, NJR would have earned the maximum incentive payment by reopening Route 74 on or before July 19, 2016. Because the court also determined that NJR was on track to earn the maximum incentive payment when it scheduled the beams to be delivered on June 29, 2016, *and* that NJR was working at an accelerated pace at that time, we cannot conclude that the court's use of June 7, 2016, to support its damages calculation was clearly erroneous.[17]

[16] This conclusion is further bolstered by the testimony of Nicholas Mancini, NJR's owner, that the beams were to be ready by June 7, 2016, so that NJR could then schedule their delivery to the jobsite.

[17] Even if the use of June 7, 2016, rather than June 29, 2016, was clearly erroneous, it was harmless because, under either date, NJR was in line to receive the maximum incentive payment. "Where . . . some of the facts found [by the trial court] are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous findings to see whether they were harmless, not only in isolation, but also taken as a whole. . . . If, when taken as a whole, they undermine appellate confidence in the court's [fact-finding] process, a new hearing is required." (Internal quotation marks omitted.) *LeBlanc* v. *New England Raceway, LLC*, 116 Conn. App. 267, 281, 976 A.2d 750 (2009). A trial court's decision that "rests on a clearly erroneous factual finding" requires a new trial. *Downing* v. *Dragone*, 184 Conn. App. 565, 573, 195 A.3d 699 (2018).

II

The plaintiff next claims that the court improperly declined to find that NJR failed to mitigate its damages by failing to work on the project at an accelerated pace once the beams were actually delivered on July 26, 2016.[18] We are not persuaded.

As we have explained, the court found that NJR was on track to earn the maximum incentive payment, achieved by opening Route 74 on or before July 19, 2016, when it scheduled delivery of the beams for June 29, 2016. Although the court did not make a particular finding that the road would have been opened in twenty days—between June 29 and July 19, 2016—the evidence presented at trial was sufficient to do so. Giguiere explained, in detail, the tasks that NJR was to undertake had the beams arrived on June 29, and the amount of time needed for each task. For example, on June 14, 2016, Giguiere requested the installation of the bridge's handrail during the week of July 11, 2016. According to Giguiere, this was one of the last items to be completed prior to opening Route 74. Several of the activities following the delivery of the beams could have been completed simultaneously. Indeed, he testified that NJR was on track to open the bridge on July 18, 2016. Therefore, even if the court's use of June 7, 2016, was clearly erroneous, it was harmless because had it used the later date, it could have reached the same conclusion. Put differently, under *either* date, the court had sufficient evidence to reach the same result with respect to NJR's earning of the maximum incentive payment. We are not persuaded, then, that the error was harmful to the plaintiff.

The plaintiff relatedly contends that NJR failed to prove its damages with reasonable certainty. Specifically, the plaintiff argues that, with respect to the incentive payment, there was no evidence that NJR could have opened Route 74 in twenty days. The plaintiff also points to the fact that the project schedules did not reflect a July 19, 2016 completion date and that NJR did not proffer a schedule analysis at trial. We reject these arguments. The court was presented with evidence that NJR was set to earn the maximum incentive payment had the beams been timely delivered. In addition, because NJR was incentivized to recoup that payment, and because there was testimony indicating that NJR could work at a faster pace than reflected in the project schedules, the plaintiff's argument, which hinges on the dates provided in the schedules, is not convincing.

Finally, the plaintiff avers that NJR failed to prove that the disincentive penalty it incurred was caused by the plaintiff's delayed delivery on July 26, 2016, because NJR failed to accelerate its work once delivery occurred. That contention fails for the reasons set forth in part II of this opinion.

[18] Although the plaintiff introduces this claim in its principal appellate brief by stating that "the trial court committed legal error in failing to apply the duty to mitigate to NJR," the plaintiff does not provide any support for the notion that the court refused to apply failure to mitigate principles or failed to otherwise recognize the plaintiff's second special defense to both counts of NJR's counterclaim, alleging a failure to mitigate. Indeed, the trial

"We have often said in the contracts and torts contexts that the party receiving a damage award has a duty to make reasonable efforts to mitigate damages. . . . What constitutes a reasonable effort under the circumstances of a particular case is a question of fact for the trier. . . . Questions of fact are subject to the clearly erroneous standard of review. . . . To claim successfully that the plaintiff [or counterclaim plaintiff] failed to mitigate damages, the defendant [or counterclaim defendant] must show that the injured party failed to take reasonable action to lessen the damages; that the damages were in fact enhanced by such failure; and that the damages which could have been avoided can be measured with reasonable certainty. . . . Furthermore, [t]he duty to mitigate damages does not require a party to sacrifice a substantial right of his own in order to minimize a loss." (Citations omitted; internal quotation marks omitted.) *Sun Val, LLC* v. *Commissioner of Transportation*, 330 Conn. 316, 334, 193 A.3d 1192 (2018). The burden to prove the failure to mitigate damages rests with the breaching party. *Webster Bank, N.A.* v. *GFI Groton, LLC*, 157 Conn. App. 409, 424, 116 A.3d 376 (2015).

The trial court found the following additional facts. Once the plaintiff delivered the beams on July 26, 2016, NJR abandoned its fast-track approach to the project because it was no longer able to realize any incentive payment. The court stated that it "[did] not fault NJR for its decision to adopt a nonaccelerated work schedule" and recognized that NJR had been investing additional resources to maintain the accelerated work schedule. Applying the principles regarding the duty to mitigate damages, the court found that NJR slowed its

court expressly applied such principles and found that the plaintiff (as the counterclaim defendant) had failed to prove a failure to mitigate on the part of NJR. What the plaintiff actually challenges on appeal are the trial court's findings of fact. We consider the plaintiff's claim accordingly.

pace of work when it determined that it could not realize any incentive payment as a result of the plaintiff's delayed delivery of the beams and that NJR thereafter "employed a more typical effort to complete the project." The court concluded that NJR's efforts to complete the project were reasonable, NJR was not required to use extraordinary and more expensive methods following the plaintiff's belated delivery of the beams, and, as a result, NJR had not failed to mitigate its damages.

In support of its claim, the plaintiff argues that NJR should have accelerated its work following the delivery of the beams in order to minimize the disincentive penalty that it ultimately incurred. This argument is unavailing. As previously explained, a party need only employ reasonable efforts to mitigate its damages, and, on appellate review, we will disturb the trial court's findings to that end only if they were clearly erroneous. *Sun Val, LLC* v. *Commissioner of Transportation*, supra, 330 Conn. 334. The record provides ample support for the court's finding that NJR acted reasonably following delivery of the beams. For instance, Nicholas Mancini, the owner of NJR, testified that accelerating the work between July 26, 2016 (when the plaintiff delivered the beams) and August 19, 2016 (when the department requested that NJR reaccelerate its work) would have been akin to "throw[ing] good money after bad" because NJR already had lost the opportunity to earn any incentive payment. Additionally, Mancini testified that NJR could not recover the expense of accelerating the work and that it "had lost [its] subcontractors as to when they would be able to come back to the project." Giguiere also explained that the acceleration costs would have caused NJR to sustain significant losses—losses that may have been passed on to the plaintiff. Furthermore, NJR sent a letter to the department requesting relief from the entire disincentive penalty in the amount of $66,000, a request that was granted in part. See footnote 8 of this opinion.

In sum, because there was evidence in the record to support the trial court's finding that NJR acted reasonably with respect to the completion of the project following the delayed delivery of the beams, the plaintiff's claim fails.

III

The plaintiff's third claim is that the court improperly rendered judgment in favor of Aegis on the plaintiff's payment bond claim pursuant to the Little Miller Act, specifically, § 49-42 (i.e., count three of the complaint), solely on the basis that the plaintiff could not prevail on its claim for interest and attorney's fees under § 49-41a (c). We agree.

The following additional facts and procedural history are relevant to our resolution of this claim. Count three of the plaintiff's complaint alleged in part that, on or about December 14, 2015, Aegis executed and delivered a payment bond on behalf of NJR, as principal, to secure payment for labor and materials supplied to the project. The payment bond provided in relevant part: "That NJR Construction, LLC . . . as Principal, and Aegis Security Insurance Company . . . as Surety, are firmly bound and held unto the State of Connecticut as Obligee, in the sum of One Million Nine Hundred Eighty Two Thousand One Hundred Eighty One Dollars and No Cents ($1,982,181.00) for the payment whereof said Principal binds itself, its successors and assigns, himself, his heirs, executors, administrators and assigns, and said Surety binds itself, its successors and assigns, jointly and severally firmly by these presents. . . . NOW, THEREFORE, if [NJR] shall make payment for all materials and labor used or employed in the performance of such contract, to the extent, and in the manner required by the contract or by the General Statutes of Connecticut, as revised, then this obligation shall be null and void, otherwise it shall remain and be in full

force and effect." The plaintiff further alleged that, on or about September 27, 2016, it put Aegis on notice of its claim against the payment bond in the amount of $252,020.60, and that, since such notice, it received a partial payment from NJR, leaving an unpaid balance of $179,500. The plaintiff alleged that Aegis was liable to it, pursuant to § 49-42, for that amount, plus interest, costs, and attorney's fees. It is undisputed that Aegis issued a payment bond in favor of NJR, as principal, in connection with the project and that the plaintiff complied with the notice requirements of § 49-42 with regard to its claim against the payment bond.

In its memorandum of decision, the trial court analyzed the plaintiff's Little Miller Act claims against NJR in count two (pursuant to § 49-41a) and against Aegis in count three (pursuant to § 49-42) together, making no mention of § 49-42 and focusing only on the rights and obligations set forth in § 49-41a. The court concluded that, because the plaintiff had materially breached the contract with NJR, it did not "substantially perform" its work pursuant to § 49-41a (c), and "[c]onsequently, [the plaintiff] cannot prevail on the second *and third* counts of its complaint . . . ." (Emphasis added.) According to the court, despite the fact that the plaintiff could recover from NJR under the UCC as a result of NJR's acceptance of the beams, the plaintiff could not recover from Aegis against the payment bond because it failed to substantially perform under the contract.

Our resolution of the plaintiff's claim requires us to interpret the relevant provisions of the Little Miller Act, specifically, §§ 49-41a and 49-42. Accordingly, we exercise plenary review. See, e.g., *Trinity Christian School* v. *Commission on Human Rights & Opportunities*, 329 Conn. 684, 694, 189 A.3d 79 (2018) (questions of statutory interpretation command plenary review). "The process of statutory interpretation involves the

determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Boisvert* v. *Gavis*, 332 Conn. 115, 141–42, 210 A.3d 1 (2019).

In addition, because the payment bond executed by Aegis is a contract, the following principles of contract interpretation apply to our interpretation of the bond. "The standard of review for the interpretation of a contract is well established. Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary]. . . . If the language of [a] contract is susceptible to more than one reasonable interpretation, [however] the contract is ambiguous. . . . Ordinarily, such ambiguity requires the use of extrinsic evidence by a trial court to determine the intent of the parties, and, because such a determination is factual, it is subject to reversal on appeal only if it is clearly erroneous." (Internal quotation marks omitted.) *Joseph General Contracting, Inc.*

v. *Couto*, 317 Conn. 565, 575, 119 A.3d 570 (2015). Further, "[w]here a statutory bond is given, the provisions of the statute will be read into the bond. . . . If the law has made the instrument necessary, the parties are deemed to have had the law in contemplation when the contract was executed." (Citations omitted; internal quotation marks omitted.) *New Britain Lumber Co.* v. *American Surety Co.*, 113 Conn. 1, 5–6, 154 A. 147 (1931).

"It is a fundamental precept of suretyship law that the liability of the surety is conditioned on accrual of some obligation on the part of the principal; the surety will not be liable on the surety contract if the principal has not incurred liability on the primary contract. . . . In the absence of limitations or restrictions contained in the (surety) contract, the liability of the surety is coextensive with that of the principal. . . . The surety's promise is in the same terms as that of the principal and the consequent duty similar and primary . . . ." (Citations omitted; internal quotation marks omitted.) *Star Contracting Corp.* v. *Manway Construction Co.*, 32 Conn. Supp. 64, 66, 337 A.2d 669 (1973). Stated differently, a surety stands in the principal's shoes and may assert defenses that are available to the principal. *Board of Supervisors* v. *Southern Cross Coal Corp.*, 238 Va. 91, 96, 380 S.E.2d 636 (1989).

In general terms, the Little Miller Act, set forth in General Statutes §§ 49-41 through 49-43, "provide[s] for the furnishing of bonds guaranteeing payment (payment bonds) on public works construction projects, [and was] enacted to protect workers and materials suppliers on public works projects who cannot avail themselves of otherwise available remedies such as mechanic's liens. . . . Section 49-41 requires that the general contractor provide a payment bond with surety to the state or governmental subdivision, which bond shall guarantee payment to those who supply labor and materials on a public works project. . . . Section 49-42 provides

that any person who has performed work or supplied materials on a public works project, but who has not received full payment for such materials or work, may enforce his right to payment under the payment bond.

"This legislation, known as the Little Miller Act (act), was patterned after federal legislation popularly known as the Miller Act; [40 U.S.C. § 3131 et seq., formerly] 40 U.S.C. §§ 270a through 270d; and, therefore, [our Supreme Court has] regularly consulted federal precedents to determine the proper scope of our statute. . . . The federal precedents, like our own, counsel liberal construction of statutory requirements other than those relating to specific time constraints. . . . As the United States Supreme Court has stated, the federal Miller Act is highly remedial in nature . . . [and] entitled to a liberal construction and application in order properly to effectuate the [legislative] intent to protect those whose labor and materials go into public projects." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Blakeslee Arpaia Chapman, Inc.* v. *EI Constructors, Inc.*, 239 Conn. 708, 714–16, 687 A.2d 506 (1997). "The very purpose of a surety bond under the Miller Act, and indeed, generally, is to ensure that claimants who perform work are paid for the work in the event and even if the principal does not pay." *United States on Behalf of Kitchens To Go* v. *John C. Grimberg Co.*, 283 F. Supp. 3d 476, 483 (E.D. Va. 2017).

Section 49-41 (a) provides in relevant part: "Each contract exceeding one hundred thousand dollars in amount for the construction . . . of any public building or public work of the state . . . shall include a provision that the person to perform the contract shall furnish to the state . . . on or before the award date, a bond in the amount of the contract which shall be binding upon the award of the contract to that person, with a surety or sureties satisfactory to the officer awarding the contract, *for the protection of persons*

supplying labor or materials in the prosecution of the work provided for in the contract for the use of each such person . . . .'' (Emphasis added.)

Section 49-41a relates to the enforcement of payment obligations pursuant to a public works contract by a general contractor to a subcontractor and by a subcontractor to its subcontractors. Subsection (a) thereof provides in relevant part: ''When any public work is awarded by a contract for which a payment bond is required by section 49-41, the contract for the public work shall contain the following provisions: (1) A requirement that the general contractor, within thirty days after payment to the contractor by the state or a municipality, pay any amounts due any subcontractor, whether for labor performed or materials furnished, when the labor or materials have been included in a requisition submitted by the contractor and paid by the state or a municipality . . . .''

Section 49-41a (c), on which the trial court relied in its disposition of the plaintiff's § 49-42 claim against Aegis, provides in relevant part: ''If payment is not made by the general contractor . . . in accordance with such requirements, the subcontractor shall set forth his claim against the general contractor . . . through notice by registered or certified mail. Ten days after the receipt of that notice, the general contractor shall be liable to its subcontractor . . . for interest on the amount due and owing at the rate of one per cent per month. In addition, the general contractor, upon written demand of its subcontractor . . . shall be required to place funds in the amount of the claim, plus interest of one per cent, in an interest-bearing escrow account in a bank in this state, provided the general contractor . . . may refuse to place the funds in escrow o*n the grounds that the subcontractor has not substantially performed the work according to the terms of his or its employment*. In the event that such general contractor . . .

refuses to place such funds in escrow, *and the party making a claim against it under this section is found to have substantially performed its work in accordance with the terms of its employment in any arbitration or litigation to determine the validity of such claim*, then such general contractor . . . shall pay the attorney's fees of such party." (Emphasis added.)

We pause at this juncture to emphasize that the term "substantially performed" appears in two places in § 49-41a (c). First, the term appears in connection with a general contractor's (or subcontractor's) ability to "refuse to place the funds in escrow on the grounds that the subcontractor [making the claim] has not *substantially performed* the work according to the terms of his or its employment." (Emphasis added.) Second, the term appears in connection with a subcontractor's ability to recover attorney's fees under § 49-41a (c), namely, when the principal refuses to place such funds in escrow and the subcontractor "is found to have *substantially performed* its work in accordance with the terms of its employment in any arbitration or litigation to determine the validity of such claim . . . ." (Emphasis added.) There is no language in § 49-41a (c) or § 49-42 to suggest that either of these provisions was intended to be engrafted into § 49-42.

Section 49-42 (a), pursuant to which the plaintiff brought its claim against Aegis, provides in relevant part: "(1) Any person who performed work or supplied materials for which a requisition was submitted to . . . the awarding authority and who does not receive full payment for such work or materials within sixty days of the applicable payment date provided for in subsection (a) of section 49-41a . . . may enforce such person's right to payment under the bond by serving a notice of claim on the surety that issued the bond and a copy of such notice to the contractor named as principal in the bond not later than one hundred eighty days

after the last date any such materials were supplied or any such work was performed by the claimant. . . . Not later than ninety days after service of the notice of claim, the surety shall make payment under the bond and satisfy the claim, or any portion of the claim which is not subject to a good faith dispute, and shall serve a notice on the claimant denying liability for any unpaid portion of the claim. The surety's failure to discharge its obligations under this section shall not be deemed to constitute a waiver of defenses the surety or its principal on the bond may have or acquire as to the claim, except as to undisputed amounts for which the surety and claimant have reached agreement. If, however, the surety fails to discharge its obligations under this section, then the surety shall indemnify the claimant for the reasonable attorneys' fees and costs the claimant incurs thereafter to recover any sums found due and owing to the claimant. . . .

"(2) If the surety denies liability on the claim, or any portion thereof, the claimant may bring an action upon the payment bond in the Superior Court for such sums and prosecute the action to final execution and judgment. . . . In any such proceeding, the court judgment shall award the prevailing party the costs for bringing such proceeding and allow interest . . . computed from the date of service of the notice of claim, provided, for any portion of the claim which the court finds was due and payable after the date of service of the notice of claim, such interest shall be computed from the date such portion became due and payable. The court judgment may award reasonable attorneys' fees to either party if upon reviewing the entire record, it appears that either the original claim, the surety's denial of liability, or the defense interposed to the claim is without substantial basis in fact or law. . . ."

Section 49-42 explains the enforcement procedure a subcontractor must undertake to recover against a

payment bond. As set forth in subdivision (1) of subsection (a), a subcontractor may enforce its right to payment under a bonded public works contract by serving a notice of claim on the surety not later than 180 days after the last delivery of materials or completion of work. The surety is required to satisfy the claim within ninety days of service of the notice, *unless* the claim, or any portion thereof, is subject to a good faith dispute. If the surety fails to comply with these provisions, and the subcontractor thereafter initiates proceedings to recover the amounts owed from the surety, it must indemnify the subcontractor for reasonable attorney's fees and costs. General Statutes § 49-42 (a) (1). Subdivision (2) explains how a subcontractor may recover from the surety in the event the surety denies liability on the claim.

As this court stated in *Blakeslee Arpaia Chapman, Inc.* v. *EI Constructors, Inc.*, 32 Conn. App. 118, 628 A.2d 601 (1993), although remedies pursuant to §§ 49-41a and 49-42 "may be pursued jointly in a single action against both the general contractor and the surety, these two statutory rights are separate and distinct, designed by the legislature to accomplish separate and distinct ends." Id., 128; see also *Nor'easter Group, Inc.* v. *Colossale Concrete, Inc.*, 207 Conn. 468, 482, 542 A.2d 692 (1988) (notice provision of § 49-41a (b) "is not . . . a statutory prerequisite to the initiation of suit by a subcontractor under § 49-42, a remedy that existed long before § 49-41a (b) came on the scene").

With the relevant statutory framework and language of the payment bond in mind, we conclude that the court erred in rendering judgment in favor of Aegis on the plaintiff's § 49-42 claim. As an initial matter, we observe that, although *Blakeslee Arpaia Chapman, Inc.* v. *EI Constructors, Inc.*, supra, 32 Conn. App. 128, instructs that a subcontractor's statutory rights against its general contractor and the surety serve distinct ends,

by analyzing the plaintiff's Little Miller Act claims against NJR and Aegis together under § 49-41a, while making no mention of § 49-42, the court effectively made Aegis's liability under § 49-42 dependent on the plaintiff's succeeding against NJR under § 49-41a. However, there is no language in the payment bond or the Little Miller Act to prevent Aegis from being held jointly and severally liable for the amount for which NJR, as the bonded principal, is liable under the UCC, even though the court did not award the plaintiff interest and attorney's fees pursuant to § 49-41a (c) against NJR. Instead, pursuant to the express terms of the payment bond, Aegis is jointly and severally liable with NJR for the unpaid balance of the subcontract. The court concluded that NJR was liable under the UCC for the "unpaid contract price" and rendered judgment accordingly, in favor of the plaintiff, on count one in the amount of $178,597.75 plus costs.[19] In the absence of NJR's "mak[ing] payment for all materials and labor used or employed in the performance of" the subcontract, as stated in the payment bond, Aegis' obligation remains in full force and effect. Moreover, as explained previously in this opinion, neither § 49–41a (c) nor § 49-42 contains any language to suggest that the substantial performance language of the former applies to a subcontractor's claim under the latter against a surety.[20] To reach a contrary conclusion would contradict the plain meaning of § 49-42 and would run afoul of the highly remedial nature of the Little Miller Act, which serves to protect those whose materials are used in

[19] We iterate that no cross appeal was taken from the judgment as to count one.

[20] Section 49-42 does, however, permit a surety to withhold payment on a claim that is subject to a good faith dispute. In the present case, the trial court made no findings as to whether the plaintiff's claim for payment under the bond was, in fact, such a claim. On remand, any adjudication by the court of count three shall express a finding as to what portion, if any, of the plaintiff's claim against Aegis was subject to a good faith dispute.

public projects. On the basis of the foregoing, we conclude that the court erred in rendering judgment in favor of Aegis on the plaintiff's § 49-42 claim on the basis that the plaintiff could not prevail on its claim for interest and attorney's fees under § 49-41a (c). Accordingly, we reverse the judgment as to count three and remand the case for a new trial on that count only.[21]

IV

The plaintiff's fourth claim is that, in connection with count two of its complaint, which was directed against NJR, the court erred by failing to award it attorney's fees and interest pursuant to § 49-41a on the ground that it failed to substantially perform under the subcontract. The plaintiff limits this claim to its contention that the trial court erred by failing to recognize that NJR had implicitly waived the "time is of the essence" provision in the subcontract. In response, NJR contends, inter alia, that the plaintiff's claim is not reviewable because the plaintiff raises it for the first time on appeal. We agree with NJR.

"Our appellate courts, as a general practice, will not review claims made for the first time on appeal. . . . [A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court. . . . The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the precise matter on which its decision is being asked." (Internal quotation marks omitted.) *IP Media Products, LLC* v. *Success, Inc.*, 191 Conn. App. 413, 421, 215 A.3d 1226, cert. denied, 333 Conn. 926, 217 A.3d 994 (2019).

[21] On remand, the trial court will have to determine the scope of Aegis's liability under § 49-42 once the remaining claims for costs, interest, and attorney's fees are adjudicated on a fully developed record.

In its memorandum of decision, the court, relying on the five factors set forth in § 241 of the Restatement (Second) of Contracts,[22] concluded that the plaintiff had not substantially performed its contractual obligations, such that it could not recover its attorney's fees under § 49-41a. See General Statutes § 49-41a (c) (subcontractor making claim against general contractor under § 49-41a must be "found to have substantially performed its work in accordance with the terms of its employment in any arbitration or litigation to determine the validity of such claim" in order to recover attorney's fees from general contractor). On appeal, the plaintiff claims that the court incorrectly applied such factors because it failed to recognize that NJR implicitly waived the "time is of the essence" provision in the subcontract. Thus, the plaintiff argues, it was not contractually required to deliver the beams by June 7, 2016, and it substantially performed under the subcontract by delivering the beams on July 26, 2016, notwithstanding NJR's request that the beams actually be delivered on June 29, 2016.[23] NJR contends that the plaintiff did not raise at trial the issue of whether NJR waived the "time is of the essence" provision in the subcontract. Notably, the plaintiff does not contend otherwise in its appellate reply brief, and our review of the record reveals no such claim. Therefore, we decline to address it for the first time on appeal. See, e.g., *IP Media Products, LLC* v. *Success, Inc.*, supra, 191 Conn. App. 421.

V

The plaintiff next claims that the court incorrectly concluded that its actions rose to the level of a CUTPA violation. We disagree.

We begin by setting forth the standard of review and the applicable principles of law. "It is well settled that

[22] See footnote 10 of this opinion.

[23] The plaintiff does not otherwise challenge the trial court's application of the Restatement factors.

whether a [party's] acts constitute . . . deceptive or unfair trade practices under CUTPA, is a question of fact for the trier, to which, on appellate review, we accord our customary deference. . . . [W]here the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous." (Internal quotation marks omitted.) *Pedrini* v. *Kiltonic*, 170 Conn. App. 343, 353, 154 A.3d 1037, cert. denied, 325 Conn. 903, 155 A.3d 1270 (2017).

Our Supreme Court has stated that "[General Statutes §] 42-110b (a) provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the [F]ederal [T]rade [C]ommission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some [common-law], statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. . . . Thus a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy. . . . In order to enforce this prohibition, CUTPA provides a private

cause of action to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a [prohibited] method, act or practice . . . .'' (Internal quotation marks omitted.) *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, 296 Conn. 315, 350–51, 994 A.2d 153 (2010), quoting *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 18–19, 938 A.2d 576 (2008). In the absence of aggravating circumstances, a simple breach of contract is insufficient to establish CUTPA liability. See *Landmark Investment Group, LLC* v. *Chung Family Realty Partnership, LLC*, 125 Conn. App. 678, 704–705, 10 A.3d 61 (2010), cert. denied, 300 Conn. 914, 13 A.3d 1100 (2011).

The following additional findings and observations by the trial court are relevant to our consideration of this claim. The court first recognized that ''NJR does not claim, nor could it, that [the plaintiff's] failure to meet the delivery deadline in the purchase order agreement was, per se, an unfair or deceptive trade practice under CUTPA.'' Instead, NJR's CUTPA claim focused on the deceptive conduct of the plaintiff's employees and/or agents, namely, Tenedine and Borkowski. As found by the trial court, on May 5, 2016, Giguiere e-mailed Tenedine to inquire about when the beams would be ready. Tenedine responded that they would be ready by May 27. On the basis of that time frame, Borkowski instructed Giguiere to schedule delivery of the beams for June 29 through the plaintiff's shipping department. Around June 13, 2016, Giguiere spoke with Borkowski by telephone to arrange the dry fit test. Borkowski assured Giguiere that the beams were ready, despite the fact that none of the beams had been poured by June 13, 2016. On June 27, 2016, just two days before the scheduled delivery, at 6:45 a.m., the plaintiff informed Giguiere that *none* of the ten beams was ready. Giguiere then tried to communicate with Borkowski

several times without any response. At the emergency meeting on June 29, 2016, with the department, neither Borkowski nor Tenedine provided a specific explanation for the failure to produce the beams. As the court stated: "The court infers that [the plaintiff's] misleading statements were communicated in response to direct inquiries by NJR regarding the status of the beams, to conceal from NJR the true state of affairs. These deceptive responses deflected NJR from further inquiry and the possibility of devising ways to remedy or mitigate the problem."

