MEDICAL DEVICE SOLUTIONS, LLC *v.* JOSEPH AFERZON ET AL. (AC 44098)

Elgo, Alexander and Sheldon, Js.

Syllabus

The plaintiff, M Co., which designs and develops prototypes of medical devices, sought to recover damages for breach of contract and unfair trade practices from the defendants, A, a neurosurgeon and inventor, and I Co., which A and a partner had formed to develop medical devices for use in spinal surgery. In November, 2004, L, an owner of M Co., and A entered into a written agreement under which the parties were to share equally any compensation that resulted from the sale and/or licensing of a medical device conceived of by A, or any version thereof, for use in spinal surgery. The parties' one page contract provided that any required funding or financial commitments were to be part of a separate agreement they would negotiate later and that A was to promptly notify M Co. of any compensation he received for the device or any versions thereof. A further agreed that he was not under any contractual agreement with any other company concerning the device. At the time the parties entered into the written agreement, they also agreed orally that M Co. would create design drawings and a prototype of the device, and, at that time, A gave M Co. his initial drawings of the device. By early 2005, M Co. had prepared a prototype of the device and successfully installed it in a cadaver. M Co. thereafter utilized a different design and produced another prototype that it gave to A by October, 2005. By that time, A had become dissatisfied with M Co.'s work and continued to

work on developing the device on his own without informing M Co. In December, 2005, A applied for a patent on an anterior intervertebral spinal fixation and fusion device that he had developed with the help of his son. A thereafter did not respond in writing to a letter from L in February, 2006, concerning the value of M Co.'s services and, in July, 2007, formed I Co. A also did not respond to e-mails from L in 2008 requesting an update on the project, and, in May, 2008, A and his son, without informing M Co., assigned to I Co. their ownership interest in their pending patent. In 2009, several months before A and his son were issued a patent on their device, I Co. entered into a cross license agreement with S Co., a medical device manufacturer, that allowed S Co. to sell spinal fusion devices that were based on the patented device. In exchange, I Co. was to receive shares of A Co.'s stock and, thereafter, certain royalty and other payments. Between June, 2010, and August, 2019, S Co. sent I Co. thirty-four royalty payments, shares of S Co. stock, and $50,000 for I Co.'s expenses in developing and patenting the spinal fusion device. A and I Co. never notified M Co. of their receipt of compensation for the sale and/or licensing of the spinal fusion device. After M Co. first became aware that A had developed and patented a profitable spinal fusion device, its counsel sent letters to A in November, 2017, and in February, 2018, requesting that A inform M Co. as to those matters. A did not respond to either letter. The defendants asserted various special defenses, including that M Co.'s claims were barred by applicable statutes of limitations. M Co. asserted that the running of the statutes of limitations had been tolled pursuant to the statute (§ 52-595) concerning fraudulent concealment and/or the continuing course of conduct doctrine. The trial court initially rendered partial judgment for M Co. on its breach of contract claim and its claim under the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110 et seq.). The court determined that the November 4, 2004 document, as supplemented by the parties' contemporaneous oral agreement, was sufficient to form a definite contract. It further determined that the patented device was a version of the device for which M Co. had created design drawings and a prototype for A, and that I Co. was founded in bad faith to avoid liability to M Co. In awarding damages, the court found that, except for S Co.'s $50,000 payment for expenses, M Co. was entitled to recover 50 percent of the sum of all thirty-four royalty payments I Co. received from S Co., including the cash value of the payment of shares of S Co. stock, and awarded M Co. damages and prejudgment interest pursuant to statute (§ 37-3a) on its breach of contract claim. Additionally, the court determined that the running of any applicable statutes of limitations had been tolled by both § 52-595 and the continuing course of conduct doctrine but did not determine whether the three year statute of limitations (§ 52-581) or the six year statute of limitations (§ 52-576) applied to M Co.'s breach of contract claim. The court limited M Co.'s recovery under CUTPA to an award of attorney's fees and expenses. The court

also awarded M Co. interest pursuant to statute (§ 52-192a) on an offer of compromise M Co. had made that the defendants did not accept. On the defendants' appeal and M Co.'s cross appeal to this court, *held*:

1. The trial court's consideration of parol evidence in determining that the parties entered into an enforceable contract was permissible, as the November, 2004 agreement was not integrated: the written portion of the agreement was clearly not the final repository of the parties' dealings, as it included no obligation on the part of M Co. and, without mentioning M Co., merely stated that another agreement would be negotiated later; moreover, because the agreement was not integrated as to M Co.'s development commitments insofar as it provided that those commitments would be the subject of the separate agreement, the element of the parties' extrinsic negotiation the court relied on was that M Co. orally agreed to create drawings and a prototype, which did not violate the parol evidence rule; furthermore, the court's conclusion that the parties had an enforceable contract was premised on its amply supported factual finding that M Co.'s obligations were orally agreed to on the same date the document was signed, and because that finding was based on the court's credibility findings, the court's subsequent finding that the essential contract terms were agreed to on November 4, 2004, was not clearly erroneous.

2. The trial court properly determined that the patented device and M Co.'s prototype, on which it was based, were within the scope of the parties' agreement, and, thus, it was not improper for the court to conclude that the patented device was a version of the device depicted in A's initial sketches: the defendants could not prevail on their claim that the court failed to apply the language in the written agreement in analyzing whether the licensed patent was associated with the device in A's initial drawings or a version thereof, as the trial court's usage of "relate" reflected its interpretation of the agreement's operative language, and it stated elsewhere in its memorandum of decision that the patent drawings appeared to be a "version" of the same device on which A had promised to partner with M Co.; moreover, it was not improper, as the defendants claimed, for the court to compare A's 2004 sketches to the figures in the patent application and patent to determine if the idea in the patent was related to the idea referenced in the parties' agreement, as nothing in the agreement suggested an intention that a claims analysis under federal patent law be the method used to determine if a subsequent device was a version of the original device, as to which M Co. was entitled to receive compensation, and the court did not rely solely on the figures in the patent, as it mentioned several times in its decision what was described in the patent; furthermore, it was not improper for the court to consider M Co.'s prototype in analyzing the language of the agreement, as the agreement allowed for such consideration, the court considered the prototype to be a link in a chain from A's initial drawings to the design he patented, and the phrase in the agreement,

"intellectual property developed associated with this device and/or versions of this device," covered intellectual property that was associated with versions of the device and permitted the court to consider later versions of the initial device.

3. The trial court improperly concluded that any statute of limitations applicable to M Co.'s claims was tolled under either § 52-595 or the continuing course of conduct doctrine:

a. Because the statute of limitations could no longer be tolled as a result of fraudulent concealment once M Co. had sufficient knowledge of its cause of action for breach of contract, the six factual predicates on which the trial court relied in making its determination could not constitute fraudulent concealment, as A's letter to L in 2006, L's e-mails to A and A's transfer of his patent rights to I Co. in 2008, and I Co.'s receipt of S Co. stock in 2010 preceded any breach of the parties' contract, and, thus, it was impossible at those times for A to have intentionally concealed or to have had actual awareness of M Co.'s then nonexistent cause of action, and M Co. had already learned of the facts necessary to establish a cause of action for breach of contract at the time its counsel mailed the presuit letters to A; moreover, A's failure to notify M Co. whenever I Co. received compensation from the sale and/or licensing of the patented device merely constituted nondisclosure, which, standing alone, could not establish fraudulent concealment in the absence of a fiduciary duty.

b. The continuing course of conduct doctrine did not apply to the defendants' actions, as A's series of breaches caused separate damages that were readily calculable at the time of each breach, which was incompatible with the doctrine's requirement of an initial wrong and a subsequent continuing duty that are distinct from one another; moreover, there was no evidence to support the court's finding that the parties had a special relationship, as A's continuing duty to report his gains from the device idea to M Co. alone was insufficient to establish a special relationship, the court made no findings that the parties had a confidential relationship or that there was a unique degree of trust and confidence between them, and a mere contractual relationship did not create a fiduciary or confidential relationship.

c. The six year statute of limitations set forth in § 52-576 applied to M Co.'s breach of contract claim, as the contract between the parties was not executory; although there may have been some dispute at trial as to the extent of M Co.'s obligations, neither party challenged the trial court's factual finding that M Co. fully performed its contractual obligations.