Against this backdrop, the court found that Tenedine's "communicating to NJR unfounded assurances that beam fabrication was progressing on schedule, and the false declaration by Borkowski that the beams were fabricated and available, so that a delivery date could be scheduled through [the plaintiff's] dispatcher" constituted "prevarications [that] were clearly immoral, unethical, and/or unscrupulous." The court went on to find that "[s]uch misleading information substantially injured NJR by leading NJR into making unnecessary and/or premature plans and expenditures for labor allocation, equipment procurement, and an inutile construction schedule. Also, customers, such as NJR, were reasonably likely to assume a sense of confidence and security based on these inaccuracies and to pass that misinformation along to others, including [the department]. That put NJR's competency in a bad light and required an emergency meeting with [the department] to seek out some resolution." Finally, the court found that "the unwarranted representations deterred NJR from taking remedial action had it known of the true state of affairs." On the basis of the foregoing, the court concluded that the plaintiff's deceptive conduct violated CUTPA. The court further concluded that the plaintiff's CUTPA violations resulted in an ascertainable loss to NJR in the form of monetary expenditures to

rent equipment and to reschedule other subcontractors and/or utility providers. Those expenses totaled $14,695.44.

On appeal, the plaintiff contends that the court's findings that the plaintiff's incorrect and/or unwarranted representations about the readiness of the beams were "clearly immoral, unethical, and/or unscrupulous" are clearly erroneous because there was no evidence that such statements were made with "ill intent." The plaintiff argues that, at most, NJR's claim is one for a simple breach of contract and that the evidence is devoid of the requisite aggravating circumstances to rise to the level of a CUTPA violation. We are not persuaded.

Contrary to the plaintiff's contentions, it did not merely breach the subcontract. Stated plainly, it communicated false information that caused NJR to incur additional expense. The factual findings recited previously in this opinion regarding the nature of the falsehoods conveyed to NJR, coupled with the effect that such conduct had on NJR, readily support the imposition of CUTPA liability on the plaintiff. See *Milford Paintball, LLC* v. *Wampus Milford Associates, LLC*, 156 Conn. App. 750, 762–66, 115 A.3d 1107 (evidence that plaintiff detrimentally relied on defendant's negligent misrepresentations sufficient to impose CUTPA liability), cert. denied, 317 Conn. 912, 116 A.3d 812 (2015); *Landmark Investment Group, LLC* v. *Chung Family Realty Partnership, LLC*, supra, 125 Conn. App. 708 (defendant's pattern of bad faith conduct in breaching parties' agreement, as well as aggravating circumstances, amply supported finding of CUTPA violation). Although we are cognizant that "[n]ot every misrepresentation constitutes a CUTPA violation"; *Calandro* v. *Allstate Ins. Co.*, 63 Conn. App. 602, 617, 778 A.2d 212 (2001); the court's findings were supported by the record and, therefore, were not clearly erroneous.

VI

The plaintiff's final claim is that the court erred in awarding attorney's fees to NJR pursuant to the subcontract because NJR did not incur attorney's fees as a result of any default on the part of the plaintiff. NJR asserts that the plaintiff's argument is premised on a flawed interpretation of the subcontract. We agree with NJR.

The plaintiff's claim requires us to determine what the parties intended by the language of the "default-remedies" provision in their subcontract. Therefore, we exercise plenary review. See *Auto Glass Express, Inc.* v. *Hanover Ins. Co.*, 293 Conn. 218, 225, 975 A.2d 1266 (2009). "The intent of the parties as expressed in [writing] is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the [writing]. . . . Where the language of the [writing] is clear and unambiguous, the [writing] is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity. . . . Similarly, any ambiguity in a [written instrument] must emanate from the language used in the [writing] rather than from one party's subjective perception of the terms." (Internal quotation marks omitted.) Id., 226.

It is well established that parties may contract around the traditional American Rule for attorney's fees, pursuant to which each party bears its own expenses. See *Ferri* v. *Powell-Ferri*, 326 Conn. 438, 451–52, 165 A.3d 1137 (2017). In the present case, where the hearing on

the amount of attorney's fees to be awarded has been stayed pending our decision on appeal; see footnote 14 of this opinion; we need to determine only whether the award of attorney's fees was permitted by the parties' contract.[24]

Mindful of the foregoing, we turn to the language of the subcontract. Section 8, titled "DEFAULT-REMEDIES," provides in relevant part: "Should Supplier [i.e., the plaintiff] at any time: (a) fail to supply the Products [defined to include the beams at issue] in sufficient quantities and of required quality to perform its obligations hereunder with the skill, conformity, *promptness and diligence* required hereunder . . . or (c) fail in the performance or observance of any of the covenants, conditions, or other terms of this [p]urchase [o]rder, then in any such event, *each of which shall constitute a default hereunder by Supplier*, Purchaser [i.e., NJR] shall have the right to exercise any one or more of the following remedies . . . (iii) recover from Supplier all losses, damages, penalties and fines . . . and *all reasonable attorneys' fees and other expenses suffered or incurred by Purchaser by reason or as a result of Supplier's default.*" (Emphasis added.) By the express terms of the subcontract, a "fail[ure] to supply" the beams with "promptness and diligence" by the plaintiff "shall constitute a default" on the part of the plaintiff. The provision goes on to provide that NJR has the right to recover, among other things, all reasonable attorney's fees and other expenses it incurred as a result of such default. In light of the court's finding that the plaintiff failed to supply the beams with promptness and diligence—a finding that we leave undisturbed—we conclude that the court's determination that reasonable

[24] Notwithstanding the fact that the trial court has yet to determine the amount of attorney's fees, the award of attorney's fees in favor of NJR on its breach of contract claim is a final judgment under *Ledyard* v. *WMS Gaming, Inc.*, 330 Conn. 75, 89–90, 191 A.3d 983 (2018), because it does not constitute a supplemental postjudgment award of attorney's fees.

attorney's fees and expenses incurred by NJR as a result of such failure should be awarded pursuant to the subcontract was not in error.

The plaintiff claims that NJR is not entitled to recover attorney's fees pursuant to the foregoing provision because NJR is the defendant in the present action and, therefore, NJR has incurred attorney's fees only in defending the action, rather than commencing it as a result of the plaintiff's default. The plaintiff's argument is belied by the language of the provision at issue. Simply put, nothing in the provision prevents NJR from recovering attorney's fees on a successful breach of contract claim that is premised on the plaintiff's failure to supply the beams in a prompt and diligent manner simply because the claim was prosecuted as part of a counterclaim.

The judgment is reversed only with respect to the plaintiff's claim against Aegis pursuant to § 49-42 and the case is remanded for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

NRT NEW ENGLAND, LLC *v.* SALVATORE R. LONGO ET AL.
(AC 43285)

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

Syllabus

The plaintiff, a commercial property broker, sought to recover damages from the defendants for, inter alia, breach of contract in connection with the defendants' failure to pay a real estate commission. The defendants listed certain property with the plaintiff through its affiliated licensed sales associates, F and P, and executed an exclusive right to sell agreement for a term of one year. Although the defendants entered into a purchase and sale agreement with a buyer, E Co., during the term of the listing agreement, that deal was cancelled. As such, the property was not sold when the listing agreement expired, and the defendants then entered into an exclusive listing agreement with L, one of the defendants who held a real estate broker's license. Eventually, the defendants and E Co. closed on the sale of the property, and the plaintiff brought an action alleging breach of contract and violations of the Connecticut Unfair Trade Practices Act (§ 42-110a et seq.), seeking to recover its commission pursuant to the listing agreement. Following a trial to the court, the trial court found for the plaintiff, and the defendants appealed to this court. *Held*:

1. The trial court properly refused to dismiss the plaintiff's action for lack of standing, the court having jurisdiction to consider the plaintiff's claims: contrary to the defendants' contention, the plaintiff's failure to strictly comply with the licensing requirements of the statute (§ 20-325a) governing actions to recover real estate commissions did not implicate the court's subject matter jurisdiction, as certain amendments to § 20-325a, enacted after the Supreme Court's decision in *McCutcheon & Burr, Inc.* v. *Berman* (218 Conn. 512), permit recovery of a commission upon proof of substantial compliance with the requirements of the statute and that denial of a comission would be inequitable.
2. The trial court improperly concluded that the defendants had breached the listing agreement, the court having made a clearly erroneous finding on which it based its conclusion: the trial court found that L caused the plaintiff to lose the opportunity to negotiate with E Co. during the final full month of the listing agreement, but, contrary to the court's finding, the uncontradicted evidence showed that P, on behalf of the plaintiff, was an active participant and took the lead in negotiations through the end of the term of the listing agreement, and this court was left with the definite and firm conviction that the court's finding that the plaintiff was taken out of the negotiations during the last month of the listing agreement was a mistake; moreover, the court's memorandum

of decision made clear that the court's clearly erroneous factual finding was the basis for its conclusion that the defendants breached the listing agreement and caused the plaintiff to suffer damages, such that the court's clearly erroneous finding was not harmless.

3. The trial court improperly concluded that the defendants violated CUTPA, as the court's conclusion that the actions of the defendants were performed in the conduct of trade or commerce for purposes of that statutory scheme was legally incorrect: the court found that L, using his real estate broker's license, inserted himself as the broker of record on the day after the listing agreement expired and, thus, engaged in trade or commerce, but all the acts alleged in the complaint and that the court determined to be CUTPA violations occurred before that date, and, consequently, at the time that L and the other defendants engaged in conduct that the court described as unscrupulous, immoral, unfair and deceptive, none of them did so while engaged in trade or commerce for purposes of CUTPA; moreover, the plaintiff's reliance on *Larsen Chelsey Realty Co.* v. *Larsen* (232 Conn. 480) was misplaced, because, unlike the situation in that case in which both the defendant and the plaintiff were acting as real estate brokers, in this case, at least during the term of the listing agreement, the defendants were acting as owners of the property and did not need a broker's license to discuss the sale of their property with any prospective buyers, and, although the terms of the listing agreement may have obligated them to refer any such inquiries to the plaintiff, their failure to do so would not have consituted their participation in trade or commerce for purposes of CUTPA.

Argued January 11—officially released September 21, 2021

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendants Anthony Longo and The Higgins Group, Inc., were defaulted for failure to appear; thereafter, the matter was tried to the court, *Hon. Alfred J. Jennings*, judge trial referee; judgment for the plaintiff, from which the named defendant et al. appealed to this court. *Reversed*; *judgment directed.*

James H. Lee, for the appellants (named defendant et al.).

Thomas E. Crosby, for the appellee (plaintiff).

BRIGHT, C. J. The defendants[1] Salvatore R. Longo, Anthony Longo, Salvatore Longo & Sons, LLC, and the estate of Salvatore Longo, Jr., appeal from the judgment of the trial court, rendered following a trial to the court, in favor of the plaintiff, NRT New England, LLC, doing business as Coldwell Banker Residential Brokerage, relating to the sale of commercial property owned by the defendants. On appeal, the defendants claim that the court erred in (1) concluding that the plaintiff had standing to bring an action for a real estate commission, (2) finding that the defendants breached the operative exclusive right to sell listing agreement, and (3) concluding that the defendants had violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. Although we disagree with the defendants' standing claim, we agree with their second and third claims. Accordingly, we reverse the judgment of the trial court.

The following procedural history, factual allegations from the operative amended complaint, and certain facts discernible from the record are relevant to this appeal. The defendants were the owners of several parcels of real property located in Stamford that the parties refer to collectively as "220 West Avenue," which, in

[1] Salvatore R. Longo, Anthony Longo, the estate of Salvatore Longo, Jr., Salvatore Longo & Sons, LLC, The Higgins Group, Inc., doing business as Higgins Group Real Estate (The Higgins Group), and Mark F. Katz were named as defendants in the complaint. Anthony Longo and The Higgins Group were nonappearing defendants before the trial court. At oral argument before this court, the appellants' counsel stated that he is representing all of the defendants except The Higgins Group. In their principal brief, however, the appellants' counsel stated that The Higgins Group and Mark F. Katz are not involved in this appeal. For clarity, we refer to Salvatore R. Longo, Anthony Longo, the estate of Salvatore Longo, Jr., and Salvatore Longo & Sons, LLC, collectively, as the defendants.

Additionally, we note that the trial case caption appears to contain a scrivener's error as Salvatore R. Longo is identified as "Salvatore B. Longo."

addition to 220 West Avenue, includes 0 West Avenue, 0-A Piave Street, 0-B Piave Street, 18 Piave Street, and 143 Leon Place (property). On October 31, 2013, the defendants listed the property for sale with the plaintiff at an asking price of $3,799,000. In connection with the listing, the defendants executed an exclusive right to sell agreement (listing agreement) for the property in which the defendants hired the plaintiff and its affiliated licensed sales associates, Kelly Feda and Joseph Porricelli, to procure a buyer for the property.[2] The listing agreement was for a term of one year and expired on October 31, 2014.

Pursuant to the listing agreement, the defendants agreed that during the term of the listing agreement, the plaintiff would have the sole and exclusive right to list, market, sell and/or rent the property for the price, terms, and conditions set forth therein. The defendants agreed to pay the plaintiff 5 percent of the gross sale price of the property as a commission if, during the term of the listing agreement, (1) the plaintiff procured a buyer who was ready, willing and able to buy the property or any part thereof, even if the defendants refused to accept such an offer for any reason, or (2) the property or any part thereof, was sold, conveyed or became subject to an agreement to purchase or option to purchase, through the efforts of anyone, including the defendants, to anyone, including a co-owner of the property. In addition, the plaintiff would receive its 5 percent commission if the property or any part thereof, was sold, conveyed or became subject to an agreement to purchase or option to purchase within 180 days after the term of the listing agreement to anyone who was introduced to the property prior to the

[2] On the same day, the defendants listed, separately, 143 Leon Place in Stamford for sale with the plaintiff for $949,000; the defendants executed a second listing agreement with the plaintiff for 143 Leon Place. The plaintiff's amended complaint makes neither a claim of a separate sale for 143 Leon Place nor a claim of any commission related solely to 143 Leon Place.

expiration of the term of the listing agreement, but only if the defendants did not owe a commission to another broker arising out of a subsequent listing agreement.

On or about August 3, 2014, during the term of the listing agreement, the defendants entered into a purchase and sale agreement with Empire Residential, LLC (Empire), in which Empire agreed to purchase the property from the defendants for $2,850,000. The Higgins Group, Inc. (The Higgins Group), a Connecticut corporation, and its affiliated real estate salesperson, Mihaela Kolich, represented Empire as its buyer's agency and agent, respectively, in the purchase transaction. The purchase and sale agreement identified Feda and Porricelli as the defendants' brokers, and stated that they and Kolich were the brokers who negotiated the sale of the property. Empire eventually cancelled the August, 2014 purchase and sale agreement when a discrepancy arose as to the acreage the defendants would convey. As a result, the property had not been sold when the listing agreement expired on October 31, 2014.

On November 1, 2014, the defendants entered into an exclusive listing agreement with "Salvatore R. Longo, Broker" to sell the property. The agreement ran from November 1, 2014, to November 1, 2015, and set a listing price of $3,200,000. On or about January 23, 2015, the defendants entered into a second purchase and sale agreement to sell the property to Empire, this time at a price of $2,760,000.

In June, 2015, pursuant to General Statutes § 20-325a, the plaintiff recorded a notice of and claim for a broker's lien for its commission against the defendants and the property in the Stamford land records. On March 24, 2016, the plaintiff, the defendants, The Higgins Group, and the defendants' attorney, Mark F. Katz, entered into an escrow agreement in which the plaintiff agreed to release its broker's lien in order to permit Empire to

purchase the property from the defendants. Under the escrow agreement, Attorney Katz would hold $138,000, the plaintiff's claimed commission from the sale, in escrow. The agreement further provided that, after the closing, any one of the parties could file a lawsuit to obtain a determination with respect to the proper disposition of the funds in escrow and to resolve all of the plaintiff's claims to the commission. On the same day, the defendants closed on the sale of the property to Empire, and Empire paid the defendants $2,760,000 for the property. In December, 2016, the plaintiff brought this action seeking to recover its commission pursuant to the listing agreement.

In May, 2017, the plaintiff filed a two count amended complaint alleging breach of contract and violations of CUTPA. In its breach of contract claim, the plaintiff alleged that it had performed all of its obligations under the listing agreement and that it is due a commission from the defendants in the amount for $138,000. In its CUTPA claim, the plaintiff alleged that the defendants were engaged in the conduct of trade or commerce, which included the sale and development of the property, and that they had engaged in unfair and deceptive acts or practices by engaging in unethical, immoral, illegal, and unscrupulous conduct. In its request for relief, the plaintiff sought, inter alia, compensatory damages, punitive damages, and attorney's fees. The defendants filed an answer, special defenses, and a counterclaim in which they alleged claims of misrepresentation, forgery, fraud, and violations of CUTPA.[3]

A trial to the court was held over the course of two days on September 11 and 12, 2018. On December 12,

[3] The court concluded that the defendants failed to prove their special defenses and rendered judgment for the plaintiff on the defendants' counterclaim, noting that the defendants expressly abandoned in their posttrial brief all counts of their counterclaim. The court's disposition of the special defenses and counterclaim are not at issue in this appeal.

2018, the parties filed posttrial briefs. In addition to arguing that the plaintiff had failed to prove any breach of the listing agreement, the defendants claimed in their brief, pursuant to § 20-325a (a), that the plaintiff was not entitled to a commission because it failed to prove that, at the time it rendered the services on which its claim was based, it was properly licensed, pursuant to General Statutes § 20-312,[4] to provide such services. The defendants argued that, based on this failure, the plaintiff lacked standing to bring this action, and, consequently, the court lacked subject matter jurisdiction over the case and should dismiss it.

In April, 2019, the court issued its memorandum of decision ruling in favor of the plaintiff. In its decision, the court found that there was undisputed evidence that the plaintiff was licensed, in accordance with §§ 20-312 and 20-325a. The court then examined the plaintiff's breach of contract claim and concluded that the plaintiff had failed to prove its claim for a commission pursuant to the pleaded provisions of the listing agreement.[5] The court found, however, that Salvatore R. Longo (Longo) had instructed Empire to cease all communication with the plaintiff and to negotiate solely with him. The court held that Longo's directive to Empire constituted a breach of the listing agreement because it caused the plaintiff to lose any opportunity to participate in the effort to negotiate the sale to Empire during the final month of the exclusive listing agreement with the plaintiff. Last, the court held that Longo's instruction to Empire constituted a violation of CUTPA, finding that

[4] General Statutes § 20-312 provides in relevant part: "(a) No person shall act as a real estate broker or real estate salesperson without a license issued by the commission or the Commissioner of Consumer Protection, unless exempt under this chapter. . . ."

[5] The court found that no claim was made for any commission related solely to 143 Leon Place, and, therefore, it held that the second listing agreement was not at issue in the case.

Longo's directive to Empire was preceded by misrepresentations or "nonrepresentations" as to the true ownership status of the property, the interfamily litigation background, and a mortgage on the property that led to a foreclosure case and judgment during the negotiations with Empire. The court held that these actions constituted violations of CUTPA and awarded compensatory and punitive damages to the plaintiff.

In May, 2019, Longo filed a motion to reargue and reconsider, arguing, inter alia, that the plaintiff lacked standing to commence the action. Longo claimed that the court erroneously found that the plaintiff, through its designated broker/realtor Brendan Grady, was licensed, in accordance with §§ 20-312 and 20-325. He argued that Grady was neither a plaintiff nor a party to the action and that, because there was no evidence presented during the trial showing that the plaintiff was a licensed real estate broker, the plaintiff lacked standing to commence the action.

In its memorandum of decision on the motion to reargue and reconsider, the court concluded that its finding that the plaintiff had established that it was licensed as a real estate broker had been erroneous. The court, however, then held that it would be inequitable to deny the plaintiff recovery of the commission that it claims in the present action. The court relied on our Supreme Court's opinion in *Location Realty, Inc.* v. *General Financial Services, Inc.*, 273 Conn. 766, 781, 873 A.2d 163 (2005), in which the court held that a corporate broker licensee's failure to be duly licensed is not a disqualifying factor, but rather is only one of the facts and circumstances to be considered in determining if it would be inequitable to deny recovery of the claimed commission. The trial court found that the plaintiff substantially complied with the licensing requirements of § 20-312 and concluded that it would be inequitable to deny the recovery of a commission

due to the plaintiff's failure to prove that it had been licensed when the plaintiff and its personnel otherwise had complied with the remaining applicable and more stringent licensing requirements. Moreover, the court concluded that it would be inequitable to deny the plaintiff recovery because Longo's actions during the last month of the exclusive listing period interfered with the plaintiff's ability to participate in negotiations with Empire and constituted egregious and inequitable conduct. This appeal followed.

On appeal, the defendants claim that the trial court improperly (1) refused to dismiss the plaintiff's action for lack of standing, (2) concluded that the defendants had breached the listing agreement, and (3) concluded that the defendants violated CUTPA. Additional facts will be set forth as necessary.

I

The defendants first claim that the court improperly refused to dismiss the plaintiff's action for lack of standing. Specifically, the defendants argue that the court misinterpreted § 20-325a (d),[6] which the defendants contend only grants standing to licensees. In response, the plaintiff does not dispute that it failed to present evidence at trial that it is duly licensed for purposes of § 20-325a (a). Instead, it argues that the failure to comply with § 20-325a does not implicate the trial court's

[6] General Statutes § 20-325a (d) provides: "Nothing in subsection (a) of this section, subdivisions (2) to (7), inclusive, of subsection (b) of this section or subsection (c) of this section shall prevent any licensee from recovering any commission, compensation or other payment with respect to any acts done or services rendered, if it would be inequitable to deny such recovery and the licensee (1) has substantially complied with subdivisions (2) to (7), inclusive, of subsection (b) of this section or (2) with respect to a commercial real estate transaction, has substantially complied with subdivisions (2) to (6), inclusive, of subsection (b) of this section or subdivision (2) of subsection (c) of this section."

subject matter jurisdiction and that it would be inequitable to deny the plaintiff recovery because it substantially complied with § 20-325a. We agree with the plaintiff that compliance with § 20-325a does not implicate the court's subject matter jurisdiction.[7]

We first set forth the applicable standard of review and legal principles governing our analysis. "Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . Our review of this question of law is plenary." (Internal quotation marks omitted.) *Castle* v. *DiMugno*, 199 Conn. App. 734, 747, 237 A.3d 731 (2020).

Our Supreme Court concluded in *McCutcheon & Burr, Inc.* v. *Berman*, 218 Conn. 512, 590 A.2d 438 (1991), that the trial court was not deprived of subject matter jurisdiction to consider a claim for a real estate commission based on a listing agreement that did not comply with § 20-325a (b). Specifically, the court noted: "The defendants argued, and the trial court agreed, that it lacked subject matter jurisdiction over the plaintiff's claim because the listing agreement did not comply with § 20-325a (b). None of the cases in which we have addressed a failure to comply with § 20-325a (b), however, has involved a motion to dismiss because of a lack of subject matter jurisdiction. . . . Furthermore, we are unaware of any cases in which the failure of a

[7] In light of our resolution of the defendants' second and third claims, we need not address the defendants' argument that the court improperly concluded that the plaintiff had substantially complied with the statute and that it would be inequitable to deny it a commission given the facts of this case.

listing agreement to satisfy the requirements of § 20-325a (b) was found to create a jurisdictional bar to an action based on that agreement.[8] An action to enforce a listing agreement is essentially a breach of contract claim, and the trial court clearly [has] subject matter jurisdiction over such a claim." (Citations omitted; footnote in original; internal quotation marks omitted.) Id., 526–27. The court reached this conclusion despite also concluding that "the requirements of § 20-325a (b) are mandatory rather than permissive and that the statute is to be strictly construed."[9] Id., 520.

The court's analysis in *McCutcheon & Burr, Inc.*, is equally applicable to the defendants' claim that the plaintiff has failed to comply with § 20-325a (a). The defendants' argument is that the plaintiff failed to prove a necessary element of its claim, namely that it was licensed to provide the services on which its commission claim is based. Failure to prove a necessary element of a claim does not deprive the court of subject matter jurisdiction; it simply means that the plaintiff cannot succeed due to a failure of proof. See, e.g., *Gurliacci* v. *Mayer*, 218 Conn. 531, 544–45, 590 A.2d 914 (1991) (declining to adopt "bizarre interpretation" of General Statutes § 7-465 that would require court to conclude it lacked subject matter jurisdiction over case tried before it solely because plaintiff failed to establish

[8] "In asserting that a failure to comply with . . . § 20-325a (b) creates a jurisdictional problem, the defendants rely primarily on the portion of the statute that provides: 'No person . . . shall commence or bring any action . . . .' We note that similar language is found in the statute of frauds; General Statutes § 52-550; and in the statute of limitations for tort actions set forth in General Statutes § 52-577. Neither of those statutes creates a jurisdictional bar. See *Seipold* v. *Gibbud*, 110 Conn. 392, 395, 148 A. 328 (1930) (statute of frauds); *Orticelli* v. *Powers*, 197 Conn. 9, 15–16, 495 A.2d 1023 (1985) (§ 52-577)." *McCutcheon & Burr, Inc.* v. *Berman*, supra, 218 Conn. 527 n.16.

[9] Subsection (d) of § 20-325a, which permits recovery of a commission upon substantial compliance with subsections (b) and (c), was not added to the statute until 1994, after the Supreme Court issued its decision in *McCutcheon & Burr, Inc.*

essential element of her cause of action). As was the case in *McCutcheon & Burr, Inc.*, the court had jurisdiction to resolve the plaintiff's two causes of action, both of which are premised on the defendants' alleged breach of the listing agreement. See *Anderson* v. *Schieffer*, 35 Conn. App. 31, 37 n.8, 645 A.2d 549 (1994) ("an alleged failure to comply with § 20-325a (a), which . . . begins by providing that '[n]o person . . . shall commence or bring any action,' does not create a jurisdictional bar").

In fact, this conclusion is even clearer given the amendments to § 20-325a, made after our Supreme Court's decision in *McCutcheon & Burr, Inc.*, which permit recovery upon substantial compliance with the requirements of the statute. See footnote 9 of this opinion. Because of those amendments, a plaintiff cannot be denied recovery under § 20-325a solely because of its failure to comply strictly with the licensing requirements of the statute. See *Location Realty, Inc.* v. *General Financial Services, Inc.*, supra, 273 Conn. 781 ("[A] corporate broker licensee, whose president was not licensed as a broker, may not be denied its right to recover a commission otherwise earned solely because of that licensing failure. Its right to recover must be gauged, instead, under all of the facts and circumstances of the case and whether it would be inequitable, in light of those facts and circumstances, to deny it the right to recover."). To the contrary, a plaintiff that does not strictly comply with the licensing requirements of the statute has the opportunity to prove that it substantially complied with the statute and that denying it a commission would be inequitable. Id. The court clearly has subject matter jurisdiction to determine whether the plaintiff has proven these elements despite the plaintiff's failure to comply strictly with the licensing requirements. Thus, the defendants' claim that the court erred in concluding that the plaintiff had substantially complied with the licensing requirements of the statute does

not implicate the court's subject matter jurisdiction. The court had jurisdiction to consider the plaintiff's breach of contract and CUTPA claims.

II

The defendants' second claim is that the trial court improperly concluded that the defendants had breached the listing agreement. Specifically, the defendants assert that the court erroneously found that Longo engaged in conduct that interfered with the plaintiff's efforts to complete the sale of the property and erroneously substituted its own theory of recovery in place of the plaintiff's theory of recovery. We agree with the defendants that the court made a clearly erroneous finding on which it based its conclusion that the defendants had breached the listing agreement.

Factual matters are determined by the finder of fact and are not subject to reversal on appeal unless such findings are clearly erroneous. See *Groton* v. *Yankee Gas Services Co.*, 224 Conn. 675, 691, 620 A.2d 771 (1993); *Crowell* v. *Danforth*, 222 Conn. 150, 156, 609 A.2d 654 (1992). "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. . . . Under the clearly erroneous standard of review, a finding of fact must stand if, on the basis of the evidence before the court and the reasonable inferences to be drawn from that evidence, a trier of fact reasonably could have found as it did." (Internal quotation marks omitted.) *CitiMortgage, Inc.* v. *Gaudiano*, 142 Conn. App. 440, 444–45, 68 A.3d 101, cert. denied, 310 Conn. 902, 75 A.3d 29 (2013); see also Practice Book § 60-5. "Where, however, some of the facts found are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous

findings to see whether they were harmless, not only in isolation, but also taken as a whole." *DiNapoli* v. *Doudera*, 28 Conn. App. 108, 112, 609 A.2d 1061 (1992). When the judgment of the trial court is based entirely on a clearly erroneous finding, and without that finding judgment would have entered for the other party, it is appropriate to reverse the judgment and remand the case with direction to render judgment for that party. See *Bayer* v. *Showmotion, Inc.*, 292 Conn. 381, 415–16, 973 A.2d 1229 (2009) (reversing judgment and remanding case with direction to render judgment for defendant after concluding that trial court's factual findings were clearly erroneous and harmful in that they affected result).

The following facts are relevant to our analysis. In its April 17, 2019 memorandum of decision, the trial court examined the listing agreement and determined that it contained three provisions that would obligate the defendants to pay a commission to the plaintiff. The first provision applied if the plaintiff procured a ready, willing, and able buyer during the term of the listing agreement in accordance with the price, terms, and conditions of the listing, or in accordance with a price, terms, and conditions that were acceptable to the defendants. The second provision applied if, during the term of the listing agreement, the property was sold or became subject to an agreement to purchase or option, through the efforts of anyone, including the defendants, to anyone, including a co-owner of the property. The third provision applied if the property was sold, conveyed, or became subject to an agreement to purchase or option to purchase, within 180 days after the term of the listing agreement, to anyone who was introduced to the property by anyone, including the defendants, prior to the expiration of the term of the listing agreement. The court found that the only provisions pleaded in the amended complaint were the first

and second provisions. The court concluded that the plaintiff failed to prove that it was entitled to its commission under either provision.

Next, the court examined the plaintiff's claim that it was entitled to judgment on its breach of contract claim in accordance with this court's holding in *William Raveis Real Estate, Inc.* v. *Zajaczkowski*, 172 Conn. App. 405, 160 A.3d 363, cert. denied, 326 Conn. 906, 163 A.3d 1205 (2017). In *William Raveis Real Estate, Inc.*, the defendants were a couple who had sought to purchase a house. Id., 408. The defendants were referred to a licensed real estate agent affiliated with the plaintiff, a real estate brokerage firm that represented buyers and sellers. Id., 407–408. Prior to showing the defendants a particular house, the real estate agent presented the defendants with an agreement for a term of one year, which provided, in part, that the real estate agent would negotiate the terms and conditions of the purchase of any property that the defendants wished to buy and that the plaintiff would earn a commission if the defendants purchased a home during the term of the agreement. Id., 408–409. After the agreement was signed, the defendants submitted an offer to purchase a property in Trumbull that was shown to them by the real estate agent. Id., 409. The transaction to purchase the property was not consummated because a bank appraisal failed to support the purchase price and the defendants were unable to obtain a mortgage. Id. Several months later, still during the term of the agreement, the defendants entered into a fully executed purchase and sale contract for a different property in Trumbull that was shown to them by a real estate agent who was not affiliated with the plaintiff. Id., 411. The plaintiff then commenced litigation to obtain payment of the commission it alleged it was owed in connection with the defendants' purchase of the property. Id., 407.

The trial court in *William Raveis Real Estate, Inc.*, held that the defendants' actions constituted a breach of their agreement with the plaintiff. Id., 413. Specifically, it found that the defendants breached the agreement with the plaintiff by entering into an enforceable contract to purchase the property while the agreement with the plaintiff was still in effect. Id., 419. The court also found that the defendants breached the agreement by failing to inform the nonaffiliated real estate agent of the existence of their agreement with the plaintiff, failing to use the plaintiff as their exclusive real estate broker to represent and assist them in locating and purchasing the property, failing to work exclusively through the plaintiff to locate and purchase the property, and failing to refer information about the property to the plaintiff. Id. On the basis of these findings, the court rendered judgment for the plaintiff. See id., 419–20.

On appeal, the defendants claimed that the court erred in concluding that they breached their agreement with the plaintiff by entering into a fully executed contract to purchase the property during the term of the agreement when the contract to purchase the property was illusory, unenforceable, and not a contract as a matter of law. Id., 415. This court concluded that there were factual and legal bases on which the trial court properly had found that the defendants breached the agreement and, thus, did not decide whether the contract to purchase the property was illusory, unenforceable, and not a contract as a matter of law. Id., 419 n.7. This court concluded further that the defendants breached numerous express provisions of the agreement during its term, but emphasized that the defendants had breached two significant provisions when they (1) entered into an agreement with the nonaffiliated real estate agent and (2) executed a contract to

purchase the property. Id., 419–20. Thus, this court concluded that the defendants caused the plaintiff to suffer damages in that their breach of the agreement led directly and proximately to the plaintiff's loss of a commission. Id.

In the present case, the trial court found that Longo, at the end of September, 2014, instructed Anthony Kolich, the purchaser's principal conducting negotiations on behalf of Empire, to cease communication with Porricelli and negotiate solely with Longo. The court found that Longo's act occurred while Porricelli was heavily involved in negotiations with Empire and, as a result, took the plaintiff out of negotiations during October, 2014, the final month of the listing agreement. The court concluded that "[t]he act of instructing [Empire] to cease all contact with [the plaintiff] and deal only with [Longo] while there was still a month remaining in the term of [the listing agreement] . . . was a breach of the [listing agreement] which gave [the plaintiff] the right, until October 31, 2014, to 'control the right to market the [p]roperty' and obligated the . . . defendants '[t]o refer all inquiries and offers for the purchase and/or rental of said [p]roperty to [the plaintiff]' and '[t]o cooperate with [the plaintiff] in every reasonable way' thereby causing [the plaintiff] . . . to lose any opportunity to participate in the effort to reach a settlement of the minor acreage dispute over the size of the property and to earn its commission. Under the rule of *William Raveis Real Estate, Inc.*, [the plaintiff] is awarded breach of contract damages in the full amount of the commission it would have earned if those negotiations had been successful during the remaining term of [the listing agreement] . . . ."

The defendants claim that the court's finding that Longo caused the plaintiff to lose the opportunity to negotiate with Empire during the final full month of the listing agreement was clearly erroneous. They argue

that the evidence shows that, contrary to the court's findings, Porricelli was an active participant in negotiations through the end of the term of the listing agreement. We agree.

The only evidence in the record that arguably supports the court's finding that Longo instructed Kolich not to deal with Porricelli was Kolich's response to two questions during his testimony at trial. First, Kolich was asked: "After the deal fell through, after more or less September of 2014, who reinstituted the purchase and sale negotiations?" Kolich answered: "I believe at that point, we were instructed not to speak to [Porricelli]. So I believe we reached out to [Longo]." Second, Kolich was asked: "Who instructed you not to deal with [Porricelli]?" His answer was: "[Longo]." Although this testimony, viewed in artificial isolation, appears to support the challenged finding, a review of the rest of the evidence presented at trial makes clear that the court's reliance on these two answers was misplaced and clearly erroneous.

First, Kolich's full testimony on this issue makes clear that he did not testify that Longo instructed him in September not to speak with Porricelli. The following colloquy between Kolich and the defendants' counsel is relevant:

"[The Defendants' Counsel]: After the deal fell through, after more or less September of 2014, who reinstituted the purchase and sale negotiations?

"[Kolich]: I believe at that point, we were instructed not to speak to [Porricelli]. So I believe we reached out directly to [Longo].

"[The Defendants' Counsel]: So you dealt directly with [Longo] after the initial contract was terminated?

"[Kolich]: Yes.

"[The Defendants' Counsel]: Who instructed you not to deal with [Porricelli]?

"[Kolich]: [Longo].

"[The Defendants' Counsel]: Do you remember when that was?

"[Kolich]: No. It was sometime after the first contract was—was null and void.

"[The Defendants' Counsel]: Was null and void?

"[Kolich]: Yeah. I mean it was—

"[The Defendants' Counsel]: Okay.

"[Kolich]:—one went away and then there was no deal. And then we called [Longo] and [Longo said] let's work this out. And we called [Porricelli] and [Porricelli] said I—[Longo] told me that you know, I can't talk to you guys anymore. And we started to deal with [Longo]."

Kolich's full testimony on this point undermines, in two significant ways, the court's factual finding that Longo instructed Kolich in September not to speak with Porricelli. First, Kolich testified that he did not remember when he was instructed not to speak with Porricelli. Kolich testified that he was instructed not to speak with Porricelli after the first contract between Empire and the defendants was "null and void." He never testified that the conversation took place in September. Second, he did not testify that the instruction not to speak to Porricelli came directly from Longo. Instead, Kolich testified that Porricelli told him that Longo had instructed Porricelli that he was not permitted to talk to Empire anymore. Consistent with this testimony, Kolich also testified that he reached out to Longo after being instructed not to speak with Porricelli. The only reasonable inference to draw from Kolich's testimony is that Kolich would not have needed to reach out to

Longo if Longo was the one who told him not to speak with Porricelli.

In addition, Porricelli did not testify that the defendants prevented him from participating in negotiations before the end of the term of the listing agreement. In fact, when asked whether he was "able to get [Empire] and the [defendants] back to a meeting of the minds on or before October 31, 2014," he testified: "We got them back to the table twice. Once in September and once in October." Porricelli's uncontradicted testimony shows that the plaintiff was involved in negotiations with Empire after September.

Finally, the uncontradicted documentary evidence clearly shows that the plaintiff, in particular Porricelli, was active in negotiating with Empire through the end of October, 2014, and, in fact, took the lead in such negotiations. For example, on October 6, 2014, Longo e-mailed Porricelli all of his e-mail correspondence with the attorney representing the defendants in their negotiations with Empire. On October 22, 2014, Porricelli e-mailed Kolich a final proposal from the defendants in which he referred to the defendants as "my clients." Shortly thereafter, Kolich responded directly to Porricelli with a counteroffer. In response, Porricelli replied in an e-mail: "Anthony, after further thought and discussion, if you [cannot] sign a contract in 48 [hours] and close the deal in 60 days, we have nothing further to discuss. We are done negotiating this deal!

"On behalf of my clients and their attorneys, we wish not be contacted with any other negotiations/offers regarding [the property]." Porricelli then sent Kolich another e-mail in which he stated: "I gave you a layup with my final offer! . . . I will not have my clients [toe] the line and carry the cost of the property for 8 months while you get all your permits [etc.]. It doesn't work that way. I offered you March, now it is 60 days."

The next day, October 23, 2014, Porricelli e-mailed Longo lamenting that "we have all been through the ringer with Anthony Kolich" and proposing a new marketing strategy for the property. Despite his e-mail to Longo, later that same day, Porricelli e-mailed Kolich a new offer, which he asked Kolich to "sign off on" *before* Porricelli spoke to his "clients." Only after Kolich responded positively to Porricelli's offer did Porricelli e-mail the proposed deal to Longo and asked him to call him "ASAP." After Longo expressed his lack of faith in Empire's offer, Porricelli e-mailed Longo encouraging him to accept the offer. The two men then exchanged additional e-mails regarding the merits of Empire's offer. In the evening of October 23, 2014, Porricelli sent an e-mail to the defendants and their lawyers in which he stated: "After much time speaking with Kolich and further conversations with [Longo], *I have negotiated the new terms listed below*." (Emphasis added.) On October 24, 2014, Porricelli and Longo continued to exchange e-mails regarding the merits of the proposed deal. On October 27, 2014, Porricelli e-mailed the defendants and their attorneys: "Per [Longo's] last e-mail on [October 24], have we decided not to accept the offer or do we want to come up with a counter to try and get the deal done?"[10]

On the basis of our review of the full evidentiary record, we are left with the definite and firm conviction that the court's finding that the plaintiff was taken out of the negotiations during the last month of the listing agreement was a mistake. The plaintiff, principally

[10] On October 28, 2014, Porricelli sent an e-mail to Attorney James Rubino asking about a meeting between Empire and the defendants the previous day at which a deal may have been reached. Rubino responded that he was not at the meeting and Porricelli asked him to keep him posted because he was unable to contact Longo. There was no evidence that an agreement was reached between Empire and the defendants at that meeting. Finally, on October 30, 2014, Porricelli sent a proposed extension of the listing agreement to the defendants for signature. The extension was never signed.

through the efforts of Porricelli, was heavily involved in negotiations between the defendants and Empire through the end of October, 2014, when the listing agreement ended. Porricelli testified that he got the parties back to the bargaining table in October and the undisputed documentary evidence shows that he was the lead negotiator for the defendants until at least October 24, 2014.

The court's memorandum of decision makes clear that the court's clearly erroneous factual finding was the basis for its conclusion that the defendants breached the listing agreement and caused the plaintiff to suffer damages. The court held that Longo's "act of instructing [Empire] to cease all contact with [the plaintiff] and deal only with [Longo] *while there was still a month remaining in the term of the* [*listing agreement*]" constituted a breach of several provisions of the listing agreement and "thereby" caused the plaintiff to lose the opportunity to earn its commission. (Emphasis added.) The court did not find any other breaches of the listing agreement by the defendants.[11]

Thus, we conclude that the court's clearly erroneous finding was not harmless. Because the court's conclusion that the defendants breached the listing agreement is based solely on a clearly erroneous factual finding,

[11] The plaintiff argues that the defendants breached the listing agreement in several other ways. It argues that the evidence showed that Longo was speaking to prospective buyers of the property without informing Porricelli and Feda and failed to turn over offer letters from prospective buyers to the plaintiff. The plaintiff also argues that the court found that the defendants misrepresented to the plaintiff who actually owned the property. The problem with the plaintiff's arguments is that the court never found that the defendants breached the listing agreement through their contacts with prospective buyers or that their misrepresentations constituted breaches of the agreement. Furthermore, the court did not find that such conduct caused the plaintiff any damages. We therefore decline to address these issues because they are irrelevant to the grounds on which the court expressly relied in rendering its judgment.

the court's judgment as to that count must be reversed and judgment rendered for the defendants. See *Bayer* v. *Showmotion, Inc.*, supra, 292 Conn. 415–16.

III

Next, the defendants claim that the trial court improperly concluded that they had violated CUTPA. In particular, the defendants argue that the court improperly concluded that they, through Longo, were engaged in the trade or commerce of real estate acquisition, thereby, satisfying the statutory requirement under CUTPA[12] that the unfair acts must have occurred in the conduct of any trade or commerce. The defendants argue that they were not engaged in the trade or commerce of real estate acquisition at the time of the occurrence of the purported CUTPA violations. In response, the plaintiff contends that the defendants were engaged in a "competing trade or commerce because they were trying to sell the property themselves while under the obligation to deal exclusively with [the plaintiff]." We agree with the defendants.

"To state a claim under CUTPA, the plaintiff must allege that the actions of the [defendants] were performed in the conduct of trade or commerce. . . . Moreover, a CUTPA violation may not be alleged for activities that are incidental to an entity's primary trade or commerce." (Citations omitted; internal quotation marks omitted.) *Sovereign Bank* v. *Licata*, 116 Conn. App. 483, 493–94, 977 A.2d 228 (2009), appeal dismissed, 303 Conn. 721, 36 A.3d 662 (2012).[13] Whether a defendant

[12] General Statutes § 42-110b (a) provides: "No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."

[13] " 'Trade' and 'commerce' means the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state." General Statutes § 42-110a (4). Furthermore, such activities constitute trade or commerce only if the party is engaged in the business of conducting such activities. See, e.g., *Landmark Investment Group, LLC* v. *Chung Family Realty Partnership*,

is subject to CUTPA is a question of law that is subject to plenary review. See *Landmark Investment Group, LLC* v. *Chung Family Realty Partnership, LLC*, 125 Conn. App. 678, 700, 10 A.3d 61 (2010), cert. denied, 300 Conn. 914, 13 A.3d 1100 (2011).

In its April 17, 2019 memorandum of decision, the court only briefly addressed the trade or commerce requirement, stating: "Neither party has raised any issue as to whether or not this single sale of a family owned parcel of land was a transaction 'in the conduct of any trade or business.' Since [Longo] held a real estate broker's license and inserted himself as of November 1, 2014, as the broker of record for the sellers, the court will treat this as a 'trade or business' dispute at least as to him." The court then went on to discuss whether the unfair acts alleged in the operative amended complaint constituted CUTPA violations.

The defendants argue that the court was correct in concluding that a single sale of a family owned parcel of land is not sufficient to meet the trade or commerce requirement of CUTPA. They then argue that the court's reliance on the fact that Longo was a licensed real estate broker and inserted himself into the transaction was in error for several reasons. First, they argue that the plaintiff made no such claim in its complaint. Second, they argue that the alleged CUTPA violations in the complaint and found by the court all occurred prior to November 1, 2014, before the defendants entered into a listing agreement with Longo and after their listing agreement with the plaintiff had expired. Therefore, according to the defendants, Longo was in the same position as the other defendants at the time of the alleged CUTPA violations; he was one member of the

LLC, 125 Conn. App. 678, 700, 10 A.3d 61 (2010) ("CUTPA violation may not be alleged for activities that are incidental to an entity's primary trade or commerce" (internal quotation marks omitted)), cert. denied, 300 Conn. 914, 13 A.3d 1100 (2011).

family involved in a single sale of the parcel that the defendants jointly owned.

In response, the plaintiff argues that the court properly held that the defendants were involved in trade or commerce because they were, as a group, competing with the plaintiff to sell the property during the term of the listing agreement. In support of this argument, the plaintiff points to evidence that the defendants failed to disclose inquiries from potential buyers to the plaintiff and agreed that they would share any commission to which Longo became entitled pursuant to the November 1, 2014 listing agreement. Relying on our Supreme Court's opinion in *Larsen Chelsey Realty Co.* v. *Larsen*, 232 Conn. 480, 656 A.2d 1009 (1995), the plaintiff argues that the defendants were engaged in trade or commerce for purposes of CUTPA because Longo was marketing the property on behalf of the defendants during the term of the listing agreement in direct competition with the plaintiff. We agree with the defendants that the court's finding that the defendants were engaged in trade or commerce at the time of the CUTPA violations was legally incorrect.

Initially, we agree with the trial court that the defendants' sale of a single family owned parcel does not constitute trade or commerce for the purposes of CUTPA. This court has previously held that where the sellers of commercial property are not in the business of selling real property, "CUTPA is inapplicable to the transaction" at issue. *Biro* v. *Matz*, 132 Conn. App. 272, 290, 33 A.3d 742 (2011). There is no evidence in this case that the defendants were in the business of selling real estate, other than the evidence that Longo was a licensed real estate broker. Thus, we agree with the trial court that any alleged CUTPA violations must be connected to Longo's activities as a real estate broker.

The trial court found that Longo "inserted himself as of November 1, 2014," using his real estate broker's

license and, thus, engaged in trade or commerce.[14] The problem with the court's analysis is that all of the acts it determined to be CUTPA violations occurred before November 1, 2014. The court found that Longo's breach of the listing agreement by directing Empire to cease all communications with the plaintiff during the term of the listing agreement and "misrepresentations [or] nonrepresentations as to the true ownership status of the property, the interfamily litigation background, and the [mortgage] on the property" *that preceded that breach* constituted the CUTPA violations. As noted previously in this opinion, the court found that the directive that Empire cease communications with the plaintiff occurred sometime in September, 2014. Although we have concluded that this finding was clearly erroneous, any such instruction could only constitute a breach of the listing agreement if it occurred during the term of the listing agreement, which expired on October 31, 2014, the day before the court concluded that Longo "inserted himself" using his broker's license. Furthermore, because the court found that the other CUTPA violations were misrepresentations and nonrepresentations that preceded the breach, they necessarily also occurred before November 1, 2014. Consequently, at the time that Longo and the other defendants engaged in conduct that the court described as unscrupulous, immoral, unfair and deceptive, none of them did so while engaged in trade or commerce for purposes of CUTPA.[15]

[14] The court made this finding "at least as to [Longo]." The court made no finding that any of the other defendants engaged in any trade or commerce for purposes of CUTPA. Despite making no such finding, the court found for the plaintiff and against all of the defendants on the plaintiff's CUTPA claim. Because we are reversing the court's decision for other reasons, we need not consider whether there was a basis to conclude that the defendants other than Longo were engaged in trade or commerce for purposes of CUTPA.

[15] We assume, arguendo, that Longo's primary trade or commerce as of November 1, 2014, was the marketing and brokering of real estate. Nonetheless, we note that the trial court, in its memorandum of decision, stated

We also conclude that the plaintiff's reliance on *Larsen Chelsey Realty Co.* is misplaced. That case involved an action between a real estate company that sought damages against its former president and a competing real estate company, wherein several claims were alleged, including violations of CUTPA. See id., 483. At trial, the court set aside the jury verdict for the plaintiff on its CUTPA count, holding that (1) the pleadings and evidence repeatedly described an employer-employee relationship between the plaintiff and its former president that could not be the basis for a CUTPA claim, and (2) the plaintiff could not prevail on its CUTPA count because the plaintiff had an employer-employee relationship with its former president as opposed to a consumer relationship. Id., 490–91.

On appeal, our Supreme Court reversed the judgment of the trial court, holding, inter alia, that (1) the alleged acts involved conduct that occurred outside the confines of an employer-employee relationship and (2) CUTPA does not impose a requirement of a consumer

that Longo "was and is a licensed real estate broker, but has never worked as such as his primary occupation . . . ." During trial, Longo testified that his principal employment from 1972 to 2008, was operating an asphalt paving and excavating business. Longo further testified that he created a limited liability company (company) in 2007, due to the growth of the business and the liability of the business' real estate assets. Longo testified that the company stopped operating after 2007, and that, afterward, he made a business decision to sell the company's assets. He also testified that a court proceeding required him to sell one of his real estate assets.

Longo, however, did testify that he engaged in the business of real estate transactions during 2013, in which he conducted eight to nine real estate deals using his broker's license. Nonetheless, the record does not contain ample evidence from which the trial court reasonably could have concluded that the defendants' primary trade or business was the sale and development of real estate. Longo testified that the sale of the property arose from a business decision and a court order. Furthermore, Longo testified that he never utilized his license as a broker as his primary employment. Also, the record does not establish an agency relationship between Longo and the other defendants, in a capacity in which he was engaging in real estate transactions on their behalf.

relationship. Id., 494–95. The court held that the jury reasonably could have found that the defendant was engaged in trade or commerce because the defendant's activities "implicated the services of both [the defendant] and the plaintiff as real estate brokers in the New Haven area and thus implicated trade or commerce under CUTPA." Id., 494.

In its appellate brief, the plaintiff argues: "Applying the *Larsen Chelsey Realty Co.* analysis to the facts found by [the] trial court, [Longo] may have been the only licensed broker among the defendant owners, but he was engaged in marketing the property on behalf of his cousins while all of the defendants were bound by the listing agreement with [the plaintiff]. This conduct, together with the defendants' disclosures and nondisclosures, resulted in the defendants waiting out until [the plaintiff's] listing agreement expired so the defendants could receive the commission for themselves. Once [the plaintiff's] listing [agreement] expired, Longo made a very similar deal directly with [Empire] and cut [the plaintiff] out of its commission."

There are several problems with the plaintiff's analysis. First, other than the court's clearly erroneous finding that the defendants in September, 2014, instructed Empire to cease communications with the plaintiff and thereby prevented the plaintiff from participating in negotiations during the last month of the listing agreement, the court made no finding that the defendants breached the listing agreement or committed any CUTPA violation by marketing the property to prospective buyers. In fact, the court did not mention a single prospective buyer other than Empire and made no finding that the defendants were unfairly competing with the plaintiff for such prospective buyers. Second, unlike in *Larsen Chelsey Realty Co.*, in which both the defendant and the plaintiff were acting as real estate brokers,

in this case, at least during the term of the listing agreement, the defendants were acting as owners of the property. They did not need a broker's license to discuss the sale of their property with any prospective buyers. Although the terms of the listing agreement may have obligated them to refer any such inquiries to the plaintiff, their failure to do so would not constitute their participation in trade or commerce for the purposes of CUTPA. Third, contrary to the plaintiff's suggestion, the court made no finding that the defendants were engaged in conduct to "wait out" the expiration of the listing agreement so that they could receive the commission themselves. Thus, *Larsen Chelsey Realty Co.* is inapposite.

In sum, we conclude that the court erred in concluding that the actions of the defendants were performed in the conduct of trade or commerce for purposes of CUTPA. Accordingly, the trial court improperly rendered judgment for the plaintiff on its CUTPA claim.

The judgment is reversed and the case is remanded with direction to render judgment for the defendants on both the breach of contract and CUTPA claims.

In this opinion the other judges concurred.

ALFRED J. KLOIBER ET AL. *v.* LINDA JELLEN ET AL. (AC 43382)

Elgo, Cradle and DiPentima, Js.

Syllabus

The plaintiffs, K and M, sought an injunction and to recover damages from the defendants for trespass, private nuisance, common-law negligence and statutory negligence in connection with a property dispute between the parties concerning surface water runoff onto certain real property located directly between the parties' properties. F Co., a limited liability company of which K is the principal and sole member, holds title to the subject property, which is maintained as a rental property. The plaintiffs never owned, occupied or resided at, or had a possessory

interest in, the subject property. Following a trial on the merits, the trial court rendered judgment in favor of the defendants, from which the plaintiffs appealed to this court. *Held* that the plaintiffs lacked standing to maintain this action in their individual capacities against the defendants and, as self-represented individuals, could not maintain it on behalf of F Co., and, therefore, the action should have been dismissed for lack of subject matter jurisdiction.

Argued May 17—officially released September 21, 2021

Procedural History

Action to recover damages for, inter alia, trespass, and for other relief, brought to the Superior Court in the judicial district of Danbury and tried to the court, *Krumeich*, *J.*; judgment for the defendants, from which the plaintiffs appealed to this court. *Improper form of judgment*; *reversed*; *judgment directed*.

Melanie McNichol, self-represented, with whom, on the brief, was *Alfred J. Kloiber*, self-represented, the appellants (plaintiffs).

Robert O. Hickey, with whom, on the brief, was *Ryan T. Daly*, for the appellees (defendants).

Opinion

ELGO, J. In this property dispute among neighbors, the self-represented plaintiffs, Alfred J. Kloiber and Melanie McNichol,[1] appeal from the judgment of the trial court in favor of the defendants, Chris Jellen and Linda Jellen. On appeal, the plaintiffs raise a variety of issues related to the court's disposition of their trespass, private nuisance, negligence, and statutory negligence claims. Following supplemental briefing by the parties on the issue of standing, we conclude that the plaintiffs lacked the requisite standing to maintain this action. Accordingly, we reverse the judgment of the trial court and remand the case with direction to render a judgment of dismissal.

[1] In this opinion, we refer to Alfred J. Kloiber and Melanie McNichol collectively as the plaintiffs and individually by name.

The following facts are relevant to this appeal. As the court found in its memorandum of decision, "[t]he [three] properties in question are located in Sherman off Route 39 South between Wanzer Mountain and Squantz Pond." In 1988, the defendants purchased real property known as 158 Route 39 South (defendants' property),[2] on which they constructed a home.[3] Central to this dispute is the parcel known as 160 Route 39 South (subject property), which the court found was "downhill from and adjacent to [the westerly side of] the defendants' property . . . ."[4] Further west and adjacent to the other side of the subject property is 162 Route 39 South (plaintiffs' property), which the plaintiffs purchased in 1999. The subject property thus sits directly between the plaintiffs' property and the defendants' property.

Approximately twenty years after the defendants developed their property and more than a decade after the plaintiffs purchased their property, an entity known as "Fred's Country Rentals, LLC," acquired the subject property in December, 2010. It is undisputed that Kloiber is the principal and sole member of that limited liability company. It also is undisputed that the limited liability company holds title to the subject property. As the court found in its memorandum of decision, the subject property at all relevant times was maintained "as a rental property."[5] At no time did the plaintiffs

[2] At trial, Chris Jellen described the topography of the area in question as a "steady . . . downhill" from the top of Wanzer Mountain to Route 39 South and the defendants' property.

[3] As the court noted in its memorandum of decision, "[t]he parties stipulated [that] the defendants' property was woodland in December, 1988, when the defendants purchased it, and the [defendants'] house, driveway and septic fields were constructed in 1990."

[4] McNichol testified at trial that the defendants' property "sits uphill directly east" of the subject property.

[5] In their operative complaint, the plaintiffs alleged that the subject property was purchased "to rent out for current income and as an investment for long-term capital appreciation." On direct examination, Kloiber was asked, "what specific damages have . . . you incurred?" Kloiber answered

occupy or reside at the subject property. Rather, the uncontroverted evidence presented at trial indicated that they resided at the plaintiffs' property at all relevant times.[6]

In December, 2017, the plaintiffs commenced this action for injunctive and monetary relief, which concerns surface water runoff onto the subject property. Their operative complaint contained four counts alleging trespass, private nuisance, negligence, and statutory negligence. As the court noted in its memorandum of decision, "[t]he only activity by the defendants that the plaintiffs point to as contributing to the migration of surface water onto the subject property concerns the construction of the defendants' house . . . . The plaintiffs complain that the defendants developed a woodland lot by constructing a house with roofs, gutters, leaders and downspouts, a driveway and a parking area, which . . . added 'impervious surfaces' that the plaintiffs contend channeled surface water that eventually traveled to the subject property. The defendants also constructed a septic system that included a swale to divert groundwater away from the septic fields. . . . All the changes in surface conditions to the defendants' property were in accordance with the building plans approved by municipal authorities when their house was constructed and certificates of occupancy were issued." (Footnote omitted.)

Following a two day trial, the court issued a comprehensive memorandum of decision, in which it found that "[t]he surface water collected on Wanzer Mountain

that "[t]he damages include, but are not limited to loss of rent . . . ." McNichol similarly testified that the defendants' alleged conduct caused a loss of rental income from the subject property.

[6] At trial, Kloiber testified repeatedly that the plaintiffs "never lived" at the subject property. He further testified that they had occupied the plaintiffs' property at all relevant times. In their supplemental brief, the plaintiffs note their status as "neighbors" to the subject property.

tends to migrate downhill across Route 39 onto the defendants' property . . . and from there through natural gullies, channels and rivulets to the subject property. . . . [T]hese natural channels were likely the result of long-standing natural water flow, not any activity to direct or increase the flow onto the subject property by the defendants. . . . [T]here is no evidence that the defendants directed or increased the natural flow onto the subject property. All the changes to the contours on the defendants' property and the structures and paved areas erected were in accordance with approvals received from municipal authorities when the defendants' house was constructed . . . and would have been known by the plaintiffs before the purchase of the subject property. . . . Nor is there proof the flooding and erosion experienced on the subject property was caused by any alterations to the defendants' property. . . .

"There was no evidence of the natural water flow before improvements to the defendants' property; it is probable that surface water flowed down the mountain and over the highway onto the defendants' property before it was improved and that excess water migrated downhill to the subject property. There is no evidence that the changes made to the defendants' property caused the conditions complained of by the plaintiffs." The court thus concluded that the plaintiffs could not prevail on any of their claims and rendered judgment in favor of the defendants.

From that judgment, the plaintiffs appealed. At oral argument before this court, McNichol, who was the only plaintiff presenting oral argument, was asked precisely who held title to the subject property.[7] Consistent with

[7] Although the plaintiffs offered into evidence a copy of the deed to the defendants' property, they did not submit a copy of the deed to the subject property at trial.

her testimony at trial,[8] McNichol responded that title to the subject property was held by "an LLC." Mindful that a question of subject matter jurisdiction may be raised at any time, including sua sponte invocation by a reviewing court; *DeCorso* v. *Calderaro*, 118 Conn. App. 617, 623 n.11, 985 A.2d 349 (2009), cert. denied, 295 Conn. 919, 991 A.2d 564 (2010); see also *Smith* v. *Snyder*, 267 Conn. 456, 460 n.5, 839 A.2d 589 (2004) ("[w]e raise this issue of standing sua sponte as it implicates our subject matter jurisdiction"); we subsequently ordered the parties to file supplemental briefs on the issue of the plaintiffs' standing to maintain this action.

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or

[8] At trial, the following colloquy occurred:

"[The Defendants' Counsel]: Ms. McNichol, who owns or who holds title to the subject property?

"[McNichol]: It's under Fred's Country Rentals, and it's part of our marital estate.

"[The Defendants' Counsel]: So, the—the title ownership is in—

"[McNichol]: My husband and it's part of the marital estate.

"The Court: I'm sorry. So, the title is under Fred—

"[McNichol]: Fred's Country Rentals.

"The Court: Fred's Country Rentals. That's an LLC or corporation?

"[McNichol]: It's an LLC, Your Honor.

"The Court: Okay. And—

"[McNichol]: Under my husband's name and—

"The Court: And, what do you mean by under your husband's name?

"[McNichol]: So, it—

"The Court: He owns Fred's Countr[y] Rentals?

"[McNichol]: Right, so [Kloiber is] the principal of Fred's Country Rentals and it's part of our marital estate.

"The Court: Okay. And, by marital estate you mean you have some interest because you're married to the person who owns the LLC?

"[McNichol]: Yes.

"The Court: Okay. So, all right. Are there any other owners of the LLC?

"[McNichol]: No, Your Honor.

"The Court: So, just [Kloiber]?

"[McNichol]: Yes, Your Honor. . . .

"The Court: All right. So [Kloiber is] the sole owner of the LLC?

"[McNichol]: Yes."

representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . [If] a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause." (Citation omitted; internal quotation marks omitted.) *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 318, 71 A.3d 492 (2013); see also *Ion Bank* v. *J.C.C. Custom Homes, LLC*, 189 Conn. App. 30, 42, 206 A.3d 208 (2019) ("the court lacks subject matter jurisdiction over an action commenced by a plaintiff without standing"). Because the issue of standing implicates a court's subject matter jurisdiction, it is subject to plenary review. *Channing Real Estate, LLC* v. *Gates*, 326 Conn. 123, 137, 161 A.3d 1227 (2017).

In their supplemental brief, the plaintiffs acknowledge that they neither own nor hold title to the subject property.[9] They nonetheless maintain that they possess standing to maintain the four causes of action alleged in their complaint. We disagree.

In count one, the plaintiffs alleged trespass against the defendants. By way of relief, they sought, inter alia, "[a]n immediate injunction requiring the defendants to cease and desist allowing the flow of their surface water runoff to enter over, under and onto" the subject property. As our Supreme Court has explained, "[t]itle is an essential element in a plaintiff's case, whe[n] an injunction is sought to restrain a trespass . . . ." (Internal quotation marks omitted.) *Socha* v. *Bordeau*, 277 Conn. 579, 586, 893 A.2d 422 (2006). When both monetary damages for trespass and an injunction are sought, as is the case here, "both title to and possession of the disputed area must be proved . . . and the burden of

[9] In their supplemental brief, the plaintiffs concede that the subject property "is titled to and owned by an LLC" and that "there is no question as to the [subject] property's ownership by an LLC . . . ."

proving them is on the plaintiff." (Citations omitted.) *McCullough* v. *Waterfront Park Assn., Inc.*, 32 Conn. App. 746, 749, 630 A.2d 1372, cert. denied, 227 Conn. 933, 632 A.2d 707 (1993). Because the plaintiffs by their own admission do not hold title to the subject property, we conclude that they lack standing to maintain the trespass action alleged in their complaint. See *Ventres* v. *Farmington*, 192 Conn. 663, 668, 473 A.2d 1216 (1984) ("the trial court correctly found that the plaintiff had no standing to complain of trespass"); *Zanoni* v. *Hudon*, 42 Conn. App. 70, 75, 678 A.2d 12 (1996) (trial court "correctly concluded" that plaintiffs lacked standing to bring trespass action).

The plaintiffs also alleged private nuisance on the part of the defendants. Under Connecticut law, such a claim may be brought only by an owner or occupier of the property in question. "A private nuisance exists only where one is injured in relation to a right which he enjoys by reason of his ownership of an interest in land. . . . [A cause of action for private nuisance] includes all injuries to an owner or occupier in the enjoyment of the property of which he is in possession, without regard to the quality of the tenure."[10] (Internal quotation marks omitted.) *Webel* v. *Yale University*, 125 Conn. 515, 525, 7 A.2d 215 (1939); see *Couture* v. *Board of Education*, 6 Conn. App. 309, 315, 505 A.2d 432 (1986) (plaintiff could not maintain private nuisance action "[b]ecause he suffered no injury in relation to his ownership of an interest in land"); *Welsh* v. *Nusbaum*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-17-6033010 (June 7, 2018) (66 Conn. L. Rptr. 574) (plaintiff's allegation that "she was a [long-term] occupant of the property" sufficient to survive motion to strike private nuisance claim); *Petrarca* v. *Doubleday*, Superior Court, judicial district of New London,

[10] The plaintiffs acknowledge that well established precept, which they quote in their supplemental brief.

Docket No. CV-09-5013111 (November 17, 2010) (50 Conn. L. Rptr. 886) (concluding that tenant's "claim sounding in private nuisance" against " 'owner/landlord' " of property was legally sufficient to survive motion to strike); *Arachy* v. *Schopen*, 22 Conn. Supp. 20, 20–21, 158 A.2d 604 (1960) (plaintiff could not maintain private nuisance action because "he was not injured in relation to a right which he enjoyed by reason of his ownership of an interest in land"); *Goldberg* v. *Wolotsky*, 8 Conn. Supp. 72, 73 (1940) (plaintiff could not maintain private nuisance action because he was not owner or occupier of property where injury occurred); see also *Adkins* v. *Thomas Solvent Co.*, 440 Mich. 293, 303, 487 N.W.2d 715 (1992) ("[t]he essence of private nuisance is the protection of a property owner's or occupier's reasonable comfort in occupation of the land in question"); *Philadelphia* v. *Brabender*, 201 Pa. 574, 576, 51 A. 374 (1902) ("only the owners or occupiers" can maintain private nuisance action); *Bowers* v. *Westvaco Corp.*, 244 Va. 139, 148, 419 S.E.2d 661 (1992) ("[a] private nuisance is the using, or authorizing the use of, one's property, or of anything under one's control, so as to injuriously affect an owner or occupier of property" (internal quotation marks omitted)); W. Keeton et al., Prosser and Keeton on the Law of Torts (5th Ed. 1984) § 87, p. 619 (private nuisances "interfere with [the] right to the undisturbed enjoyment of the premises which is inseparable from ownership of the property"); W. Keeton et al., supra, p. 622 ("[p]rivate nuisance is a tort that protects the interest of those who own or occupy land").

Here, the plaintiffs do not own the subject property. See footnote 9 of this opinion. It also is undisputed that the plaintiffs never occupied the property. See footnote 6 of this opinion. Accordingly, they lack standing to maintain a cause of action for private nuisance against the defendants.

Relying on § 821E of the Restatement (Second) of Torts, the plaintiffs nonetheless claim that they are entitled to maintain a private nuisance action due to their purported status as "possessors" of the subject property. That claim is unavailing. Titled "Who Can Recover For Private Nuisance," § 821E enumerates three classes of individuals "who have property rights and privileges in respect to the use and enjoyment of the land affected . . . (a) possessors of the land, (b) owners of easements and profits in the land, and (c) owners of nonpossessory estates in the land that are detrimentally affected by interference with its use and enjoyment." 4 Restatement (Second), Torts § 821E, pp. 102–103 (1979). The plaintiffs in this case do not qualify for any of those three classes.

As the commentary expressly states, the term "[p]ossessors of land," as used in § 821E, is defined in § 328E. Id., comment (c), p. 103. Section 328E, in turn, defines "possessor of land" as "(a) a person who is in occupation of the land with intent to control it or (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under [c]lauses (a) and (b)." 2 Restatement (Second), Torts § 328E, p. 170 (1965). It is undisputed that the plaintiffs have never been in occupation of the subject property. See footnote 6 of this opinion. Furthermore, because they concededly are not the owners of the subject property, they are not "a person who is entitled to immediate occupation" of that property when it is unoccupied. The plaintiffs, therefore, are not possessors of the subject property, as that term is used in the Restatement (Second). See 4 Restatement (Second), supra, § 821E (a), p. 102. There also is no claim or evidence in this case that the plaintiffs are owners of easements and profits in the subject

property. See id., § 821E (b), p. 102. Finally, in light of their concession that the subject property at all relevant times was owned by a limited liability company; see footnotes 8 and 9 of this opinion; the plaintiffs plainly are not owners of nonpossessory estates in the subject property. See id., § 821E (c), p. 103. They thus do not qualify as possessors of the subject property pursuant to the Restatement (Second).

Apart from the Restatement (Second) of Torts, the plaintiffs have provided no legal authority to support their claim of a possessory interest in the subject property. At trial, both plaintiffs equated ownership of real property with possession thereof and testified that they were in exclusive possession of the subject property due to their status as owners of the property,[11] which testimony they now concede was incorrect. See footnote 9 of this opinion.

Although the plaintiffs testified that they paid the mortgage, property taxes, and utility bills for the subject property, they presented no documentary evidence of such payments, save for a redacted Form 1098 mortgage interest statement for 2018 addressed to Kloiber at "PO Box 8832 New Fairfield, CT 06812."[12] More importantly, they provided no evidence that such payments were made *in their individual capacities*, rather than on behalf of the limited liability company that owned the subject property. At all relevant times, Kloiber was the principal and sole member of that company. This court takes judicial notice of the records of the Connecticut

[11] On direct examination, McNichol, acting in a self-represented capacity, asked Kloiber: "[Y]ou still remain in possession of the [subject] property, correct? You still own the property at this time?" Kloiber answered, "Yes, my wife and I both own the property." In her testimony, McNichol similarly testified that "[Kloiber] and I are the only owners of the property. We hold the sole title, and we remain in exclusive possession of the property."

[12] That document, which the plaintiffs introduced into evidence at trial, does not disclose the name of the account holder.

Secretary of the State, which indicate that the business address of that limited liability company is "PO Box 8832 New Fairfield, CT 06812"—the same address contained on the mortgage interest statement admitted into evidence. See, e.g., *Nationstar Mortgage, LLC* v. *Server*, Superior Court, judicial district of New Haven at Meriden, Docket No. CV-17-6011564-S (September 13, 2018) (taking judicial notice of business address of limited liability company); *Dowling* v. *Schupp*, Superior Court, judicial district of Hartford, Docket No. CV-11-6027560 (July 28, 2015) (taking judicial notice of "the corporate records in the [S]ecretary of [the] [S]tate's office").

The plaintiffs have provided this court with no authority to support the contention that the payment of certain bills and expenses on behalf of a limited liability company by one of its members suffices to establish a possessory interest in real property owned by that company, particularly when the payor never occupied the property. See *DeNunzio* v. *DeNunzio*, 90 Conn. 342, 348, 97 A. 323 (1916) ("The plaintiff as an officer . . . never had possession of any of the assets of the corporation in his own right. His possession as an officer . . . was that of the corporation. As an individual he never had any corporate assets . . . and no right to the possession of any [corporate assets] . . . ."). In the present case, any interest the plaintiffs had in the subject property derived exclusively from their activities on behalf of the limited liability company in a representative capacity. In such circumstances, they cannot be said to have a possessory interest in the subject property. Accordingly, the plaintiffs lacked standing to maintain an action for private nuisance against the defendants.

For that same reason, the plaintiffs lacked standing to maintain their common-law and statutory negligence actions. Although the plaintiffs submit that "their claims were based solely on an invasion of their individual

rights," they have not identified any rights that are distinct from, and not derivative of, those of the limited liability company that owned the subject property. Because the plaintiffs did not own, occupy, or have a possessory interest in that property, any harm caused by the defendants' allegedly improper conduct was sustained by the limited liability company, as the owner of the subject property. See *Padawer* v. *Yur*, 142 Conn. App. 812, 818, 66 A.3d 931 (concluding that plaintiff lacked standing to bring action because, "[i]f the defendants' alleged breach caused any harm . . . it was to [the limited liability company], not to the plaintiff in his individual capacity"), cert. denied, 310 Conn. 927, 78 A.3d 145 (2013).

Tellingly, the plaintiffs, in their supplemental brief, assert that the defendants' actions interfered with "the right of full and unfettered use and enjoyment *of one's real property*." (Emphasis added.) Yet, the subject property indisputably does not belong to the plaintiffs—it is owned by a limited liability company. The self-represented plaintiffs are not entitled to bring this action in their individual capacities on behalf of that limited liability company, despite the fact that Kloiber was the sole member of that company.[13] See, e.g., *Channing Real Estate, LLC* v. *Gates*, 326 Conn. 123, 138, 161 A.3d 1227 (2017) ("[b]ecause a member of a limited liability company cannot recover for an injury allegedly

[13] Because the plaintiffs have appeared in a self-represented capacity, they cannot represent the limited liability company in this action. "Any person who is not an attorney is prohibited from practicing law, except that any person may practice law, or plead in any court of this state in his own cause. General Statutes § 51-88 (d) (2). The authorization to appear [in a self-represented capacity] is limited to representing one's own cause, and does not permit [self-represented] individuals to appear . . . in a representative capacity. In Connecticut, a corporation may not appear [in a self-represented capacity]. . . . A corporation may not appear by an officer of the corporation who is not an attorney." (Internal quotation marks omitted.) *Certo* v. *Fink*, 140 Conn. App. 740, 747 n.4, 60 A.3d 372 (2013).

suffered by the limited liability company, we conclude that the defendant lacks standing to pursue a claim" on its behalf); *O'Reilly* v. *Valletta*, 139 Conn. App. 208, 214–15, 55 A.3d 583 (2012) ("[a] member or manager . . . may not sue in an individual capacity to recover for an injury based on a wrong to the limited liability company"), cert. denied, 308 Conn. 914, 61 A.3d 1101 (2013); *Ma'Ayergi & Associates, LLC* v. *Pro Search, Inc.*, 115 Conn. App. 662, 666, 974 A.2d 724 (2009) (rejecting plaintiff's claim that he had "standing to assert all of the causes of action on behalf of his companies because he is the sole member of those companies").[14]

The plaintiffs also argue, in passing, that the defendants interfered with their rights as "neighbors" to the subject property. They have provided neither legal authority nor analysis to substantiate that bald assertion. "[Our Supreme Court] repeatedly [has] stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Taylor* v. *Mucci*, 288 Conn. 379, 383 n.4, 952 A.2d 776 (2008); see also *Northeast Ct. Economic Alliance, Inc.* v. *ATC Partnership*, 272

[14] We further note that the present case does not fall within the "narrowly tailored exception" articulated in *Saunders* v. *Briner*, 334 Conn. 135, 174, 221 A.3d 1 (2019), which our Supreme Court explained is applicable "only in rare circumstances"; id., 174 n.39; nor have the plaintiffs so alleged. This case does not involve a sole plaintiff seeking recovery for "capital [that] belonged to him personally." Id. Here, there are two plaintiffs who claim an equal interest in the subject property and who submit that they "have standing as individuals . . . ." This case also does not involve an attempt to recover capital assets of the limited liability company, nor does it involve breach of fiduciary duty, breach of contract, breach of an implied covenant of good faith and fair dealing, or unfair trade practices claims. Rather, the present case involves a dispute regarding water runoff from a neighboring property, for which the plaintiffs seek injunctive and monetary relief.

Conn. 14, 51 n.23, 861 A.2d 473 (2004) ("[i]nasmuch as the plaintiffs' briefing of the . . . issue constitutes an abstract assertion completely devoid of citation to legal authority or the appropriate standard of review, we exercise our discretion to decline to review this claim as inadequately briefed"); *Russell* v. *Russell*, 91 Conn. App. 619, 635, 882 A.2d 98 (parties must analyze relationship between facts of case and applicable law), cert. denied, 276 Conn. 924, 888 A.2d 92 (2005), and cert. denied, 276 Conn. 925, 888 A.2d 92 (2005). We therefore decline to review that abstract assertion.

In light of the foregoing, we conclude that the plaintiffs lacked standing to maintain this action in their individual capacities against the defendants, which necessitates a dismissal of the action. We further conclude that, as self-represented individuals, the plaintiffs cannot maintain this action on behalf of the limited liability corporation that owned the subject property at all relevant times.

The form of the judgment is improper, the judgment is reversed and the case is remanded with direction to dismiss the plaintiffs' action for lack of subject matter jurisdiction.

In this opinion the other judges concurred.

DANIEL ONOFRIO ET AL. *v.* JOSEPH MINERI ET AL.
(AC 43158)

Moll, Alexander and Suarez, Js.

Syllabus

The plaintiffs sought to recover damages from the defendants M, T Co. and G Co. for, inter alia, violations of the Connecticut Unfair Trade Practices Act (§ 42a-110 et seq.) and from T Co. and G Co. for violations of the New Home Warranties Act (warranties act) (§ 47-116 et seq.). The plaintiffs purchased certain real property from G Co., which included

a house built by T Co. M, an owner of both T Co. and G Co., was aware before the purchase that the house had a problem with water in the basement, but he did not inform the plaintiffs. The trial court rendered judgment for the plaintiffs on their CUTPA and warranties act claims, and M and T Co. appealed to this court. *Held*:

1. The trial court properly determined that M was personally liable pursuant to CUTPA, but the court incorrectly determined that T Co. violated CUTPA.

   a. This court declined to review M and T Co.'s claim that the trial court's conclusion that they violated CUTPA was inconsistent with the judgment the court rendered in their favor on the plaintiffs' breach of contract, negligent misrepresentation, negligence and fraudulent concealment claims; M and T Co. failed to meaningfully analyze in their brief how the court's rendering judgment in their favor on the other claims was necessarily inconsistent with its conclusion that the finding that G Co. violated CUTPA should be applied to them, and, thus, this court deemed the claim abandoned.

   b. M could not prevail on his claim that the trial court erred in extending CUTPA liability to him on the basis of its finding that G Co. had violated CUTPA; the court found that the evidence established that M effectively controlled the closely held corporations G Co. and T Co. and that he had complete knowledge of the water problems in the basement and the representations or nonrepresentations given to the plaintiffs, and he either directly participated in the wrongful conduct or had the ability to control it.

   c. The trial court improperly extended to T Co., on the basis of a joint coordination theory, its finding that G Co. violated CUTPA; the court's conclusion that *Joseph General Contracting, Inc.* v. *Couto* (317 Conn. 565) supported an extension of CUTPA liability to T Co. because it had jointly coordinated its activities with G Co. went beyond the issues considered by our Supreme Court in that case, which had considered only whether liability under CUTPA could be extended to an individual who engaged in unfair or unscrupulous conduct on behalf of a business entity.

2. T Co. could not prevail on its claim that the trial court erred in concluding that it was a vendor pursuant to statute (§ 47-118 (a)) and, thus, that it violated the implied warranty that the improvement on the plaintiffs' house was constructed in a workmanlike manner; T Co. was a vendor pursuant to § 47-116, as it was engaged in the business of erecting or creating an improvement on real estate, and, pursuant to statute (§ 47-119), a vendor who conveys an improvement to an intermediate purchaser to evade liability is liable to a subsequent purchaser, thus, T Co. was liable for a breach of the warranties act notwithstanding the fact that the plaintiffs directly purchased the house from G Co.

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

Procedural History

Action to recover damages for, inter alia, the defendants' alleged unfair trade practices, and for other relief, brought to the Superior Court in the judicial district of New Haven where the matter was tried to the court, *Hon. Jon C. Blue*, judge trial referee; judgment for the plaintiffs, from which the named defendant et al. appealed to this court. *Affirmed in part*; *reversed in part*; *judgment directed.*

Scott Jackson, for the appellants (named defendant et al.).

Thomas J. Dembinski, for the appellees (plaintiffs).

Opinion

MOLL, J. In this new home construction dispute, the defendants Joseph Mineri (Mineri) and Timberwood Homes, LLC (Timberwood), appeal from the judgment of the trial court, rendered after a bench trial, in favor of the plaintiffs, Daniel Onofrio and Elsie Onofrio, against (1) Mineri and Timberwood on the plaintiffs' claim pursuant to the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and (2) Timberwood on the plaintiffs' claim pursuant to the New Home Warranties Act (warranties act), General Statutes § 47-116 et seq.[1] We affirm in part and reverse in part the judgment of the trial court.

The trial court found the following facts that are relevant to our resolution of this appeal. "The named defendant . . . Mineri, is one of three brothers who, through their [businesses], work together in the contracting business." Mineri is a fifty-fifty owner of Timberwood with his brother, Louis. "Timberwood is in

[1] Judgment also was rendered against the defendant G & M Properties, LLC (G & M). G & M is not participating in this appeal. We refer to Mineri, Timberwood, and G & M collectively as the defendants and individually by name.

the business of building new homes. [Mineri] and one Alan Genn (not a party to this action) are fifty-fifty owners of G & M [Properties, LLC (G & M)]. G & M buys and sells real property. Christopher [Mineri (Christopher)] (also not a party) owns all or part of Mineri Excavating . . . .'' Mineri testified at trial that he is actively involved in the operation of all three businesses.

The subject property is located at 6 Pine View Drive in North Branford (property). ''A previous house at this location was destroyed by fire, leaving a foundation. [Mineri], through one or more of his [businesses] . . . purchased the property with the intention of building a new home on the existing foundation and 'flipping' it. Timberwood proceeded to build the home.

''The home was built over the existing foundation. Timberwood also built an adjacent garage, and, in the process of doing so, laid a foundation for the garage. The garage foundation is approximately four feet higher than the existing foundation for the house. In excavating the garage foundation, Christopher (the excavator of the Mineri family) saw water.'' Mineri was well aware that Christopher found water. ''In addition, in the process of building the home, footings were dug in the existing foundation to hold 'lolly columns' to support the home. In digging these footings, [Mineri] saw water. Although it is unclear whether the water in question resulted from a high water table or runoff, [Mineri] was aware that there was a high water table in the neighborhood. In an attempt to resolve the [water] problem, he dug footing drains and waterproofed the foundation. The drains were connected to a cement pit buried in the yard.''

In the fall of 2015, the plaintiffs, looking to buy their dream home, visited the property and decided to purchase it. Prior to purchasing the home, the plaintiffs

took a walk-through and saw the basement, which was dry at that time. Neither Mineri nor anyone else informed them of the water problems that Mineri and his brother Christopher had observed or of the existence of the high water table in the neighborhood. In the plaintiffs' view, because they were purchasing a new home, they did not need to employ a home inspector.

The plaintiffs initially executed a contract to purchase the property on December 17, 2015. This contract identified the " 'seller' " as G & M, but an addendum, identifying repairs that needed to be made, mistakenly identified the " 'seller' " as Timberwood. On January 15, 2016, after the mistake had been noticed, the plaintiffs executed a substantively identical contract, identifying G & M as the " 'seller' " in the main contract and the addendum. On January 27, 2016, an updated addendum, which identified G & M as the " 'seller' " and which identified additional repairs to be made, was executed. Paragraph 7 of the contract provides: "Buyer represents that Buyer has examined the Real Property and is satisfied with the physical condition subject to the Inspection Contingency if applicable. Neither Seller nor any representative of the Seller or Buyer has made any representation or promise other than those expressly stated herein which Buyer has relied upon in making this Agreement." On February 4, 2016, the town of North Branford issued a certificate of use and occupancy.

The closing on the plaintiffs' purchase of the property occurred on February 10, 2016. As part of the closing, the plaintiffs and G & M executed a so-called punch list agreement identifying additional repairs to be made by February 24, 2016, including a repair for " 'basement drain pipe leaking.' " Within one week of the closing, the plaintiffs saw water in the basement. Daniel Onofrio notified Mineri, and the two met on February 17, 2016. Mineri stated: " 'This is my responsibility, and I will take care of this ASAP.' " Mineri did not do so, a "lengthy

saga of texts" between Daniel Onofrio and the Mineris ensued, and water continued to appear in the basement.

After months of promises, Mineri sent Christopher to deal with the problem. On October 31, 2016, a crew appeared at the property without announcement and dug up the yard in search of the cement pit that Mineri had installed when building the home. After much excavation, the pit was found without water in it. Christopher subsequently put a sump pump in the basement but did not arrange for an electrician to activate it. In April, 2017, the basement flooded with approximately four inches of water, destroying some of the plaintiffs' personal property. Thereafter, the plaintiffs hired an electrician to activate the sump pump.

On June 29, 2017, the plaintiffs commenced this action against the defendants. On September 8, 2017, the plaintiffs filed the operative complaint consisting of six counts: (1) breach of contract (count one); (2) negligent misrepresentation (count two); (3) negligence (count three); (4) breach of warranties (count four); (5) fraudulent concealment (count five); and (6) violations of CUTPA (count six). Counts one, two, three, five, and six were directed to Mineri, G & M, and Timberwood. Count four was directed to G & M and Timberwood. The defendants filed an answer and special defenses. The case was tried to the court, *Hon. Jon C. Blue*, judge trial referee, on March 15, 18 and 19, 2019.

On June 17, 2019, the court issued its memorandum of decision rendering judgment as follows: (1) on count one (breach of contract), in favor of the plaintiffs against G & M in the amount of $22,340 and in favor of Mineri and Timberwood; (2) on count two (negligent misrepresentation), in favor of the plaintiffs against G & M in the amount of $22,340 and in favor of Mineri and Timberwood; (3) on count three (negligence), in favor

of the defendants; (4) on count four (breach of warranties act), in favor of the plaintiffs against G & M and Timberwood in the amount of $22,340; (5) on count five (fraudulent concealment), in favor of the defendants; and (6) on count six (CUTPA), in favor of the plaintiffs against the defendants in the amount of $22,340. Although the court declined to award punitive damages under CUTPA, the court awarded costs and reasonable attorney's fees pursuant to CUTPA, stating that, by agreement of the parties, the amount of such fees would be addressed at a subsequent hearing. This appeal followed.[2] Additional facts and background will be set forth as necessary.

I

Mineri and Timberwood claim that the trial court erred in concluding that they violated CUTPA. Specifically, they contend that the court's conclusion that they had violated CUTPA through their " 'representations or nonrepresentations' " to the plaintiffs cannot stand because it is inconsistent with its finding in their favor on the plaintiffs' claims for breach of contract, negligent misrepresentation, negligence, and fraudulent concealment. They also contend that the court erred in extending CUTPA liability to them based on its finding that G & M had violated CUTPA. Although Mineri and Timberwood intertwine these arguments in their appellate brief, we distill and address them separately.

A

Mineri and Timberwood argue that the trial court's conclusion that they violated CUTPA through their omissions to the plaintiffs is inconsistent with its rendering judgment in their favor on the plaintiffs' claims for breach of contract, negligent misrepresentation,

[2] G & M has not filed an appeal from the judgment, and the plaintiffs have not filed a cross appeal.

negligence, and fraudulent concealment. We do not reach the merits of this claim because it is inadequately briefed.

"Both this court and our Supreme Court 'repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited.' . . . *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016); see also *Parnoff* v. *Mooney*, 132 Conn. App. 512, 518, 35 A.3d 283 (2011) ('[i]t is not the role of this court to undertake the legal research and analyze the facts in support of a claim or argument when it has not been briefed adequately . . . .')." *Seaport Capital Partners, LLC* v. *Speer*, 202 Conn. App. 487, 489–90, 246 A.3d 77, cert. denied, 336 Conn. 942, 250 A.3d 40 (2021); see also Practice Book § 67-4.

In the present case, Mineri and Timberwood's brief fails to analyze how the court's rendering judgment in their favor as to the counts alleging breach of contract, negligent misrepresentation, negligence, and fraudulent concealment is necessarily inconsistent with the court's rendering judgment against them as to the count alleging CUTPA violations. That is, Mineri and Timberwood's brief contains no meaningful analysis as to how the court's treatment of the plaintiffs' allegations in support of counts one, two, three, and/or five is necessarily inconsistent with its conclusion, vis-à-vis count six, that its finding that G & M violated CUTPA should be applied to each of them. "Adequate briefing is necessary in

order to avoid abandoning an issue on appeal. See, e.g., *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 120, 830 A.2d 1121 (2003)." *Seaport Capital Partners, LLC* v. *Speer*, supra, 202 Conn. App. 490. Because we conclude that Mineri and Timberwood have failed to meet their burden with respect to this particular argument, we deem it abandoned.

B

Mineri and Timberwood also contend that the trial court erred in extending CUTPA liability to each of them based on its finding that G & M had violated CUTPA. We disagree as to Mineri and agree as to Timberwood.

By way of background, the court found that the plaintiffs had established a CUTPA violation with respect to G & M. Specifically, the court found that "[t]he acts of nondisclosure by G & M discussed with respect to count one . . . offended public policy as it has been established by the common law. Under all of the circumstances they were also immoral, oppressive, and unscrupulous. Under well established Connecticut law, the plaintiffs have established a CUTPA violation with respect to G & M. The impact of this finding on the remaining defendants will be discussed . . . ."[3] The acts of nondisclosure, as found by the court with respect to count one, are as follows. Mineri failed to inform the plaintiffs of the water infiltration problem, which was known to him. That omission was worsened by Mineri's affirmative agreement to repair the leaking basement drainpipe, which would lead a reasonable

[3] Although the court also stated that "the actions alleged and proved in counts one, two, and four constitute a CUTPA violation," it appears that it specifically intended to have its findings, vis-à-vis G & M with respect to count one, extended to Mineri and Timberwood for purposes of CUTPA.

purchaser to believe that such repair would fix whatever water problem remained in the basement. The court acknowledged the applicability of the legal principle that " '[a] seller of real or personal property is . . . ordinarily expected to disclose a known latent defect of quality or title that is of such character as would probably prevent the buyer from buying at the contract price.' 2 Restatement (Second), Contracts § 161, comment (d), pp. 433–34 (1981)." The court further stated that "[p]ublic policy discourages the use of fraud and misrepresentation with respect to unsuspecting purchasers of homes."

We turn to the standard of review and the applicable principles of law. "It is well settled that whether a [party's] acts constitute . . . deceptive or unfair trade practices under CUTPA, is a question of fact for the trier, to which, on appellate review, we accord our customary deference. . . . [W]here the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous." (Internal quotation marks omitted.) *Pedrini* v. *Kiltonic*, 170 Conn. App. 343, 353, 154 A.3d 1037, cert. denied, 325 Conn. 903, 155 A.3d 1270 (2017).

Our Supreme Court has stated that "[General Statutes §] 42-110b (a) provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the [F]ederal [T]rade [C]ommission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public

policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some [common-law], statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. . . . Thus a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy. . . . In order to enforce this prohibition, CUTPA provides a private cause of action to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a [prohibited] method, act or practice . . . .'' (Internal quotation marks omitted.) *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, 296 Conn. 315, 350–51, 994 A.2d 153 (2010), quoting *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 18–19, 938 A.2d 576 (2008).

In *Joseph General Contracting, Inc.* v. *Couto*, 317 Conn. 565, 583, 119 A.3d 570 (2015), our Supreme Court considered whether there could be individual liability for a corporate entity's violation of CUTPA. Upon analyzing the relevant statutory text, the court first determined that ''[t]he plain language of § 42-110b clearly indicates that an individual can be liable for a CUTPA violation.'' Id., 587. The court next considered ''whether liability under CUTPA may be extended to an individual who engages in unfair or unscrupulous conduct on behalf of a business entity.'' Id., 588. In doing so, pursuant to the directive in § 42-110b, the court looked to the federal courts' interpretation of CUTPA's federal statutory counterpart, the Federal Trade Commission

Act (federal act), 15 U.S.C. § 41 et seq. (2006), and observed: "The test used by the federal courts is uniformly stated, but it is flexible and highly fact specific in application. In order to hold an individual liable, a plaintiff, after showing that an entity violated the federal act, must prove that the individual either participated directly in the entity's deceptive or unfair acts or practices, or that he or she had the authority to control them. . . . The plaintiff then must establish that the individual had knowledge of the wrongdoing at issue. . . .

"An individual's status as controlling shareholder or officer in a closely held corporation creates a presumption of the ability to control . . . but is not necessarily dispositive in all cases. . . . On the other hand, an employee who is not an owner or officer may, under some circumstances, possess the requisite authority. . . . Authority to control may be established by evidence of an individual's conduct, such as his or her active involvement in business affairs and [participation in] the making of company policy. . . . Evidence that other employees of an entity deferred to the individual also is relevant. . . .

"The knowledge requirement may be established with evidence showing that the individual had actual knowledge of [the entity's] material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth. . . . An individual's degree of participation in business affairs is probative of knowledge. . . . [T]he [plaintiff] is not required to show that a defendant *intended* to defraud consumers in order to hold that individual personally liable. . . . A good faith belief in the truth of a misrepresentation may, however, preclude individual liability under the federal act.

"The requirements of this test will necessarily preclude certain types of liability under CUTPA, namely, liability for merely negligent acts of an individual or the negligent acts of another, subordinate person in service to an entity. In order for any individual liability to attach under CUTPA, someone must knowingly or recklessly engage in unfair or unscrupulous acts, as contemplated by the statute, in the conduct of a trade or business." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) Id., 589–92.

In the present case, with respect to extending CUTPA liability to Mineri on the basis of G & M's conduct, the court found that "[t]he evidence establishes that both G & M and Timberwood were closely held corporations and that . . . Mineri effectively controlled both corporations. . . . Mineri also had complete knowledge both of the water issues in the basement in question and of all the representations or nonrepresentations given to the [plaintiffs]. He was personally involved in each of the events (or nonevents) described in this opinion. He 'either directly participated in the wrongful conduct or, by virtue of his ownership, position, and day-to-day involvement' in the construction project in question 'had the ability to control it. Moreover, given the character of the actions at issue, [he] necessarily knew or should have known of their wrongfulness.' [*Joseph General Contracting, Inc.* v. *Couto*, supra, 317 Conn.] 593. . . . Mineri is therefore personally liable under CUTPA."

Applying the test adopted by the court in *Joseph General Contracting, Inc.*, described previously in this opinion, and satisfied that the court's factual findings are adequately supported by the record, we conclude that the court properly found Mineri personally liable under CUTPA. The court's conclusion remained faithful to the principle that an officer of a corporate entity

does not incur personal liability for the entity's violation of CUTPA merely by virtue of his or her official position. Indeed, the court's factual findings support its determination that the test adopted in *Joseph General Contracting, Inc.*—which requires proof of (1) the entity's violation of CUTPA; (2) the individual's participation in the acts or practices, or the authority to control them; and (3) the individual's knowledge of the wrongdoing at issue—was satisfied. See *Joseph General Contracting, Inc.* v. *Couto*, supra, 317 Conn. 589. Accordingly, Mineri's claim on appeal with respect to the judgment against him on count six fails.

With respect to extending CUTPA liability to Timberwood on the basis of G & M's conduct, the court stated: "Although the issue of Timberwood's CUTPA liability is less directly governed by precedent, the logic of both *Joseph General Contracting, Inc.*, and of CUTPA itself strongly indicates that Timberwood should be held liable here. As mentioned, [the Mineris] own Timberwood on a fifty-fifty basis. [Mineri] effectively controlled both Timberwood and G & M and used them in a common enterprise. CUTPA is intended to protect the rights of consumers such as the [plaintiffs]. It is the express intent of the legislature that CUTPA 'be remedial and be so construed.' [General Statutes] § 42-110b (d). CUTPA further directs the courts to 'be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5 (a) (1) of the Federal Trade Commission Act (15 U.S.C. § 45 (a) (1)),' in construing CUTPA. [General Statutes] § 42-110b (b). The [United States] Supreme Court has 'repeatedly held that the [c]ommission has wide discretion in determining the type of order that is necessary to cope with the unfair trade practices found . . . .' *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392, [85 S. Ct. 1035, 13 L. Ed. 2d 904] (1965). It has long been established that corporations

cannot be permitted to evade the reach of antitrust laws by the use of holding companies and interlocking boards of directors. '[T]he interests of private persons and corporations cannot be made paramount to the interests of the general public.' *Northern Securities Co.* v. *United States*, 193 U.S. 197, 352, [24 S. Ct. 436, 48 L. Ed. 679] (1904). Courts, in cases such as this, are allowed to mold their decrees 'so as to accomplish practical results—such results as law and justice demand.' Id., 360.

"G & M, [Mineri], and Timberwood jointly coordinated their activities in this case. Those activities . . . violated CUTPA. Law and justice demand that all three defendants be held accountable under CUTPA."

When the court's decision is construed as a whole, it is apparent that the court found Timberwood liable under CUTPA based on a "joint coordination" theory. That is, on the basis of a theory that they jointly coordinated their activities, the court extended to Timberwood its finding that G & M had violated CUTPA. Although the court cited *Joseph General Contracting, Inc.* v. *Couto*, supra, 317 Conn. 565, as supporting the foregoing extension of CUTPA liability, such conclusion places weight on that decision that it cannot bear. As explained previously in this opinion, our Supreme Court addressed in *Joseph General Contracting, Inc.*, "whether liability under CUTPA may be extended to an individual who engages in unfair or unscrupulous conduct on behalf of a business entity." Id., 588. The court did not have occasion to consider the extension of CUTPA liability to another entity that has a controlling shareholder or officer in common with the entity found to have engaged in unfair or unscrupulous conduct. We conclude that the court improperly extended its finding that G & M violated CUTPA to Timberwood on the basis of a so-called joint coordination theory.[4]

[4] The plaintiffs argue that the judgment against Timberwood as to count six should be affirmed because "[t]he evidence was legally sufficient for

II

Timberwood also claims that the trial court erred in rendering judgment against it on count four of the operative complaint for violation of the warranties act, specifically, for breach of the implied warranty that the improvement was constructed in a workmanlike manner. See General Statutes § 47-118 (a) (3). Timberwood exclusively contends on appeal that no warranties existed between it and the plaintiffs because it was not the selling vendor and, therefore, is not a "vendor" for purposes of § 47-118 (a). We disagree.

Whether Timberwood, as the builder of the plaintiffs' new home, qualifies as a "vendor" for purposes of § 47-118 (a) is a matter of statutory interpretation over which our review is plenary. "Well settled principles of statutory interpretation govern our review. . . . Because statutory interpretation is a question of law, our review is de novo. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words,

the [court] to find [that] Timberwood committed an unfair trade practice by its refusal to correct the basement water condition." This argument is unavailing because we do not interpret the court's opinion as having found Timberwood liable under CUTPA based on its refusal to correct the plaintiffs' water problem.

The plaintiffs further argue that Timberwood's violation of the warranties act may also support the imposition of CUTPA liability against it, and they suggest that this court hold that a violation of the warranties act is a per se violation of CUTPA. We reject the notion that the judgment against Timberwood as to CUTPA may be affirmed on these grounds. The trial court did not conclude that Timberwood had violated CUTPA by virtue of its violation of the warranties act. Moreover, our Supreme Court rejected such an argument in *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 229 n.17, 990 A.2d 326 (2010), stating: "To the extent that the plaintiffs claim that a violation of the warranties act is a per se CUTPA violation, we disagree." "[A]s an intermediate appellate court, we are bound by Supreme Court precedent and are unable to modify it . . . ." (Internal quotation marks omitted.) *Moutinho* v. *500 North Avenue, LLC*, 191 Conn. App. 608, 616, 216 A.3d 667, cert. denied, 333 Conn. 928, 218 A.3d 68 (2019).

we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . .'' (Internal quotation marks omitted.) *Joseph General Contracting, Inc.* v. *Couto*, supra, 317 Conn. 586–87.

Resolving Timberwood's claim requires us to interpret various provisions of the warranties act. We begin with the text of § 47-118, which provides in relevant part: ''(a) *In every sale of an improvement by a vendor to a purchaser*, except as provided in subsection (b) of this section or excluded or modified pursuant to subsection (d) of this section, *warranties are implied that the improvement is*: (1) Free from faulty materials; (2) constructed according to sound engineering standards; (3) *constructed in a workmanlike manner*; and (4) fit for habitation, at the time of the delivery of the deed to a completed improvement, or at the time of completion of an improvement not completed when the deed is delivered.

"(b) The implied warranties of subsection (a) of this section shall not apply to any condition that an inspection of the premises would reveal to a reasonably diligent purchaser at the time the contract is signed. . . .

"(d) Neither words in the contract of sale, nor the deed, nor merger of the contract of sale into the deed is effective to exclude or modify any implied warranty; provided, if the contract of sale pertains to an improvement then completed, an implied warranty may be excluded or modified wholly or partially by a written instrument, signed by the purchaser, setting forth in detail the warranty to be excluded or modified, the consent of the purchaser to exclusion or modification, and the terms of the new agreement with respect to it. . . ." (Emphasis added.)

General Statutes § 47-116, which sets forth the definitions for chapter 827 "unless the context otherwise requires," defines " '[i]mprovement' " as "any newly constructed single family dwelling unit, any conversion condominium unit being conveyed by the declarant and any fixture or structure which is made a part thereof at the time of construction or conversion by any building contractor, subcontractor or declarant." Section 47-116 also defines " 'vendor' " as "any person engaged in the business of erecting or creating an improvement on real estate, any declarant of a conversion condominium, or any person to whom a completed improvement has been granted for resale in the course of his business." In addition, § 47-116 defines " 'purchaser' " as "the original buyer, his heirs or designated representatives."

We note at this juncture that the court found that "[t]he home at issue in this case is an 'improvement.' It is a 'newly constructed single family dwelling unit.' The preexisting foundation was a 'structure which [was] made a part of [the newly constructed single family dwelling unit] at the time of construction.' " The court

also found that G & M is a " 'vendor,' " as defined in § 47-116, because "it is a corporate 'person to whom a completed improvement had been granted for resale in the course of [its] business.' " In addition, the court found that Timberwood is a " 'vendor,' " as defined in § 47-116, because "it is a corporate 'person engaged in the business of erecting or creating an improvement on real estate.' " The court went on to find that "[t]he home, being an 'improvement,' had an implied warranty of, inter alia, being 'constructed in a workmanlike manner.' A home with a wet basement that periodically floods has not been constructed in a workmanlike manner, particularly when, as the evidence here shows, the problem would have been resolvable with a modest expenditure of funds." Those particular findings remain unchallenged on appeal. Moreover, it is undisputed that the plaintiffs are "purchasers" under § 47-116.

The question before us, which appears to be an issue of first impression, is whether the implied warranties created by § 47-118 "[i]n every sale of an improvement by a vendor to a purchaser"; General Statutes § 47-118 (a); are owed by the builder/vendor of such improvement to the original purchaser notwithstanding the fact that the home was sold by an intermediary vendor. For the reasons that follow, we answer that question in the affirmative.

First, the definition of "vendor," set forth in § 47-116, captures, inter alia, not only "any person to whom a completed improvement has been granted for resale in the course of his business" (i.e., a selling vendor who satisfies this definition), but also "any person engaged in the business of erecting or creating an improvement on real estate" (e.g., the builder of the new home). Second, pursuant to § 1-2z, we consider the relationship of § 47-118 to other statutes, specifically, General Statutes § 47-119, titled "Vendor not to evade by intermediate transfer," which provides: "Any vendor who conveys

an improvement to an intermediate purchaser to evade the provisions of this chapter shall be liable to the subsequent purchaser as if the subsequent conveyance had been effectuated by the vendor to the subsequent purchaser." We construe these provisions to reflect the legislature's intent not to permit the builder of a newly constructed single family dwelling unit, who satisfies the definition of "vendor" set forth in § 47-116, to evade liability for breach of the implied warranties otherwise owed to an original "purchaser," as defined in § 47-116.[5]

In sum, we conclude that the implied warranties created by § 47-118 are owed by the builder "vendor" of an "improvement" to the original "purchaser" notwithstanding the fact that the home was sold by an intermediary "vendor," as those terms are defined in § 47-116. Accordingly, Timberwood's claim that the court erred in rendering judgment against it on count four fails.

The judgment is reversed with respect to the plaintiffs' CUTPA claim against Timberwood, and the case is remanded with direction to render judgment in favor of Timberwood on that claim; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STRAZZA BUILDING AND CONSTRUCTION, INC. *v.* JENNIFER G. HARRIS, TRUSTEE, ET AL.
(AC 43958)

Moll, Alexander, and Vertefeuille, Js.

Syllabus

The defendants H and T appealed from the judgment of the trial court denying their motion for summary judgment against the plaintiff, S Co. H served as trustee for T, a trust that owned certain real property where

[5] Timberwood contends, without any explication, that applying the implied warranties provisions set forth in § 47-118 to it, as a nonselling builder/vendor, will yield an absurd result. We find this contention to be without merit.

she resided. The defendants hired S Co. as a general contractor for renovations to the home located on the property, and, after a dispute, the defendants terminated S Co. S Co. and two subcontractors, R Co. and I Co., filed mechanic's liens claiming unpaid balances. H, as trustee for T, initiated a separate action against R Co. seeking to reduce or discharge R Co.'s lien. S Co. subsequently commenced this action to foreclose on its mechanic's lien. The trial court in the separate action found that the lienable fund for S Co.'s contract was exhausted and concluded that R Co.'s lien was invalid. Subsequently, the court denied the defendants' motion for summary judgment in the present case, concluding that there was a genuine issue of material fact with respect to whether there was sufficient privity between R Co. and S Co. so as to preclude S Co. from pursuing its claims, and this appeal followed. *Held*:

1. The defendants could not prevail on their claim that the court failed to apply the doctrine of res judicata, thereby improperly denying their motion for summary judgment:

   a. The trial court correctly analyzed the issue of privity: although our Supreme Court concluded in *Girolametti* v. *Michael Horton Associates, Inc.* (332 Conn. 67) that the presumption of privity arises from the "flow down" obligation that a general contractor owes to a subcontractor, there is no corresponding "flow up" obligation extending from a subcontractor to a general contractor, and, thus, the court improperly applied the presumption of privity in this case; nevertheless, the trial court, on the basis of certain factual findings, thoroughly analyzed the issue of privity and correctly concluded, under the functional relationship test, that a genuine issue of material fact existed as to whether S Co.'s interests were sufficiently represented in the separate action so as to warrant the application of res judicata.

   b. The defendants' claim that the existence of the right of a general contractor to intervene in an action by a subcontractor involving a mechanic's lien established privity was unavailing: the defendants' argument that, because S Co. had an interest in the separate action and would be bound by the court's holding in that action, S Co., therefore, had a right to intervene in that action was circular, the defendants having failed to identify any case holding that general contractors have an automatic right to intervene in an application to discharge the mechanic's lien of a subcontractor, and the defendants did not explain how or why a failure to intervene could establish privity for the purposes of res judicata.

2. The trial court properly declined to apply the doctrine of collateral estoppel: the court thoroughly analyzed the issue of privity and the question of whether S Co.'s interests were sufficiently represented in the separate action, and, on the basis of this analysis, appropriately concluded that a genuine issue of material fact existed as to whether S Co. and R Co. were in privity.

Argued May 19—officially released September 21, 2021

Procedural History

Action, inter alia, to foreclose on a mechanic's lien, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the named defendant et al. filed a counterclaim; therafter, the court, *Genuario*, *J.*, denied the motion for summary judgment filed by the named defendant et al., and the named defendant et al. appealed to this court. *Affirmed.*

Bruce L. Elstein, for the appellants (named defendant et al.).

Anthony J. LaBella, with whom, on the brief, was *Deborah M. Garskof*, for the appellee (plaintiff).

Opinion

VERTEFEUILLE, J. The defendants[1] appeal from the judgment of the trial court denying their motion for summary judgment against the plaintiff, Strazza Building & Construction, Inc. (Strazza). The defendants claim that the court improperly denied their motion for summary judgment, which was predicated on a claim that the action is barred by the doctrine of res judicata.[2] In the alternative, the defendants claim that the court erred in failing to find that Strazza's claims fail as a result of the application of collateral estoppel. We disagree and affirm the judgment of the trial court.

[1] This action was brought against the defendant Jennifer G. Harris, both in her individual capacity and as trustee of the Jennifer G. Harris Revocable Trust, which owns the subject real property, and the defendants Robert Rozmus Plumbing & Heating, Inc., and Interstate & Lakeland Lumber Corporation, as junior lienholders to the property. The junior lienholders are not participating in this appeal. Accordingly, our references to the defendants in this opinion are to Jennifer G. Harris, both in her individual capacity and as trustee for the trust.

[2] Generally, the denial of a motion for summary judgment is not appealable, but the denial of a motion for summary judgment predicated on the doctrine of res judicata is a final judgment for purposes of appeal. See *Singhaviroj* v. *Board of Education*, 124 Conn. App. 228, 232, 4 A.3d 851 (2010).

The following facts, viewed in the light most favorable to Strazza, and procedural history are relevant to this appeal. The defendant Jennifer G. Harris (Harris) serves as trustee of the Jennifer G. Harris Revocable Trust (trust), which owns real property located in Greenwich. On June 7, 2016, the defendants hired Strazza to serve as a general contractor for substantial renovations to a home located on the property. After a dispute arose over the cost and quality of the work that had been completed and the estimated time remaining to complete the project, the defendants terminated Strazza. Prior to its termination, Strazza had billed the defendants for $1,570,239.16 in labor and materials. Strazza alleges that, of that sum, $1,009,083.28 has been paid and that it is owed the remaining sum of $561,155.88. Strazza and two subcontractors, Robert Rozmus Plumbing & Heating, Inc. (Rozmus), and Interstate & Lakeland Lumber Corporation, then filed and served mechanic's liens on the defendants claiming unpaid balances. Strazza thereafter commenced the present action on May 2, 2018, seeking to foreclose on its lien and alleging claims for breach of contract and unjust enrichment.

On October 23, 2017, Harris, as trustee for the trust, initiated a separate proceeding against Rozmus (Rozmus action) pursuant to General Statutes § 49-35a[3] seeking to reduce or discharge the mechanic's lien filed by

[3] General Statutes § 49-35a (a) provides: "Whenever one or more mechanics' liens are placed upon any real estate pursuant to sections 49-33, 49-34, 49-35 and 49-38, the owner of the real estate, if no action to foreclose the lien is then pending before any court, may make application, together with a proposed order and summons, to the superior court for the judicial district in which the lien may be foreclosed under the provisions of section 51-345, or to any judge thereof, that a hearing or hearings be held to determine whether the lien or liens should be discharged or reduced. The court or judge shall thereupon order reasonable notice of the application to be given to the lienor or lienors named therein and, if the application is not made by all owners of the real estate as may appear of record, shall order reasonable notice of the application to be given to all other such owners, and shall set a date or dates for the hearing or hearings to be held thereon. If the lienor or lienors or any owner entitled to notice is not a resident of this

Rozmus. See *Harris* v. *Robert Rozmus Plumbing & Heating, Inc.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-17-6033512-S. Rozmus' mechanic's lien claimed $97,469.86 as the amount due to Rozmus for plumbing services and materials. A trial was held in the Rozmus action to resolve the validity of the mechanic's lien. A principal of Strazza testified at the trial. Prior to trial, Strazza's counsel filed a motion to file an appearance on behalf of a third-party witness. The court in the Rozmus action, *Hernandez, J.*, granted the motion, but, because Strazza was not a party to the Rozmus action, the court did not permit Strazza's counsel to object to any of the questions posed to the principal of Strazza who had testified.

The court in the Rozmus action issued its memorandum of decision on the motion to reduce or discharge the mechanic's lien held by Rozmus on July 12, 2019, concluding that the lien was not valid. The court in the Rozmus action first found that a number of the charges included in the lien filed by Rozmus either were for work that had not been completed or materials that had never been used, and it reduced the amount of the Rozmus lien to $62,040.36. The court next determined whether Strazza was appropriately owed funds, because Rozmus could recover the sum it claimed to be owed only to the extent that Strazza, as the general contractor, was still owed money. See, e.g., *ProBuild East, LLC* v. *Poffenberger*, 136 Conn. App. 184, 191–92, 45 A.3d 654 (2012). The court in the Rozmus action, therefore, reviewed the charges that were included in the liens held by Strazza and Rozmus and found that Harris was entitled to credits against the liens for many of the charges. For example, the court found that several products had been delivered, but never installed,

state, the notice shall be given by personal service, registered or certified mail, publication or such other method as the court or judge shall direct. At least four days' notice shall be given to the lienor, lienors or owners entitled to notice prior to the date of such hearing."

and that a number of charges contained unwarranted upcharges and overhead. Ultimately, the court concluded that the sum total of the credits due to Harris was $261,194.44.

The court then reviewed the applicable legal principles, most importantly, the general rule that "[a] subcontractor is subrogated to the rights of the general contractor through whom he claims, such that a subcontractor only can enforce a mechanic's lien to the extent that there is unpaid contract debt owed to the general contractor by the owner." Id., 191–92. Additionally, "General Statutes §§ 49-33 and 49-36 . . . define and delimit the fund to which a properly noticed mechanic's lien may attach. Both of these sections start with the proposition that no mechanic's lien may attach to any building or land in an amount greater than the price which the owner has agreed to pay to the general contractor for the building being erected or improved. This amount may be diminished to the extent that it exceeds the reasonable cost . . . of satisfactory completion of the contract plus any damages resulting from . . . default for which [the general contractor] might be held liable to the owner. . . . The amount may be diminished further by bona fide payments, as defined in [§] 49-36, made by the owner [to the general contractor] before receiving notice of [the mechanic's] lien or liens." (Citation omitted; footnotes omitted; internal quotation marks omitted.) *Rene Dry Wall Co.* v. *Strawberry Hill Associates*, 182 Conn. 568, 571–72, 438 A.2d 774 (1980). The court in the Rozmus action first concluded that the total lienable fund was $151,589.15, but after subtracting the credits owed to Harris, the court ultimately concluded that the total adjusted lienable fund was negative $109,605.29. Thus, because the lienable fund for Strazza's contract was entirely exhausted, the lien held by Rozmus was invalid and ordered discharged.[4]

[4] Harris also requested the court in the Rozmus action to make a finding that Strazza's behavior constituted fraud, but the court declined to do so,

The central finding of the Rozmus action was that no lienable fund existed. Subsequently, the defendants filed a motion for summary judgment in the present case, arguing that the decision in the Rozmus action warranted the application of res judicata as to the issue of whether a lienable fund exists and that such an outcome is mandated by our Supreme Court's holding in *Girolametti* v. *Michael Horton Associates, Inc.*, 332 Conn. 67, 208 A.3d 1223 (2019).[5] Strazza objected to the motion, arguing that it was not a party to the Rozmus action and could not be bound by a ruling in which it did not have an opportunity to participate and that there was insufficient privity between Strazza and Rozmus for the doctrine of res judicata to apply.

The trial court rendered judgment on February 18, 2020, denying the defendants' motion for summary judgment, from which the defendants have appealed. The court first explained in its memorandum of decision that "there is no genuine issue of material fact that Rozmus was a subcontractor to [Strazza] and provided services and materials to the property owned by Harris, as trustee. There is no genuine issue of material fact that Rozmus filed a mechanic's lien on the subject property and that Harris filed the application to discharge that mechanic's lien, which resulted in an evidentiary hearing and a decision filed by the court . . . . There is no genuine issue of material fact that the court in the

explaining that, "[w]hile the court has very serious concerns about the manner in which the project was undertaken, monitored and billed, Strazza is not a party to this action and, thus, does not have an opportunity to rebut [Rozmus'] claimed inferences. Moreover . . . because there is a net negative balance in the lienable fund, the court does not need to make [a] finding of fraud to reach its conclusion that the instant lien is not enforceable."

[5] In *Girolametti*, our Supreme Court held that, when a property owner and general contractor were previously involved in arbitration, "in the absence of clear evidence of contrary intent by the parties, subcontractors are presumptively in privity with the general contractor on a construction project for purposes of res judicata." *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 332 Conn. 71.

Rozmus [action] determined that there was no 'lienable fund' and, [therefore], discharged the Rozmus mechanic's lien." The court acknowledged that, if Strazza was bound by the prior ruling, such a conclusion would necessitate a grant of summary judgment, stating: "Under the applicable law regarding mechanic's liens, if there is no 'lienable fund' there can be no enforceable mechanic's lien. There is no question that, in the Rozmus [action], the court found that there was no lienable fund. If the principles of res judicata and/or collateral estoppel result in the Rozmus court's holding that there was no 'lienable fund' binding [Strazza], then summary judgment must enter in favor of the defendant[s], if not, then the [defendants'] motion for summary judgment must be denied. This is true even though the case at bar includes a breach of contract claim and an unjust enrichment claim, because the ultimate finding of the court in [the] Rozmus [action] was that [Strazza] . . . was not due any money as a result of credits, overcharges and defective work."

In finding that three of the four elements of res judicata were met and, thus, that the issue of privity would determine the outcome of the case, the trial court stated: "The fundamental issue that will control the decision in the case at bar is whether or not the parties to the prior and subsequent actions were in privity with each other . . . ." In addressing this issue, the court then noted that Strazza's mechanic's lien is for a substantially greater sum than Rozmus' mechanic's lien, and that the court in the Rozmus action considered many aspects of the project in which Rozmus had no involvement, as Rozmus was involved only in plumbing.

Based on these facts, and because Strazza was not a party to the prior proceeding, the court questioned whether it would be equitable "to bind [Strazza] to findings based upon litigation involving a party subcontractor whose involvement in the project represented

only a small portion of the work and who might not be in a position to defend the allegations of wrongdoing made against the general contractor concerning portions of the work in which the subcontractor had little or no involvement." Ultimately, the court concluded that, "[w]hile it would seem intuitive that if, as a principle of law, a subcontractor is in privity with a general contractor, that the general contractor must be in privity with the subcontractor. However, because the principle, at most, renders a rebuttable presumption, the court must consider the functional relationship between the parties to determine whether or not there is privity for purposes of employing res judicata or collateral estoppel. As stated, while both Rozmus and [Strazza] are interested in the same question, to wit, whether or not there was a lienable fund (and therefore whether [Strazza] is due any money from [the defendants]), it is difficult to determine that a lone subcontractor's interest in many of these underlying factual issues presents such an identification of interest so as to justify preclusion of [Strazza] from litigating its rights to payment. . . . For all these reasons the court concludes that there is a genuine issue of material fact with regard to the issue of whether or not there was sufficient privity between Rozmus and [Strazza] . . . so as to preclude [Strazza] from pursuing its claims against the owner, and for that reason the motion for summary judgment must be denied." This appeal followed.[6]

[6] While this appeal was pending, the defendants filed a motion for an articulation of the trial court's decision pursuant to Practice Book § 66-5. The court issued its articulation on July 16, 2020. The court expressed its belief that it had adequately addressed the defendants' arguments as to privity and the application of *Girolametti* to the present case but, nevertheless, addressed those issues in more detail. Further, the court acknowledged that it had not addressed the defendants' claim, raised for the first time in their reply brief in support of their motion for summary judgment, that Strazza could have intervened as a matter of right in the Rozmus action pursuant to General Statutes §§ 52-102 and 52-107. In addressing and denying that claim in its articulation, the court noted that the defendants did not cite a single case holding that a general contractor can intervene as a matter

I

The defendants first claim that the court failed to apply res judicata, thereby improperly denying their motion for summary judgment. Specifically, the defendants claim that the court (1) failed to apply the presumption of privity appropriately and (2) failed to consider that Strazza had the right to intervene in the Rozmus action. In response, Strazza argues that the court correctly considered the presumption and determined that Strazza had overcome the presumption, and that the court properly dismissed the defendants' intervention of right argument.

We first set forth our standard of review and the applicable legal principles.

"[T]he applicability of res judicata . . . presents a question of law over which we employ plenary review." (Internal quotation marks omitted.) *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 332 Conn. 75. Where, however, only the element of privity is relevant, as in the present case, this legal question is driven by the factual findings of the court relative to the functional relationship of the parties. See id., 76.

"[T]he doctrine of res judicata, or claim preclusion, [provides that] a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action [between the same parties or those in privity with them] on the same claim. A judgment is final not only as to every matter which was offered to sustain the claim, but also as to any other admissible matter which might have been offered for that purpose. . . . The rule of claim preclusion prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support

of right in an action involving a homeowner's application to discharge a mechanic's lien of a subcontractor.

of it. . . . In order for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue." (Emphasis omitted; internal quotation marks omitted.) Id., 75. As stated previously, only the privity element is relevant to this appeal.

"The following principles govern the second element of res judicata, privity . . . . Privity is a difficult concept to define precisely. . . . There is no prevailing definition of privity to be followed automatically in every case. It is not a matter of form or rigid labels; rather it is a matter of substance. In determining whether privity exists, we employ an analysis that focuses on the functional relationships of the parties. Privity is not established by the mere fact that persons may be interested in the same question or in proving or disproving the same set of facts. Rather it is, in essence, a shorthand statement for the principle that [preclusion] should be applied only when there exists such an identification in interest of one person with another as to represent the same legal rights so as to justify preclusion. . . .

"While it is commonly recognized that privity is difficult to define, the concept exists to ensure that the interests of the party against whom collateral estoppel [or res judicata] is being asserted have been adequately represented . . . . A key consideration in determining the existence of privity is the sharing of the same legal right by the parties allegedly in privity. . . .

"Consistent with these principles, this court and other courts have found a variety of factors to be relevant to the privity question. These factors include the

functional relationships between the parties, how closely their interests are aligned, whether they share the same legal rights, equitable considerations, the parties' reasonable expectations, and whether the policies and rationales that underlie res judicata—achieving finality and repose, promoting judicial economy, and preventing inconsistent judgments—would be served. . . . [T]he crowning consideration, [however, is] that the interest of the party to be precluded must have been sufficiently represented in the prior action so that the application of [res judicata] is not inequitable." (Citations omitted; internal quotation marks omitted.) Id., 75–77.

A

The defendants first claim that the trial court failed to appropriately consider the presumption of privity set forth in *Girolametti*. In response, Strazza argues that the court correctly concluded that the presumption was rebutted. We conclude that the presumption does not apply because the facts of *Girolametti* are clearly distinguishable from those of the present case. We further conclude, however, that the judgment of the court should be affirmed on the basis of its analysis relative to the issue of privity.

We turn first to the issue of the applicability of the presumption of privity. Because our Supreme Court's decision in *Girolametti* is central to the parties' claims, we provide a brief summary of that case. In *Girolametti*, following the completion of a construction project, the owners of the property and the general contractor entered into arbitration to resolve various disputes. Id., 71–72. Before the arbitration concluded, the owners decided to no longer participate in the arbitration hearings and failed to present their damages claims. Id., 72. The arbitrator subsequently awarded the general contractor $508,597 in damages and ruled that, because

the owners had made a conscious decision to no longer attend the arbitration, they either did not incur any damages or were unable to prove their damages. Id., 72–73.

The appeal in *Girolametti* concerned two actions: one filed during the arbitration proceedings and one filed thereafter, in which the owners alleged negligence in connection with the design and construction of the second floor of the building and sought damages from the general contractor and the subcontractors. Id. Each of the defendants filed a motion for summary judgment on the basis of res judicata, arguing that all of the claims raised in the owner's actions either had been or could have been raised and resolved in the arbitration. Id. The trial court granted the motion filed by the general contractor but denied the motions filed by the subcontractors, concluding that the subcontractor defendants were not parties to the arbitration and, thus, were not in privity with the general contractor. Id., 73–74. The subcontractor defendants appealed from the denial of their motions. Id., 74.

This court ruled that each of the subcontractor defendants was in privity with the general contractor for the purposes of res judicata. *Girolametti* v. *Michael Horton Associates, Inc.*, 173 Conn. App. 630, 685, 164 A.3d 731 (2017), aff'd, 332 Conn. 67, 208 A.3d 1223 (2019). Our Supreme Court affirmed this court's ruling, stating that "the Appellate Court correctly determined that when a property owner and a general contractor enter into binding, unrestricted arbitration to resolve disputes arising from a construction project, subcontractors are presumptively in privity with the general contractor with respect to the preclusive effects of the arbitration on subsequent litigation arising from the project." *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 332 Conn. 87.

In the present case, the defendants argue that the trial court effectively ignored the presumption of privity set forth in *Girolametti*. *Girolametti*, however, is clearly distinguishable from the present case because it involved a situation in which a property owner and a general contractor were engaged in previous arbitration proceedings. Id., 71. This is significant because, in the present case, the previous action was between Harris, as trustee for the trust, which owned the property, and Rozmus, a subcontractor. This difference is crucial, because our Supreme Court concluded in *Girolametti* that the presumption of privity arises from the "flow down" obligation that a general contractor owes to a subcontractor. (Internal quotation marks omitted.) Id., 89. As the court detailed, "this rule primarily has been justified on the theory that subcontractors are in privity of contract with a general contractor, [although] some commentators and other legal authorities also have reasoned that the parties share legal rights because general contractors are vicariously or derivatively liable for the work of their subcontractors." Id., 80–81. In light of this language, it is clear that the opposite is not necessarily true, meaning that there is no corresponding "flow up" obligation that extends from a subcontractor to a general contractor.

Despite there being no corresponding "flow up" obligation that runs from a subcontractor to a general contractor, the trial court still applied the *Girolametti* presumption of privity to the facts of this case. In so doing, the court effectively established a "flow up" obligation that began with Rozmus—the subcontractor—and extended to Strazza—the general contractor. This is clearly beyond the scope of the applicability of the presumption, as detailed by our Supreme Court in *Girolametti*, and, for this reason we conclude that the court

erred in applying the presumption of privity to the facts of this case.[7]

Having reached this conclusion, we note that "[i]t is axiomatic that [we] may affirm a proper result of the trial court for a different reason." (Internal quotation marks omitted.) *Rafalko* v. *University of New Haven*, 129 Conn. App. 44, 51 n.3, 19 A.3d 215 (2011). This principle guides our analysis in the present case because, after applying the presumption of privity, the court found that, because it is "at most . . . a rebuttable presumption, [it] must [still] consider the functional relationship between the parties to determine whether or not there is privity for purposes of employing res judicata or collateral estoppel." Accordingly, the court still conducted a thorough analysis of the issue of privity, despite having improperly applied the presumption.

In conducting this analysis, the trial court accurately concluded that, under the functional relationship test, a genuine issue of material fact existed as to the question of whether Strazza's interests were sufficiently represented in the Rozmus action. After noting that the amount of the mechanic's lien held by Rozmus was far less than Strazza's lien, the court noted that "in litigating the issue of the amount of the lienable fund the [court in the Rozmus action] had to decide many issues relating to work that Rozmus, a plumbing subcontractor, had no involvement. A review of the decision in [the] Rozmus [action] reveals that the basis of the court's decision centered around many portions of the renovations and improvements to the subject property with which Rozmus had virtually no involvement. In *Girolametti*, the opposite was true. The first action involved

[7] We note that a "flow up" obligation establishing privity could exist under circumstances in which a general contractor is seeking only the same funds that a subcontractor sought and lost in a prior action, but, in such a case, the property owner would not be able to rely on the *Girolametti* presumption.

the general contractor who presumably had involvement in all aspects of the job. The holding in *Girolametti* was that the owner, who was a party to the first proceeding brought by the general contractor, was bound by the rulings in that case when subsequent cases were brought by the subcontractors because the subcontractors were in privity with the general contractor. There [was] no basis for determining that it would be inequitable to preclude the owner, who had the opportunity to fully participate in the first proceeding, from later contesting findings in that first proceeding in later proceedings between himself and certain subcontractors. The owner in *Girolametti* . . . had every opportunity to assert any claim that he might have against a [subcontractor] in the case against the general contractor. The same is not true in the [present] case . . . . [T]he . . . interest [of Rozmus] in the prior litigation, while not nominal, was less than 12 percent of the value of the claim of [Strazza] . . . . More importantly, Rozmus would not have firsthand knowledge [of] or significant involvement [in] many aspects of the required performance of other areas of necessary performance under the general contract."

These findings demonstrate that the court conducted a thorough analysis with regard to the issue of privity. Moreover, we agree with the outcome of the court's analysis, and therefore conclude that, despite having erroneously applied the presumption of privity, the court nevertheless correctly determined that there was a genuine issue of fact as to whether Strazza was in privity with Rozmus for the purpose of res judicata.

B

The defendants also claim that a general contractor has a right to intervene in an action brought by a subcontractor involving a mechanic's lien, pursuant to General

Statutes §§ 52-102 and 52-107,[8] and that the existence of such a right establishes privity. Specifically, the defendants argue that Strazza had a right to intervene in the Rozmus action because Strazza had an interest in the action and would be bound by that action. In response, Strazza claims that the court thoroughly considered, and properly rejected, the defendants' argument in this regard. We agree with Strazza.

In resolving this claim, we turn to the reasoning of the trial court: "[T]he application to discharge a mechanic's lien is a statutory right of action designed to provide a property owner with an expeditious process for challenging an encumbrance placed upon his property. The limited relief allowed, the discharge of the subject mechanic's lien, contradicts the defendants' claim that Strazza had an interest in the subject matter since the subject matter of the case was the validity of the . . . mechanic's lien [held by Rozmus] and no other. The defendant[s] [argue] that, because [Strazza] would be bound by the holding regarding the existence of a lienable fund, [Strazza] had an interest in the case, and, therefore, would have been allowed to intervene as a matter of right. This, of course, is a circular argument. Its reasoning is that Strazza had a right to intervene

[8] General Statutes § 52-102 provides: "Upon motion made by any party or nonparty to a civil action, the person named in the party's motion or the nonparty so moving, as the case may be, (1) may be made a party by the court if that person has or claims an interest in the controversy, or any part thereof, adverse to the plaintiff, or (2) shall be made a party by the court if that person is necessary for a complete determination or settlement of any question involved therein; provided no person who is immune from liability shall be made a defendant in the controversy."

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."

because it would be bound by the holding and that because it would be bound by the holding it had a right to intervene."

We agree with the reasoning of the court that the defendants' argument is circular. Moreover, the defendants have failed to identify a single case holding that general contractors have an automatic right to intervene in an application to discharge a subcontractor's mechanic's lien. Further, beyond the bare assertion that "the failure to intervene cannot now bolster [Strazza's] argument that res judicata does not apply," the defendants have failed to explain how or why a failure to intervene could establish privity for the purposes of res judicata. In any event, if the law does not provide that a general contractor has a right to intervene in a subcontractor's lien discharge case, we fail to see how it could possibly be equitable to later preclude a general contractor's action for its failure to attempt to intervene. Accordingly, we conclude that the court properly rejected the defendants' argument that Strazza should be bound by the holding in the Rozmus action as a result of its failure to intervene.

II

The defendants' final claim is that the court improperly failed to find that collateral estoppel applied to Strazza's claims. In response, Strazza claims that the application of collateral estoppel is barred because a genuine issue of material fact exists with regard to the issue of privity. We agree with Strazza.

We set forth the applicable legal principles. "Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. . . . To assert successfully the doctrine of issue preclusion, therefore,

a party must establish that the issue sought to be foreclosed actually was litigated and determined in the prior action between the parties or their privies, and that the determination was essential to the decision in the prior case." (Internal quotation marks omitted.) *Deutsche Bank AG* v. *Sebastian Holdings, Inc.*, 174 Conn. App. 573, 587, 166 A.3d 716 (2017), aff'd, 331 Conn. 379, 204 A.3d 664 (2019).

Because the sole issue in the present case is whether Strazza and Rozmus were in privity, "we recognize the 'crowning consideration' in collateral estoppel cases and the basic requirement of privity—that the interest of the party to be precluded must have been sufficiently represented in the prior action so that the application of collateral estoppel is not inequitable. . . . A trial in which one party contests a claim against another should be held to estop a third person only when it is realistic to say that the third person was fully protected in the first trial." (Citation omitted.) *Mazziotti* v. *Allstate Ins. Co.*, 240 Conn. 799, 818, 695 A.2d 1010 (1997).

In resolving the defendants' claim, we turn to our analysis in part I A of this opinion. As discussed in the context of res judicata, the court conducted a thorough analysis with regard to the issue of privity and the question of whether Strazza's interests were sufficiently represented in the Rozmus action. On the basis of this analysis, the court appropriately reached the conclusion that a genuine issue of material fact exists with regard to the issue of whether Strazza and Rozmus were in privity. Because the privity requirement of collateral estoppel, when applicable, is analyzed under the same principles as res judicata, we conclude that the court also properly rejected this claim. See id.

The judgment is affirmed.

In this opinion the other judges concurred.

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES *v.* RICHARD CANTILLON ET AL.
(AC 43534)

Alvord, Alexander and Vertefeuille, Js.

Syllabus

The defendant H filed a complaint with the plaintiff Commission on Human Rights and Opportunities alleging discrimination in housing because of race against the defendant C, her neighbor in a condominium complex. C was defaulted in the underlying administrative proceeding. At the hearing in damages, the plaintiff commission requested $75,000 in compensatory damages. The human rights referee of the defendant Commission on Human Rights and Opportunities awarded H, inter alia, $15,000 in compensatory damages for emotional distress. The plaintiff commission filed a request for the referee to reconsider her decision, which request was deemed denied after the referee failed to take further action. The plaintiff commission then appealed the referee's decision, claiming, primarily, that the damages awarded were insufficient. The trial court remanded the matter for further consideration of damages in light of the Supreme Court's decision in *Patino* v. *Birken Mfg. Co.* (304 Conn. 679). On remand, the referee issued a final decision that did not change the amount of the damages awarded. The administrative appeal was then argued before the trial court, which rendered judgment dismissing the appeal and affirming the referee's decision. On the plaintiff commission's appeal to this court, *held* that the referee did not act unreasonably or arbitrarily in her decision and the trial court did not abuse its discretion in dismissing the plaintiff commission's appeal and affirming the referee's decision: neither the referee nor the trial court misinterpreted or misapplied *Patino* in the determination of emotional distress damages, as *Patino* did not establish a presumptive or mandatory range of damages for emotional distress claims but merely addressed a general range that such claims typically merit, references to that range in other cases did not establish any binding principle pertaining to damage awards in emotional distress actions, the fact that the emotional distress damage award fell outside of that general range did not, by itself, create a presumption of error, and, although it might have been instructive or persuasive for the referee to consider damage awards and decisions outside of the state, there was no legal mandate requiring her to do so; moreover, neither the referee nor the trial court misapplied the factors set forth in *Commission on Human Rights & Opportunities ex rel. Harrison* v. *Greco* (CHRO No. 7930433) in the calculation of emotional distress damages, as the referee did not act unreasonably in considering the relationship between H and C because the nature of that relationship

was highly relevant to the degree of offensiveness and to the impact the infliction of emotional distress had on H, H and C did not share a power dynamic similar to that of a landlord and tenant because, as her neighbor, C did not have any enforcement or supervisory power over H and he lacked the ability to oppress or penalize her, the referee's conclusion that the discrimination was not public was a reasonable factual finding in light of the evidence before her and this court declined to disturb it, and, in discussing the public nature of C's conduct and his intentions relating to the same, the referee did not impose an additional requirement without a legal basis but, rather, considered C's intentions as a means to analyze the circumstances surrounding the harassment and its effect on H.

Argued March 2—officially released September 21, 2021

Procedural History

Appeal from the decision by a human rights referee for the defendant Commission on Human Rights and Opportunities, inter alia, declining to increase the amount of damages awarded to the defendant Kelly Howard in an action alleging discrimination in housing against the named defendant, brought to the Superior Court in the judicial district of New Britain, where the court, *Cordani*, *J.*, rendered judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Michael E. Roberts, human rights attorney, for the plaintiff (appellant).

Charles Krich, principal attorney, for the appellee (defendant Commission on Human Rights and Opportunities).

William Tong, attorney general, *Clare E. Kindall*, solicitor general, and *Colleen B. Valentine* and *Matthew F. Larock*, assistant attorneys general, filed a brief for the state of Connecticut as amicus curiae.

Opinion

ALEXANDER, J. The plaintiff, the Commission on Human Rights and Opportunities (plaintiff commission), appeals from the judgment of the Superior Court

dismissing its administrative appeal from the final decision of the defendant Commission on Human Rights and Opportunities (defendant commission).[1] On appeal, the plaintiff commission argues that the Superior Court erred in dismissing its administrative appeal because the human rights referee (referee) and the Superior Court (1) misinterpreted and misapplied *Patino* v. *Birken Mfg. Co.*, 304 Conn. 679, 41 A.3d 1013 (2012),

[1] General Statutes § 46a-94a authorizes the Commission on Human Rights and Opportunities (CHRO) to appeal to the Superior Court an adverse decision of a presiding officer. General Statutes § 4-183 requires the CHRO, in such instances, to serve the agency that rendered the final decision. In the present case, the CHRO appealed the decision of its own human rights referee and thus named and served itself as defendant. See *Blinkoff* v. *Commission on Human Rights & Opportunities*, 129 Conn. App. 714, 719, 20 A.3d 1272 ("[w]e recognize that, pursuant to . . . § 46a-94a (a) and in accord with the rules provided in . . . § 4-183, the [CHRO] has the statutory right to appeal from the final decision of its own hearing officer" (footnote omitted)), cert. denied, 302 Conn. 922, 28 A.3d 341 (2011); see also *Commission on Human Rights & Opportunities* v. *Torrington*, 96 Conn. App. 313, 314 n.1, 901 A.2d 46 ("[i]n its administrative appeal, the plaintiff, appealing from the decision of its human rights referee, properly named itself as a defendant"), cert. denied, 280 Conn. 929, 909 A.2d 957 (2006).

The defendant commission represents that it is prevented, however, from advocating for both sides in an appeal under *Quist* v. *Commission on Human Rights & Opportunities*, Court of Common Pleas, Tolland County, Docket No. 5055 (November 10, 1975), because it owes a "continuing obligation to the [complainant] . . . ." See also *Commission on Human Rights & Opportunities* v. *Board of Education*, 270 Conn. 665, 682, 855 A.2d 212 (2004) ("under its statutory regime, the [CHRO], and not the original complainant, carries the laboring oar in investigating, attempting to mediate, presenting, and ultimately administratively adjudicating, a claim of discrimination filed by an individual complainant"). The defendant commission has elected to support the plaintiff commission. The present case thus presents us with the unusual situation of both parties on appeal advocating for the same interests; specifically, asking this court to reverse the decision of the Superior Court, vacate the referee's award of damages and remand the case for a new calculation of damages.

Additionally, neither the complainant, Kelly Howard, nor the respondent, Richard Cantillon, appeared in Superior Court or participated in the appeal. The state of Connecticut has, pursuant to Practice Book § 67-7, filed an amicus curiae brief in the present matter advocating for a position averse to certain arguments of both the plaintiff and the defendant commissions. The state did not participate in oral argument.

in the calculation of emotional distress damages, and (2) misapplied the factors set forth in *Commission on Human Rights & Opportunities ex rel. Harrison* v. *Greco*, CHRO No. 7930433 (June 3, 1985) pp. 7–8, in the determination of emotional distress damages. We are unpersuaded and, accordingly, affirm the judgment of the Superior Court.

The following facts, as found by the Superior Court, and procedural history are relevant to our resolution of this appeal. "On June 8, 2015, Kelly Howard . . . filed a complaint with the [Commission on Human Rights and Opportunities (CHRO)] against Richard Cantillon . . . her neighbor, alleging discrimination in housing because of race in violation of General Statutes §§ 46a-58 (a) and 46a-64c. [Specifically, Howard alleged that she was subjected to verbal and physical harassment in the form of racial slurs, including use of the N-word, obscene gestures and threats of physical harm, by Cantillon at the condominium complex where they both resided.] The CHRO took up the matter. [Cantillon] was defaulted in the underlying administrative proceeding, and a hearing in damages was held. At the hearing in damages, the CHRO requested $75,000 in compensatory damages. The [referee] awarded $15,000 in compensatory damages for emotional distress and $157.15 in compensatory damages for out-of-pocket travel expenses. The [referee] also awarded postjudgment interest at 10 percent per year, and entered cease and desist, as well as nonretaliation orders. The CHRO filed a request for the [referee] to reconsider her decision, but the [referee] took no action, and the request was deemed denied. The CHRO timely appealed the decision of its own [referee], complaining primarily that the damages awarded were insufficient. On February 7, 2018, [the Superior Court] remanded the matter for further consideration of damages in light of the Supreme Court's decision in *Patino* v. *Birken Mfg. Co.*, [supra, 304 Conn.

679]. Upon remand, the [referee] issued a final decision, but did not change the damages award." (Footnote omitted.) The administrative appeal subsequently was briefed and argued before the Superior Court. On October 2, 2019, the Superior Court rendered a judgment and accompanying memorandum of law dismissing the appeal and affirming the referee's decision. This appeal followed. Additional facts will be set forth as necessary.

We begin our analysis by setting forth our standard of review. The plaintiff commission appeals from the judgment of the Superior Court dismissing its administrative appeal and affirming the decision of the referee. "It is well established that [j]udicial review of [an administrative agency's] action is governed by the Uniform Administrative Procedure Act [(UAPA) General Statutes § 4-166 et seq.] . . . and the scope of that review is very restricted. . . . With regard to questions of fact, it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010). "Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . [Thus] [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." (Internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board* v. *Freedom of Information Commission*, 310 Conn. 276, 281, 77 A.3d 121 (2013).

In the present case, both parties ask us to reverse the referee's award of damages and the Superior Court's affirmance thereof. Specifically, both parties claim that

the referee misapplied *Patino* and the *Harrison* factors in its determination of damages. We note that both the plaintiff commission and the defendant commission argue that they have raised pure questions of law such that we must exercise our plenary review over their claims. We disagree with this assertion. The present case does not present a pure question of law because it requires the review of the referee's award of damages, which constitutes a question of fact. See *Westport Taxi Service, Inc.* v. *Westport Transit District*, 235 Conn. 1, 28, 664 A.2d 719 (1995). Accordingly, "the factual and discretionary determinations of administrative agencies are to be given considerable weight by the courts [and] . . . it is for the courts, and not for administrative agencies, to expound and apply governing principles of law." (Internal quotation marks omitted.) *Board of Education* v. *Freedom of Information Commission*, 217 Conn. 153, 159, 585 A.2d 82 (1991); see also General Statutes § 4-183 (j). We iterate that we cannot substitute our judgment for that of the referee and our ultimate duty is to decide only if the referee "acted unreasonably, arbitrarily, illegally, or in abuse of [her] discretion" and that any conclusion of law must stand if we determine that it "resulted from a correct application of the law to the facts found . . . ." (Internal quotation marks omitted.) *Meriden* v. *Freedom of Information Commission*, Conn. , , A.3d (2021).

I

The plaintiff commission first argues that the referee and the Superior Court misinterpreted and misapplied *Patino* v. *Birken Mfg. Co.*, supra, 304 Conn. 679, in the calculation of emotional distress damages. The plaintiff commission contends that *Patino* stands for the proposition that in "garden variety" emotional distress claims, there is a presumptive monetary range of damages between $30,000 and $125,000. See id., 708. The plaintiff commission argues that, because the referee did not

"consider analogous decisions from neighboring tribunals" and the damage award in the present case fell below this range, the referee committed an "error of law." The defendant commission argues similarly. We disagree with the parties' interpretation of *Patino*.

An analysis of *Patino* v. *Birken Mfg. Co.*, supra, 304 Conn. 679, will facilitate our review of the parties' arguments. In *Patino*, the central issue on appeal was "whether General Statutes § 46a-81c (1) imposes liability on employers for failing to take reasonable steps to prevent their employees from being subjected to hostile work environments based on their sexual orientation." (Footnote omitted.) Id., 682. Our Supreme Court determined that it did and concluded that the phrase " 'terms, conditions or privileges of employment' constitutes a term of art with a fixed legal meaning" and the use of that phrase in § 46a-81c (1) evidenced the legislature's intent to permit hostile work environment claims under the statute. Id., 697.

A tertiary claim on appeal was whether "the trial court, in denying the motion to set aside the verdict and the motion for remittitur, abused its discretion by concluding that the $94,500 noneconomic damages award was supported by the evidence and was not excessive." Id., 705. In its analysis of this claim, our Supreme Court concluded that, "given the sustained nature of the discrimination described by the plaintiff, the severity of the hostility he experienced, and the continued failure of the defendant to remedy the situation, the trial court did not abuse its discretion when it concluded that the award was not excessive or shocking when compared to verdicts awarded under similar circumstances. See, e.g., *Gonzalez* v. *Bratton*, 147 F. Supp. 2d 180, 208–209 (S.D.N.Y. 2001) ($250,000 compensatory damages award for emotional distress claim under both federal and state law) [aff'd, 48 Fed. Appx. 363 (2d Cir. 2002)]; *Oliver* v. *Cole Gift Centers, Inc.*, 85 F.

Supp. 2d 109, 114–15 (D. Conn. 2000) ($100,000 compensatory damages award in Title VII and Connecticut Fair Employment Practices Act case); *Ikram* v. *Waterbury Board of Education*, United States District Court, Docket No. 3:95CV2478 (AHN), [1997 WL 597111, *4] 1997 U.S. LEXIS 14619 (D. Conn. September 9, 1997) ($100,000 compensatory damages award in Title VII case); *Annis* v. *Westchester*, 939 F. Supp. 1115, 1121–22 (S.D.N.Y. 1996) ($100,000 compensatory damages award based on 42 U.S.C. § 1983 civil rights violation causing plaintiff's emotional suffering) [aff'd in part, vacated and remanded in part, 136 F.3d 239 (2d Cir. 1998)]; *Rush* v. *Scott Specialty Gases, Inc.*, 930 F. Supp. 194, 199 (E.D. Pa. 1996) ($100,000 compensatory damages award based on Title VII claim for plaintiff's emotional distress and depression) [rev'd, 113 F.3d 476 (3d Cir. 1997)]; see also *Olsen* v. *Nassau*, [615 F. Supp. 2d 35, 46 (E.D.N.Y. 2009)] ('[*g*]*arden variety emotional distress claims generally merit $30,000 to $125,000 awards*' . . .)." (Emphasis added; footnote omitted.) *Patino* v. *Birken Mfg. Co.*, supra, 304 Conn. 707–708.

The plaintiff commission argues that, based on this language, "[t]he pertinent lessons of *Patino* . . . are twofold: first, that the general range of garden variety emotional distress damages claims in discrimination cases is ordinarily between $30,000 and $125,000; and second, that a tribunal calculating an award of damages should not only look to its own previous decisions for guidance, but should consider analogous decisions from neighboring tribunals as well. That the referee failed to adhere to these aspects of *Patino* on remand constitutes an error of law."

To support its first assertion concerning a presumptive range of damages, the plaintiff commission focuses on our Supreme Court's citation to *Olsen* v. *Nassau*, supra, 615 F. Supp. 2d 46, and the statement contained therein that "[g]arden variety emotional distress claims

generally merit $30,000 to $125,000 awards." (Internal quotation marks omitted.) See *Patino* v. *Birken Mfg. Co.*, supra, 304 Conn. 708. The plaintiff commission asserts that this favorable citation to *Olsen* demonstrates a recognition by our Supreme Court that there is a presumptive range of damages to be awarded in so-called garden variety emotional distress claims. We are not persuaded.

A review of *Patino* reveals that the holding pertaining to the damage award was limited and based on the particular factual circumstances of that case. Our Supreme Court concluded that, "the trial court did not abuse its discretion when it concluded that the award was not excessive or shocking when compared to verdicts awarded under *similar circumstances*." (Emphasis added.) Id., 708. Additionally, the language from *Olsen* v. *Nassau*, supra, 615 F. Supp. 2d 46, cited by our Supreme Court addresses only a *general* range of emotional distress damages as it states simply that "[g]arden variety emotional distress claims *generally* merit $30,000 to $125,000 awards." (Emphasis added; internal quotation marks omitted.) In *Patino*, the Supreme Court did not establish a presumptive or mandatory range of damages. We decline to extend the language of *Patino* and the cases cited therein to create a presumptive or mandatory range for emotional distress damages.

The plaintiff commission directs us to multiple federal decisions in the United States District Court for the District of Connecticut that, it argues, provide guidance on the strength of the range of damages discussed in *Patino* as a presumptive reference point for an emotional distress damage award. See *State* v. *Commission on Human Rights & Opportunities*, 211 Conn. 464, 470, 559 A.2d 1120 (1989) ("[w]e have often looked to federal

employment discrimination law for guidance in enforcing our own antidiscrimination statute" (internal quotation marks omitted)). Specifically, the plaintiff commission points to *Vera* v. *Alstom Power, Inc.*, 189 F. Supp. 3d 360 (D. Conn. 2016), appeal dismissed, United States Court of Appeals, Docket No. 16-2488 (2d Cir. August 16, 2016), and *Carmichael* v. *Advanced Nursing & Rehabilitation Center of New Haven, LLC*, United States District Court, Docket No. 3:19CV908 (JBA), (D. Conn. February 24, 2021), as persuasive authorities that rely on the principles of *Patino* in analyzing emotional distress damages.

In *Vera* v. *Alstom Power, Inc.*, supra, 189 F. Supp. 3d 379, the District Court, as part of its discussion of similar federal and state cases, cited *Patino* and the language therein that "[g]arden variety emotional distress claims *generally* merit $30,000 to $125,000 awards." (Emphasis added; internal quotation marks omitted.) In *Carmichael* v. *Advanced Nursing & Rehabilitation Center of New Haven, LLC*, supra, United States District Court, Docket No. 3:19CV908 (JBA), the District Court noted in a footnote that its decision to award $70,000 for the plaintiff's "emotional injuries and associated physical impacts" was "consistent with other comparable cases in this [c]ircuit where compensatory damages awards range between $30,000 and $125,000."

Although perhaps instructive, these cursory references to a range of damages in other cases do not persuade us that *Patino* stands for any *binding* principle pertaining to damage awards in emotional distress actions. Contrary to the parties' claims, there is not a binding or presumptive range for emotional distress damages recognized in this state. The claim that emotional distress damage awards appear to fall *generally*

within a certain range does not by itself create a presumption of error if an award is outside that range.[2] Rather, "[i]n garden variety emotional distress claims, the evidence of mental suffering is generally limited to the testimony of the plaintiff." (Internal quotation marks omitted.) *Patino* v. *Birken Mfg. Co.*, supra, 304 Conn. 707, quoting *Olsen* v. *Nassau*, supra, 615 F. Supp. 2d 46.

Further, to the extent that the plaintiff commission argues that *Patino* holds that a tribunal calculating an award of damages should consider analogous decisions from neighboring jurisdictions in addition to awards granted in this state, we find no support in the language of the case that supports this proposition. In the present case, the referee extensively analyzed the range of awards issued from that office. Although it may be instructive or persuasive for a tribunal to consider damage awards and decisions outside of Connecticut, there is no mandate in law requiring a tribunal to do so in its analysis.

After a thorough review of the record, we find that neither the referee nor the Superior Court misinterpreted or misapplied *Patino*. Accordingly, we conclude

[2] In the present case, the plaintiff commission has alleged a violation of § 46a-64c. Damage awards under that statute are issued pursuant to General Statutes § 46a-86 (c), which is silent as to any range or minimum amount of damages that a presiding officer must award on a finding of discriminatory practice and provides only that "the presiding officer shall determine the damage suffered by the complainant, which damage shall include, but not be limited to, the expense incurred by the complainant for obtaining alternate housing or space, storage of goods and effects, moving costs and other costs actually incurred by the complainant as a result of such discriminatory practice and shall allow reasonable attorney's fees and costs. . . ." In the absence of any language in the statute, we cannot conclude that a binding or presumptive range of damages in emotional distress claims is recognized in Connecticut. See *Kobyluck Bros., LLC* v. *Planning & Zoning Commission*, 167 Conn. App. 383, 391, 142 A.3d 1236 ("[a] court must interpret a statute as written . . . and it is to be considered as a whole, with a view toward reconciling its separate parts in order to render a reasonable overall interpretation" (internal quotation marks omitted)), cert. denied, 323 Conn. 935, 151 A.3d 383 (2016).

that the referee did not act unreasonably or arbitrarily in her decision and that the Superior Court did not abuse its discretion in dismissing the plaintiff commission's appeal and affirming the referee's decision.

II

The plaintiff commission next argues that the referee erred in her interpretation and application of the factors set forth in *Commission on Human Rights & Opportunities ex rel. Harrison* v. *Greco*, supra, CHRO No. 7930433, pp. 7–8, to determine emotional distress damages. Specifically, the plaintiff commission argues that the referee erred in considering the relationship between Howard and Cantillon; that the referee erred in concluding that the discrimination was not public; and that the Superior Court erroneously upheld the referee's findings. We are not persuaded.

We begin our analysis with a review of *Harrison*. The complainant in that case, Donna Harrison, filed a complaint with the CHRO alleging discrimination on the basis of race in public accommodations, specifically, rental housing, by the respondent, John Greco. Id., p. 1. In her discussion of the damage award for humiliation and emotional distress, the hearing officer analyzed numerous cases in Connecticut, as well as those from other state and federal jurisdictions, and enumerated a series of factors that other courts and administrative officers had found relevant in their determinations of awards for emotional distress and humiliation. Id., pp. 6–8. The hearing officer, quoting *Commission on Human Rights & Opportunities ex rel. Barboza* v. *Chestnut Realty, Inc.*, CHRO No. 7830126 (April 12, 1983) p. 12, noted that "[t]he most important element of such damages is the subjective internal emotional reaction of the complainant to the discriminatory experience which he has undergone . . . ." (Internal quotation marks omitted.) *Commission on Human Rights &*

Opportunities ex rel. Harrison v. *Greco*, supra, CHRO No. 7930433, p. 7. The officer further noted that "[o]ther factors that courts and administrative officers have found relevant in determining the amount to award for emotional distress and humiliation are . . . whether the discrimination occurred in front of other people . . . [and] the degree of offensiveness of the discrimination and the impact on the [complainant] . . . ." (Citations omitted.) Id., p. 8; see also *Commission on Human Rights & Opportunities* v. *Sullivan Associates*, Docket Nos. CV-94-4031061-S and CV-95-4031060-S, 2011 WL 3211150, *4 (Conn. Super. June 6, 2011) ("Under the *Harrison* analysis, the most important factor of such damages is the subjective internal emotional reaction of the complainants to the discriminatory experience which they have undergone and whether the reaction was intense, prolonged and understandable. . . . Second, is whether the discrimination occurred in front of other people. . . . For this, the court must consider if the discriminatory act was in public and in view or earshot of other persons which would cause a more intense feeling of humiliation and embarrassment. . . . The third and final factor is the degree of the offensiveness of the discrimination and the impact on the complainant. . . . In other words, was the act egregious and was it done with the intention and effect of producing the maximum pain, embarrassment and humiliation." (Citations omitted.)).

The plaintiff commission notes that the *Harrison* factors are to be "weighed and considered, rather than elements necessary to support a claim for emotional distress damages . . . ." In the present case, the referee explicitly addressed the three *Harrison* factors and engaged in a thorough analysis for each factor. Nevertheless, the plaintiff commission argues that the referee unreasonably departed from these criteria when she considered the relationship between Howard and

Cantillon and increased the evidentiary threshold for demonstrating that the discrimination was public in nature. As a result of these alleged deviations, the plaintiff commission claims that the referee committed a "prejudicial error of law." We are not persuaded.

The plaintiff commission first argues that the referee erred by considering the relationship between Howard and Cantillon. Specifically, the plaintiff commission challenges the following passage from the referee's decision found in her analysis of the degree of offensiveness of the discriminatory actions and impact on the complainant: "The present case stands in contrast to several other housing harassment decisions of this tribunal wherein the parties had a legal housing relationship. See *Commission on Human Rights & Opportunities ex rel. Brown* v. *Jackson*, [CHRO Nos. 0750001 and 0750002, 2008 WL 5122193 (November 17, 2008)], and *Commission on Human Rights & Opportunities ex rel. Scott* v. [*Jemison*], CHRO No. 9950020, 2000 WL 35575662 (March 20, 2000) which both involved direct discriminatory harassment of a tenant by a landlord. See also *Commission on Human Rights & Opportunities ex rel. Hartling* v. *Carfi*, [CHRO No. 0550116, 2006 WL 4753467 (October 26, 2006)], which involved direct discriminatory harassment of a condominium owner by the property manager of the condominium complex. In these three harassment cases, the respondent landlord, or condominium association property manager as the case may be, had the power and authority, and hence far greater ability than the discriminator in the present matter, to interfere with the housing rights and status of the victim or to affect the provision or services or facilities in connection with housing. In the present case, where both parties are resident-owners, the respondent, not being an association board member or property manager of the condominium complex, had

no enforcement and supervisory power over the complainant with respect to association rules or the provision or enjoyment of services or common facilities, and lacked an ability to oppress or penalize her by virtue of his authority." (Footnotes omitted.) The plaintiff commission challenges this analysis and argues that it was an error of law for the referee to consider this relationship in her decision.

A review of the referee's decision reveals that she considered the relationship between Howard and Cantillon as neighbors in contrast to harassment cases involving a landlord-tenant relationship. The distinction between the two circumstances is readily apparent. The power dynamic found in harassment cases involving a landlord-tenant relationship is highly relevant because it pertains directly to the emotional reaction of the complainant as well as to the degree of offensiveness and the impact of the conduct on the complainant. As the Superior Court noted in its decision: "If a landlord-tenant relationship existed with the landlord being the discriminating party, the conduct would be more likely to have a more serious effect because the landlord has a position of dominance over the tenant. For example, the landlord is capable of taking actions that others cannot, such as eviction, raising the tenant's rent, or refusing to make repairs, thereby having the potential to engender more fear. If the parties have or had a social relationship, the conduct may be more or less hurtful, depending upon the relationship. Lastly, as further example, if the parties had a relationship of trust or authority, that relationship may affect how the discriminatory conduct is perceived by the complainant." We agree with the court's analysis.

In the present case, Howard and Cantillon were neighbors. The referee concluded, based on the evidence before her, that Howard and Cantillon's relationship did not exhibit a similar power dynamic to that

of a landlord-tenant relationship, such that it would increase the degree of offensiveness and impact on Howard. The referee noted that "[Cantillon], not being an association board member or property manager of the condominium complex, had no enforcement and supervisory power over the complainant with respect to association rules or the provision or enjoyment of services or common facilities, and lacked an ability to oppress or penalize [Howard] by virtue of his authority." Given our deference to the factual findings of the referee, as well as the highly relevant nature of the relationship between a complainant and the party accused of inflicting emotional distress, we conclude that the referee did not act unreasonably by considering the relationship between Howard and Cantillon in the present case.

The plaintiff commission further argues that the referee erred in her determination that the discrimination was not public. Whether the discrimination was public is a question of fact. In her decision, the referee pointed to specific testimony from Howard explaining that Cantillon would harass and direct racial slurs at her " 'especially when there were no witnesses to observe this behavior.' . . . 'If I see him at the mailbox and he's with no one and I'm with no one, he would say "I'm still going to get you, [N-word]," and that was mainly every time that, if his wife is not in the car with him, or no one is with me, that's when he would do it.' " (Citation omitted; emphasis omitted.) On the basis of this testimony and the totality of the evidence before it, the referee concluded: "The complaint allegations, and the testimony of the complainant and her former boyfriend, establish that the respondent's racially hostile epithets and obscene-gesture harassment generally were not visible or readily apparent to other persons. . . . [T]he discriminatory harassment occurred in front of other people only twice." (Citations omitted.)

The plaintiff commission argues that the evidence before the referee established that the harassment occurred "exclusively in the open" and that others were aware of Cantillon's behavior, and, therefore, the evidence establishes that there were more than two instances of "public" discrimination. It is well established that, "[w]ith regard to questions of fact, it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, supra, 298 Conn. 716. Our review of the record leads us to the conclusion that the referee's factual determinations were reasonable given the evidence before her.

The plaintiff commission further argues that the referee's conclusions regarding the public nature of the discrimination contains an error of law. Specifically, the plaintiff commission argues that the referee impermissibly implemented a requirement that more than one person must be present for the discrimination to be public and erred as a matter of law in concluding that the discrimination was not public. We disagree. The plaintiff commission attempts to characterize the referee's factual findings that the discrimination was not public as a question of law. We conclude that the referee's determination was a factual finding based on the evidence before her and agree that the harassment generally was not visible or apparent to other persons. We will not disturb this factual finding.

The plaintiff commission next argues that the referee added an additional requirement that the discriminatory conduct be intentionally public for the express purpose of inflicting greater pain and distress. Specifically, the plaintiff commission points to the referee's conclusions that "there is no evidence that the respondent aimed his hostile speech and conduct at the complainant in

the presence of other listeners with the intent to inflict greater emotional distress" and "[t]he absence in the present case of public humiliation done with the intention and effect of producing the maximum pain, embarrassment and humiliation . . . militates against a higher-end award"; (citation omitted; internal quotation marks omitted); and argues that the referee erred as a matter of law in considering the intentionality of the discrimination as part of its analysis of the public nature of the discriminatory actions. We disagree.

In its decision on appeal, the Superior Court properly analyzed this argument stating: "Discriminatory conduct of this type . . . is always intentional, and the choice to engage in that conduct in public, where the effect is obvious, is also always intentional. The [referee's] quote thus merely recognizes that when a respondent intentionally chooses to publically exhibit discriminatory conduct towards another person, that discriminatory conduct will have the effect of producing the maximum pain, embarrassment and humiliation." The referee, in her discussion of the public nature of the conduct, considered Cantillon's intentions behind the conduct as a means to analyze the circumstances surrounding the harassment and its effect on Howard. We do not agree with the plaintiff commission that the referee was imposing an additional requirement with no basis in law. The ultimate goal of a human rights referee, in determining damages, is to thoughtfully and thoroughly consider the evidence and circumstances pertaining to the misconduct at issue.[3] See *Thames Talent, Ltd.* v. *Commission on Human Rights & Opportunities*, 265 Conn. 127, 136, 827 A.2d 659 (2003) ("[t]his

[3] We note that both the plaintiff commission and the defendant commission have directed us to numerous cases detailing the long history of racial hatred and bigotry associated with the racial epithet used by Cantillon. See *State* v. *Liebenguth*, 336 Conn. 685, 703–704, 250 A.3d 1 (2020), cert. denied, U.S. , 141 S. Ct. 1394, 209 L. Ed. 2d 132 (2021); *Rogers* v. *New Britain*, 189 F. Supp. 3d 345, 356 (D. Conn. 2016); *In re John M.*, 201 Ariz. 424, 428, 36 P.3d 772 (App. 2001).

remedial goal is furthered by vesting in a hearing officer *broad discretion* to award . . . appropriate remedies specifically tailored to the particular discriminatory practices at issue" (emphasis added; internal quotation marks omitted)). As the Superior Court correctly stated, "[f]lexibility must be maintained to consider other potentially important evidence that may be relevant in particular cases." Indeed, the plaintiff commission agrees that the *Harrison* factors are not elements that must be met to support a claim for emotional distress damages but are, instead, factors to be weighed and considered among other evidence. We conclude that the referee acted reasonably in her analysis pertaining to the public nature of the discriminatory conduct and that the Superior Court did not abuse its discretion in dismissing the appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* YURY G.*
(AC 43069)

Alvord, Clark and Sullivan, Js.

Syllabus

Convicted, after a jury trial, of the crime of disorderly conduct stemming from a physical altercation with her husband, the defendant appealed to this court. She claimed, inter alia, that the trial court improperly

In her decision, the referee made detailed findings of fact regarding Cantillon's regular use of that racial epithet directed at Howard. In making her damages award, the referee expressly stated: "There is no doubt that the respondent's race-based verbal harassment, obscene gestures, and threatening conduct were highly offensive and inflammatory. The pervasive and persistent use of derogatory racial epithets . . . and race-based threats . . . over a period of seven years is patently offensive and well recognized as such." Accordingly, we conclude that the referee properly considered the weight of this word and its effect. The parties' arguments that we consider the use of that specific word in our analysis of the referee's factual findings does not persuade us to reverse her factual findings.

* In accordance with our policy of protecting the privacy interests of the victims of family violence, we decline to identify the victims or others

determined that her request to instruct the jury on the infraction of creating a public disturbance as a lesser included offense failed to satisfy the test set forth in *State* v. *Whistnant* (179 Conn. 576). *Held*:

1. The trial court properly denied the defendant's request for an instruction on the lesser included offense of creating a public disturbance; the defendant's request failed under the fourth prong of the *Whistnant* test, as the evidence showing that the defendant intentionally hit her husband with her knee would have supported a conviction under either the greater or the lesser offense and, thus, the jury could not, as a matter of law, have found the defendant guilty only of creating a public disturbance and not guilty of disorderly conduct.
2. The defendant could not prevail on her unpreserved claim that the statutory scheme that gave the prosecutor complete discretion in choosing whether to charge her with an infraction or with a misdemeanor that contained identical elements to the infraction violated her state and federal constitutional rights to due process of law and equal protection under the law; our Supreme Court held in *State* v. *Harden* (175 Conn. 315) that a trial court should not give a lesser included offense instruction when both the greater and lesser offenses contain only identical elements, and the United States Supreme Court held in *United States* v. *Batchelder* (442 U.S. 114) that, if there is no discrimination against any particular class of defendants when deciding under what statute to charge a defendant, there is no violation under the federal constitution for two statutes with different penalties to punish the same conduct, thus, the defendant failed to establish her claimed constitutional violations and her claim was not reviewable under the third prong of *State* v. *Golding* (213 Conn. 233).
3. The defendant could not prevail on her unpreserved claim that the statutory scheme that gave the prosecutor complete discretion in choosing whether to charge her with an infraction or with a misdemeanor that contained identical elements to the infraction violated the separation of powers provision of the Connecticut constitution by shifting power from the judiciary to the executive branch; our legal precedent has held that, in Connecticut, the power of sentencing is shared by all three branches of government, thus, the defendant failed to establish her claimed constitutional violation, and her claim was not reviewable under the third prong of *Golding*.
4. The defendant could not prevail on her claim that the trial court abused its discretion in instructing the jury that it could consider her husband's affidavit, which had been admitted as a full exhibit, only for impeachment purposes; although the defendant failed to comply with the rules of practice by directing her requests to charge to particular evidence in the case, and she never requested that the court provide an instruction pursuant to *State* v. *Whelan* (200 Conn. 743) regarding the affidavit or

through whom the victims' identities may be ascertained. See General Statutes § 54-86e.

asked the court specifically to instruct the jury that it could use the affidavit for substantive purposes, a review of the court's charge in its entirety revealed that the court never instructed the jury that it was limited in its use of the affidavit but instead instructed it to consider all of the testimony and exhibits admitted into evidence in reaching its verdict.

Argued May 13—officially released September 21, 2021

Procedural History

Information charging the defendant with one count of the crime of disorderly conduct, brought to the Superior Court in the judicial district of Ansonia-Milford, geographical area number twenty-two, and tried to the jury before *Wilkerson-Brillant*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

David C. Nielsen, former certified legal intern, with whom was *James B. Streeto*, senior assistant public defender, for the appellant (defendant).

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, *Alexander C. Beck*, assistant state's attorney, and *Leeza N. Tirado*, certified legal intern, for the appellee (state).

Opinion

ALVORD, J. The defendant, Yury G., appeals from the judgment of conviction, rendered following a jury trial, of disorderly conduct in violation of General Statutes § 53a-182 (a) (1). On appeal, the defendant claims: (1) the trial court incorrectly determined that the defendant's request to charge the jury on the "lesser included offense" of creating a public disturbance, an infraction, failed to meet the test articulated in *State* v. *Whistnant*, 179 Conn. 576, 588, 427 A.2d 414 (1980); (2) the statutory scheme that gives the prosecutor complete discretion in choosing whether to charge the defendant with an infraction or with a misdemeanor that contains identical

elements to the infraction violates her state and federal constitutional right to due process of law and to equal protection under the law; (3) the statutory scheme that gives the prosecutor complete discretion in choosing whether to charge the defendant with an infraction or with a misdemeanor that contains identical elements to the infraction violates the separation of powers provision of the Connecticut constitution; and (4) the court abused its discretion when it instructed the jury that it could consider the affidavit of the defendant's husband (H) only for impeachment purposes despite having admitted the affidavit as a full exhibit. We affirm the judgment of the trial court.

The following facts, which reasonably could have been found by the jury, inform our review of the defendant's claims. The defendant and H were married and were the parents of a ten year old daughter. On October 5, 2016, the power company shut off the family's electricity due to nonpayment of their bill. When H came home that evening, the defendant was upset and confronted him. The accounts of what transpired after he returned home conflicted, however. The defendant alleged that H shoved her during the argument, and H alleged that the defendant struck him in the groin with her knee, injuring his testicles, during the argument. It is undisputed, however, that H began to record the events on his phone, and that the defendant telephoned the police. Officer Michael Beutel of the West Haven Police Department arrived at the family's home at 10:17 p.m. The defendant was waiting outside when Beutel arrived, and Beutel took the statements of each party separately. Beutel believed that he had probable cause to arrest both parties.

Relevant to this appeal, the defendant was charged with one count of disorderly conduct, and, following a jury trial, she was found guilty of that charge. After

accepting the jury's verdict, the court rendered a judgment of conviction, imposing a total effective sentence of ninety days of incarceration, execution suspended, followed by one year of probation. This appeal followed.

I

The defendant first claims that the trial court incorrectly determined that her request to charge the jury on the "lesser included offense" of creating a public disturbance, an infraction, failed to meet the test articulated in *State* v. *Whistnant*, supra, 179 Conn. 588. The state argues that the defendant's claim fails for two reasons—first, an infraction cannot be a lesser included offense of an actual offense, and, second, the defendant's request to charge fails to satisfy the *Whistnant* test. We conclude that the defendant's request to charge the jury on the infraction of creating a public disturbance, as a "lesser included offense" of disorderly conduct, fails the fourth prong of the *Whistnant* test.[1]

In this case, the defendant submitted to the trial court a request that the jury be instructed on the "lesser included offense" of creating a public disturbance, arguing that the request to charge satisfied the four part test set forth in *Whistnant*. The court denied the request, concluding that the fourth prong of the *Whistnant* test was not satisfied.

"A defendant is entitled to an instruction on a lesser [included] offense if . . . the following conditions are

[1] Because we agree with the state that the defendant's request to charge fails under *Whistnant*, we need not determine whether an infraction legally can be a lesser included offense of a misdemeanor. As our Supreme Court recently did in *Marsala*, we save this question for another day. See *State* v. *Marsala*, 337 Conn. 55, 57 n.4, 252 A.3d 349 (2020) ("[b]ecause we conclude that the defendant failed to satisfy *Whistnant*, we do not reach the state's alternative ground for affirmance, in which the state contends that the defendant would not have been entitled to an instruction on the infraction . . . even if he had satisfied *Whistnant* because infractions are categorically prohibited from being submitted to the jury as lesser included offenses of crimes").

met: (1) an appropriate instruction is requested by either the state or the defendant; (2) it is not possible to commit the greater offense, in the manner described in the information or bill of particulars, without having first committed the lesser; (3) there is some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction of the lesser offense; and (4) the proof on the element or elements which differentiate the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant [not guilty] of the greater offense but guilty of the lesser. *State* v. *Whistnant*, [supra, 179 Conn. 588]." (Internal quotation marks omitted.) *State* v. *Marsala*, 337 Conn. 55, 65–66, 252 A.3d 349 (2020).

"In considering whether the defendant has satisfied the requirements set forth in *State* v. *Whistnant*, supra, 179 Conn. 588, we view the evidence in the light most favorable to the defendant's request for a charge on the lesser included offense. . . . On appeal, an appellate court must reverse a trial court's failure to give the requested instruction if we cannot as a matter of law exclude [the] possibility that the defendant is guilty only of the lesser offense." (Internal quotation marks omitted.) *State* v. *Corbin*, 260 Conn. 730, 745, 799 A.2d 1056 (2002).

In the present case, the trial court concluded that the defendant's request to charge on the infraction of creating a public disturbance, as a "lesser included offense" of disorderly conduct, failed the fourth prong of *Whistnant*. "[T]he fourth prong of *Whistnant* specifically requires that the proof be sufficiently in dispute. . . . Such proof is sufficient when it is marked by [a] quality [such as] to meet with the demands, wants or needs of a situation . . . . In the *Whistnant* context, therefore, the proof is sufficiently in dispute [when] it is of such a factual quality that would permit the finder

of fact reasonably to find the defendant guilty [of] the lesser included offense. This requirement serves to prevent a jury from capriciously [finding a defendant guilty] on the lesser included offense when the evidence requires either [a finding of guilt] on the greater offense or [a finding of not guilty]. . . . Moreover, the trial court, in making its determination whether the proof is sufficiently in dispute, [although] it must carefully assess all the evidence whatever its source, is not required to put the case to the jury on a basis [of a lesser included offense] that essentially indulges and even encourages speculations as to [a] bizarre reconstruction [of the evidence]." (Citation omitted; internal quotation marks omitted.) *State* v. *Marsala*, supra, 337 Conn. 66–67.

Section 53a-182 provides: "(a) A person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior; or (2) by offensive or disorderly conduct, annoys or interferes with another person; or (3) makes unreasonable noise; or (4) without lawful authority, disturbs any lawful assembly or meeting of persons; or (5) obstructs vehicular or pedestrian traffic; or (6) congregates with other persons in a public place and refuses to comply with a reasonable official request or order to disperse; or (7) commits simple trespass, as provided in section 53a-110a, and observes, in other than a casual or cursory manner, another person (A) without the knowledge or consent of such other person, (B) while such other person is inside a dwelling, as defined in section 53a-100, and not in plain view, and (C) under circumstances where such other person has a reasonable expectation of privacy.

"(b) Disorderly conduct is a class C misdemeanor."

General Statutes § 53a-181a provides: "(a) A person is guilty of creating a public disturbance when, with intent

to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he (1) engages in fighting or in violent, tumultuous or threatening behavior; or (2) annoys or interferes with another person by offensive conduct; or (3) makes unreasonable noise.

"(b) Creating a public disturbance is an infraction."

In the present case, the defendant was charged under § 53a-182 (a) (1), which required the state to prove that she had "[e]ngage[d] in fighting or in violent, tumultuous or threatening behavior . . . ." Likewise, a charge pursuant to § 53a-181a (a) (1) would have required the state to prove that that the defendant had "engage[d] in fighting or in violent, tumultuous or threatening behavior . . . ." The evidence to support a conviction under either charge, as set forth in the facts section of this opinion demonstrates that the defendant intentionally hit H in the groin with her knee. Pursuant to the fourth prong of the *Whistnant* test, a request to charge on a greater and lesser offense that contain identical elements and that are premised on the same proof necessarily will fail. See, e.g., *State* v. *Marsala*, supra, 337 Conn. 75 (trial court properly denied defendant's request for instruction of lesser included offense when, on basis of evidence, jury could not have found defendant guilty only of lesser included offense and not of greater offense); *State* v. *Manley*, 195 Conn. 567, 580–81, 489 A.2d 1024 (1985) (trial counsel's rhetorical argument to jury, in absence of any proof at trial, did not place matter of whether defendant's gun could have been starter pistol sufficiently in dispute for purposes of fourth prong of *Whistnant*); *State* v. *Harden*, 175 Conn. 315, 325, 398 A.2d 1169 (1978) (trial court should not give lesser included offense instruction when both greater and lesser offense contain only identical elements);[2] see also *Sansone* v. *United States*, 380 U.S.

[2] The defendant also argues that *State* v. *Harden*, supra, 175 Conn. 315, should be overruled because it was wrongly decided. "[I]t is axiomatic that, [a]s an intermediate appellate court, we are bound by Supreme Court

343, 349–50, 85 S. Ct. 1004, 13 L. Ed. 2d 882 (1965) ("[A] lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses. . . . In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense." (Citations omitted.)).

Accordingly, in light of the evidence introduced at trial and the elements of the "lesser offense" and the greater offense, we can exclude as a matter of law the possibility that the jury rationally could have found the defendant guilty only of creating a public disturbance, and not guilty of disorderly conduct. The trial court, therefore, properly denied the defendant's request for an instruction on the "lesser included offense" because the request failed under the fourth prong of the *Whistnant* test.

II

The defendant, requesting review pursuant to *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),[3] next claims that the statutory scheme

precedent and are unable to modify it. . . . [W]e are not at liberty to overrule or discard the decisions of our Supreme Court but are bound by them. . . . [I]t is not within our province to reevaluate or replace those decisions." (Internal quotation marks omitted.) *State* v. *Vasquez*, 194 Conn. App. 831, 839–40, 222 A.3d 1018 (2019), cert. denied, 334 Conn. 922, 223 A.3d 61 (2020).

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

that gives the prosecutor complete discretion in choosing whether to charge her with an infraction or with a misdemeanor that contains identical elements to the infraction violates her right to due process of law and equal protection under the law under both the federal and state constitutions. We conclude that this issue is controlled by *State* v. *Harden*, supra, 175 Conn. 325, 325 n.6, and *United States* v. *Batchelder*, 442 U.S. 114, 124–25, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979), and that the defendant's claim fails under *Golding*'s third prong.

Whether a statutory scheme violates a defendant's rights to due process of law or to equal protection under the law presents this court with questions of law over which we exercise plenary review. See *State* v. *Collymore*, 334 Conn. 431, 477, 223 A.3d 1, cert. denied, U.S. , 141 S. Ct. 433, 208 L. Ed. 2d 129 (2020); *State* v. *Long*, 268 Conn. 508, 520–21, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004). When reviewing such a claim, "[o]ur analysis . . . begins with the premise that a validly enacted statute carries with it a strong presumption of constitutionality, [and that] those who challenge its constitutionality must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt. . . . The court will indulge in every presumption in favor of the statute's constitutionality . . . . Therefore, [w]hen a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear." (Citations omitted; internal quotation marks omitted.) *State* v. *Long*, supra, 521.

The defendant argues that a rule like the one set forth in *Harden*, which provides that the trial court should

violation beyond a reasonable doubt. . . . *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, supra, 317 Conn. 781 (modifying third prong of *Golding*)." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Silva*, Conn. , n.5, A.3d (2021).

not give a lesser included offense instruction when both the greater and the lesser offense contain only identical elements, "would represent an unconstitutional delegation of sentencing authority to the executive branch and would impermissibly hinder the jury's ability to determine whether the defendant was guilty of the greater crime beyond a reasonable doubt." As we explained in footnote 2 of this opinion, as an intermediate appellate court, we have no authority to overrule decisions of our Supreme Court.[4] Additionally, as also recognized by the defendant, the United States Supreme Court determined long ago that, as long as the government does not discriminate against any particular class of defendants when deciding under what statute to charge a defendant, there is no violation of due process or equal protection under the federal constitution for two statutes with different penalties to prohibit the same conduct. See *United States* v. *Batchelder*, supra, 442 U.S. 124–25. As the Supreme Court explained: "Whether to prosecute and what charge to file . . . are decisions that generally rest in the prosecutor's discretion." Id., 124. Accordingly, we conclude that the defendant's claim fails under the third prong of *Golding*; the defendant has failed to establish her claimed constitutional violations.

III

The defendant also claims that the statutory scheme that gives the prosecutor complete discretion in deciding whether to charge a defendant with an infraction

[4] During oral argument before this court, the defendant conceded that she raised this claim under the state constitution in order to preserve the issue for review by our Supreme Court. She also stated in her main appellate brief: "Inasmuch as this court cannot overrule or modify decisions of the Connecticut Supreme Court, the defendant appreciates the futility in bringing this claim before it. Nevertheless, the defendant has chosen to assert the foregoing state constitutional claims in order to preserve them for possible review by the Connecticut Supreme Court."

or with a misdemeanor that contains identical elements violates the separation of powers provision of the Connecticut constitution by shifting powers from the judiciary to the executive branch.[5] The defendant again requests *Golding* review. The state argues that the defendant's claim again fails under *Golding*'s third prong because the statutory scheme that assigns different penalties to identical conduct and that gives the prosecutor discretion in deciding under which of these statutes to charge a defendant does not unconstitutionally shift powers from the judiciary to the executive branch. We agree with the state.

"[T]he primary purpose of [the separation of powers] doctrine is to prevent commingling of different powers of government in the same hands. . . . The constitution achieves this purpose by prescribing limitations and duties for each branch that are essential to each branch's independence and performance of assigned powers. . . . It is axiomatic that no branch of government organized under a constitution may exercise any power that is not explicitly bestowed by that constitution or that is not essential to the exercise thereof. . . . [Thus] [t]he separation of powers doctrine serves a dual function: it limits the exercise of power within each branch, yet ensures the independent exercise of that power. . . .

"In the context of challenges to statutes whose constitutional infirmity is claimed to flow from impermissible intrusion upon the judicial power, we have refused to

[5] The defendant appears to recognize that her claim fails under the federal constitution. See *United States* v. *Batchelder*, supra, 442 U.S. 126 ("The provisions at issue plainly demarcate the range of penalties that prosecutors and judges may seek and impose. In light of that specificity, the power that Congress has delegated to those officials is no broader than the authority they routinely exercise in enforcing the criminal laws. Having informed the courts, prosecutors, and defendants of the permissible punishment alternatives available under each Title, Congress has fulfilled its duty.").

find constitutional impropriety in a statute simply because it affects the judicial function . . . . A statute violates the constitutional mandate for a separate judicial magistracy only if it represents an effort by the legislature to exercise a power which lies exclusively under the control of the courts . . . or if it establishes a significant interference with the orderly conduct of the Superior Court's judicial functions. . . . In accordance with these principles, a two part inquiry has emerged to evaluate the constitutionality of a statute that is alleged to violate separation of powers principles by impermissibly infringing on the judicial authority. . . . A statute will be held unconstitutional on those grounds if: (1) it governs subject matter that not only falls within the judicial power, *but also lies exclusively within judicial control*; or (2) it significantly interferes with the orderly functioning of the Superior Court's judicial role." (Emphasis added; internal quotation marks omitted.) *State* v. *Evans*, 329 Conn. 770, 810, 189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019).

"[U]nder our state's law, the power of sentencing is a shared power. Although the judiciary exclusively has the power to render, open, vacate, or modify a judgment, we repeatedly have held that the power to sentence is shared by all three branches of government. See, e.g., *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 828, 950 A.2d 1220 (2008) ('[a]lthough the judiciary unquestionably has power over criminal sentencing . . . the judiciary does not have exclusive authority in that area' . . .); id. (legislature decides appropriate penalties, judiciary adjudicates and determines sentence, and executive manages parole system); *State* v. *Campbell*, 224 Conn. 168, 178, 617 A.2d 889 (1992) ('sentencing is not within the exclusive control of the judiciary and . . . there is no constitutional requirement that courts be given discretion in imposing

sentences'), cert. denied, 508 U.S. 919, 113 S. Ct. 2365, 124 L. Ed. 2d 271 (1993). The judiciary may impose a specific sentence, but the legislature has the power to define crimes, prescribe punishments for crimes, impose mandatory minimum terms of imprisonment for certain crimes, preclude the probation or suspension of a sentence, and even pardon offenders. See *State* v. *Darden*, 171 Conn. 677, 679–80, 372 A.2d 99 (1976) ('the constitution assigns to the legislature the power to enact laws defining crimes and fixing the degree and method of punishment and to the judiciary the power to try offenses under these laws and impose punishment within the limits and according to the methods therein provided'); *State* v. *Morrison*, 39 Conn. App. 632, 634, 665 A.2d 1372 ('Prescribing punishments for crimes . . . is . . . a function of the legislature. . . . The judiciary's power to impose specific types of sentences is therefore defined by the legislature.' . . .), cert. denied, 235 Conn. 939, 668 A.2d 376 (1995) . . . ." (Emphasis omitted.) *State* v. *McCleese*, 333 Conn. 378, 416–17, 215 A.3d 1154 (2019).

In *State* v. *Erzen*, 29 Conn. App. 591, 617 A.2d 177 (1992), the defendant argued that the legislature had delegated too much discretion to law enforcement agencies because it gave the state's attorneys the ability to take crimes, such as public indecency cases, and prosecute them under the risk of injury statute, thereby increasing potential penalties from six months of incarceration to ten years of incarceration. Id., 599–600. This court explained that such a statutory scheme "presents no constitutional problem. . . . The state has broad discretion to choose which crimes to charge in particular circumstances and as long as the state does not discriminate against any class, the state may choose to prosecute a defendant under either applicable statute." (Citations omitted.) Id. Our Supreme Court also has explained that, provided "the state does not avail itself

of overlapping criminal statutes in a manner that discriminates against any class, the state may legally choose to prosecute the defendant under either applicable statute. . . . Absent a showing of a selection deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification . . . conscious selectivity in enforcement of the law is not in itself a constitutional violation." (Citation omitted; internal quotation marks omitted.) *State* v. *Grullon*, 212 Conn. 195, 217, 562 A.2d 481 (1989).

In the present case, the defendant argues that "where the prosecutor is able to determine which of two duplicative charges a defendant must defend himself against, *he necessarily impedes the judiciary's ability to exercise its power to impose punishment*." (Emphasis added.) The defendant's argument flatly fails in the face of our legal precedent, which holds that, in Connecticut, the power of sentencing *is a shared power*. See *State* v. *McCleese*, supra, 333 Conn. 416–17 (citing cases to support statement that, under our state's law, power to sentence is shared by all three branches of government). "The fact that certain governmental powers overlap is not only necessary to ensure the smooth and effective operation of government . . . but also is a product of the historical evolution of Connecticut's governmental system, which established a tradition of harmony among the separate branches of government that the separate branches of the federal government system did not have." (Citation omitted; internal quotation marks omitted.) Id., 419.

On the basis of the foregoing, we conclude that the defendant has failed to establish that the statutory scheme that allows the prosecutor to choose under which of two statutes, containing the same elements but different punishments, to charge a defendant violates the separation of powers provision of our state

constitution. Accordingly, her claim fails under the third prong of *Golding*.

IV

Lastly, the defendant claims that the trial court abused its discretion when it instructed the jury that it could consider H's affidavit only for impeachment purposes, despite having admitted the affidavit as a full exhibit. She contends that the court should have given the jury an instruction pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86 (jury may find prior statement of witness inconsistent with witness' trial testimony and may give such inconsistent statement whatever weight jury concludes it should be given when determining witness' credibility, and jury may use such statement for truth of its content and may find facts from it), cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986).

The state argues that "[t]he defendant's claim fails because: (1) it is an unpreserved evidentiary claim; (2) she induced any error by requesting the instruction she now challenges; (3) she implicitly waived any error by failing to object to the trial court's proposed instructions despite having a meaningful opportunity to do so; and (4) in any event, the instruction was correct." In her reply brief, the defendant responds to the state's argument: (1) there were two different types of inconsistent statements made by H, one consisting of his oral statements and the other, his signed affidavit, (2) the oral statements were not *Whelan* statements, (3) the affidavit was a *Whelan* statement, (4) the defendant was entitled to a *Whelan* instruction regarding the affidavit, and (5) the defendant preserved this issue by submitting a request to charge to the trial court. We are not persuaded by the defendant's claim.

"We begin with the well established standard of review governing the defendant's [challenge] to the trial

court's jury instruction. Our review of the defendant's claim requires that we examine the [trial] court's entire charge to determine whether it is reasonably possible that the jury could have been misled by the omission of the requested instruction. . . . While a request to charge that is relevant to the issues in a case and that accurately states the applicable law must be honored, a [trial] court need not tailor its charge to the precise letter of such a request. . . . If a requested charge is in substance given, the [trial] court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. . . . Additionally, we have noted that [a]n [impropriety] in instructions in a criminal case is reversible . . . when it is shown that it is reasonably possible for [improprieties] of constitutional dimension or reasonably probable for nonconstitutional [improprieties] that the jury [was] misled." (Internal quotation marks omitted.) *State* v. *Edwards*, 334 Conn. 688, 716–17, 224 A.3d 504 (2020).

The following additional facts are necessary for our review of the defendant's claim. H signed an affidavit, dated January 2, 2019, that provided in relevant part: "My wife and I were arrested in a dual arrest on October 5, 2016 . . . . I was the primary aggressor but the . . . [p]olice at the time were following protocol and arrested both of us and I engaged my wife and she defended herself. The police stated that they were required to arrest both parties . . . . I accepted responsibility for my actions and I received a conditional discharge. . . . I entered a plea to end the case against me. . . . I would like to withdraw any complaints against my wife and I wish for the charge of disorderly conduct against her to be dropped. . . . The argument was over a high electric bill, the electricity

had been shut off and we could have both handled the problem more appropriately." The state introduced H's affidavit as a full exhibit, without objection from the defendant. During his trial testimony, H stated that he had not read the affidavit before signing it and that he had signed it only because the defendant had told him that she needed it signed in order to get her job back. The defendant attempted to use the affidavit to impeach H during cross-examination and through the testimony of the court service center employee who had typed the affidavit.

The defendant filed a request to charge that was more than sixty pages. In her request to charge, the defendant requested that the court instruct the jury on direct and circumstantial evidence, including instructing that "[t]he evidence from which you are to decide what the facts are consists of: (1) the sworn testimony of witnesses both on direct and cross examination, regardless of who called the witness, [and] (2) the exhibits that have been admitted into evidence . . . . In reaching your verdict, you should consider all the testimony and exhibits admitted into evidence." The defendant also requested, inter alia, an instruction on inconsistent statements of witnesses and an instruction under the *Whelan* rule. Specifically, she submitted verbatim copies of § 2.4-3 of the Connecticut Criminal Jury Instructions, titled "Impeachment—Inconsistent Statements,"[6]

[6] Specifically, the request pursuant to § 2.4-3 of the Connecticut Criminal Jury Instructions provides: "Evidence has been presented that a witness, <*insert name of witness*>, made [a] statement[s] outside of court that (is/are) inconsistent with (his/her) trial testimony. You should consider this evidence only as it relates to the credibility of the witness's testimony, not as substantive evidence. In other words, consider such evidence as you would any other evidence of inconsistent conduct in determining the weight to be given to the testimony of the witness in court. [<*Include if appropriate*:> The law treats an omission in a prior statement as an inconsistent statement.]" (Emphasis in original.) See Connecticut Criminal Jury Instructions, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited September 15, 2021).

and § 2.4-4 of the Connecticut Criminal Jury Instructions, titled "Impeachment—*Whelan* Rule."[7] She did not tie any of these requests to any particular evidence—neither to testimony nor to exhibits. During oral argument before this court, the defendant conceded that her request to charge did not comply with the requirements of our rules of practice.

The trial court conducted its initial charging conference, and it distributed a proposed draft of its jury instructions, stating that it had included some of the defendant's requests. The next morning, the court continued its charging conference, noting the changes that it had made to the proposed draft charge; none of the changes involved *Whelan* or inconsistent statements. Counsel for the defendant and the state engaged in discussions with the court concerning the instructions; none of those discussions concerned *Whelan* or inconsistent statements. The court, thereafter, asked each party whether it had any exceptions, to which both the state and the defendant responded in the negative.

In its final charge to the jury, the court instructed in relevant part: "The evidence . . . from which you are to decide what the facts are consist of the sworn testimony of witnesses both on direct and cross-examination regardless of who called the witness, and the exhibits that have been admitted into evidence. *In reaching your verdict you should consider all the testimony and exhibits admitted into evidence*." (Emphasis added.)

[7] Specifically, the request pursuant to § 2.4-4 of the Connecticut Criminal Jury Instructions provides: "In evidence as exhibit [ ] is a prior statement of <*identify witness*>. To the extent, if at all, you find such statement inconsistent with the witness's trial testimony, you may give such inconsistency the weight to which you feel it is entitled in determining the witness's credibility here in court. You may also use such statement for the truth of its content and find facts from it." (Emphasis in original.) See Connecticut Criminal Jury Instructions, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited September 15, 2021).

The court also instructed the jury that it could evaluate a witness' credibility based on, inter alia, whether "the witness' testimony [was] contradicted by what that witness has said or done at another time or by the testimony of other witnesses or by other evidence." Shortly thereafter, as had been requested by the defendant, the court further instructed: "Evidence has been presented that [H] made statements outside of court that may be inconsistent with his trial testimony. You should consider this evidence only as it relates to credibility of the witness' testimony, not as substantive evidence. In other words, consider such evidence as you would any other evidence of inconsistent conduct in determining the weight to be given to the testimony of the witness in court."

Near the end of its instructions to the jury, the court stated: "[A]s I indicated earlier, your verdict must be based on the evidence, and you may not go outside the evidence to find facts. . . . I impress upon you that you are duty bound as jurors to determine the facts on the basis of the evidence as it has been presented." After the court concluded its final instructions to the jury, it asked both the defendant and the state whether they had any comment, and neither voiced any objection to the court's instructions as given.

Practice Book § 42-18 provides: "(a) When there are several requests [to charge the jury in a criminal matter], they shall be in separate and numbered paragraphs, each containing a single proposition of law clearly and concisely stated with the citation of authority upon which it is based, *and the evidence to which the proposition would apply*. Requests to charge should not exceed fifteen in number unless, for good cause shown, the judicial authority permits the filing of an additional number. If the request is granted, the judicial authority shall apply the proposition of law to the facts of the case.

"(b) A principle of law should be stated in but one request and in but one way. Requests attempting to state in different forms the same principle of law as applied to a single issue are improper." (Emphasis added.)

In the present case, the defendant concededly failed to adhere to our rules of practice and did not tie her requested instructions to any particular evidence. After the court provided its proposed instructions to counsel, which included the defendant's specific request that the court provide an instruction pursuant to § 2.4-3 of the Connecticut Criminal Jury Instructions, the defendant voiced no objection to the court's proposed draft instructions.

On the merits of the defendant's claim, we conclude, on the basis of the entirety of the court's jury charge, that, although the defendant claims that the court "instructed the jury to consider [H's] affidavit, a full exhibit, for impeachment purposes only," the court never instructed the jury that it was limited in its use of H's affidavit. Indeed, the court specifically told the jury that it "should consider all the testimony and exhibits admitted into evidence" in reaching its verdict. Additionally, although the court gave the limiting instruction pursuant to § 2.4-3 of the Connecticut Criminal Jury Instructions that the defendant requested, the defendant readily acknowledges that this instruction was relevant to alleged oral statements made by H. We are not persuaded by the defendant's argument that the instructions given by the court did not specify to the jury that it could use H's affidavit for substantive purposes. The defendant failed to comply with our rules of practice by directing her requests to charge to particular evidence in the case, and she never asked the court to provide a *Whelan* instruction regarding the affidavit.[8]

[8] During oral argument before this court, the state also argued that the affidavit was not admitted as a *Whelan* statement and that *Whelan* has no applicability here. Because we conclude that the court did not limit the jury's use of the affidavit, we need not address the state's argument.

The defendant also never asked the court to single out the affidavit and to tell the jury specifically that it could use the affidavit for substantive purposes. Nevertheless, our review of the charge in its entirety reveals no instance where the court told the jury that it could use H's affidavit only for impeachment purposes. The court clearly instructed the jury that it "should consider all the testimony and exhibits admitted into evidence" in reaching its verdict. Accordingly, we conclude that the defendant's claim has no merit.

The judgment is affirmed.

In this opinion the other judges concurred.