d. Because of the viability of the defendants' special defense under the statute of limitations, the trial court's award of expectation damages on M Co.'s breach of contract claim had to be reduced to the total of all expectation damages the court awarded on the basis of the defendants' failure to pay M Co. its 50 percent share of the compensation the defendants received for the sale and/or licensing of the patented device within

the applicable six year limitation period, and, although the court unaccountably included 50 percent of S Co.'s $50,000 reimbursement payment to I Co. for expenses in the calculation of M Co.'s expectation damages, this court did not need to modify the adjusted award of expectation damages because the $50,000 payment was received by the defendants before the six year limitation period began; moreover, because the trial court erroneously awarded prejudgment interest on several sums M Co. claimed as expectation damages that were outside the six year limitation period and then compounded that error by awarding additional prejudgment interest on those same sums until the date it rendered final judgment, the interest on both awards had to be reduced to exclude the improperly awarded interest.

e. The trial court properly found that A breached the parties' agreement in bad faith and that those breaches constituted violations of CUTPA: although the court improperly awarded M Co. attorney's fees and expenses on the basis of conduct by the defendants that occurred outside of CUTPA's three year statute of limitations (§ 42-110g), the evidence supported the court's finding that a number of the defendants' breaches of the agreement occurred within the three year limitation period, and, because the court engaged in no discussion of the applicable statute of limitations, and several breaches on which it relied occurred outside the three year limitation period, the case had to be remanded for a determination, if possible, of what portion of the fees and costs awarded were reasonably incurred to litigate that portion of the CUTPA claim that was not barred by § 42-110g.

4. The trial court erred in determining the amount of offer of compromise interest to which M Co. was entitled: the court improperly calculated the interest on the basis of the difference between the amount of M Co.'s recovery and the amount of its offer of compromise, as § 52-192a (c) requires a calculation on that difference only when the offer of compromise is filed by a counterclaim plaintiff pursuant to statute (§ 8-132), the court failed to include its award of prejudgment interest under § 37-3a in M Co.'s total recovery when calculating offer of compromise interest, and it improperly calculated the interest at a rate other than the statutory rate; accordingly, the judgment on the cross claim awarding offer of compromise interest was reversed, and the case was remanded for recalculation of the amount of that award.

Argued March 10—officially released September 28, 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 New Haven and transferred to the judicial district of Hartford, Complex Litigation Docket, where the action was withdrawn in part;

thereafter, the case was tried to the court, *Moukawsher*, *J.*; judgment in part for the plaintiff, from which the defendants appealed to this court; subsequently, the court, *Moukawsher*, *J.*, granted in part the plaintiff's motion for attorney's fees; thereafter, the court, *Moukawsher*, *J.*, issued an order awarding the plaintiff certain interest and rendered judgment for the plaintiff, from which the defendants filed an amended appeal and the plaintiff filed a cross appeal. *Reversed in part*; *judgment directed*; *further proceedings*.

John L. Cordani, *Jr.*, with whom, on the brief, was *Andrew A. DePeau*, for the appellants-appellees (defendants).

Michael T. Cretella, with whom was *Brian P. Daniels*, for the appellee-appellant (plaintiff).

Opinion

SHELDON, J. This appeal and cross appeal involve a dispute over the defendants' alleged failure to make payments to the plaintiff under a contractual agreement between them to share equally all compensation resulting from the sale and/or licensing of a medical device conceived of by the individual defendant, or any version thereof, in exchange for the plaintiff's creation of design drawings and a prototype of the device based on the individual defendant's initial sketches of it. The defendants appeal from the judgment of the trial court, *Moukawsher*, *J.*, rendered in favor of the plaintiff on its claims of breach of contract and unfair trade practices in violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., arising from that dispute. The defendants claim that the trial court improperly concluded (1) that the parties entered into a definite and enforceable contract to make the subject payments in exchange for the plaintiff's work, (2) that payments received by the defendants for the sale and/or licensing of an anterior spinal fusion device

known as the Solus, which was based on a design patented by the individual defendant after his alleged contract with the plaintiff had been entered into, were covered by the contract, (3) that all statutes of limitations applicable to the plaintiff's claims for relief in this case were tolled under the fraudulent concealment doctrine and/or the continuing course of conduct doctrine, and (4) that the plaintiff was entitled to recover attorney's fees from the defendants under CUTPA based upon the defendants' bad faith breaches of the parties' alleged contract. The plaintiff cross appeals from the trial court's judgment awarding it offer of compromise interest on its judgment against the defendants, arguing that the court improperly calculated the amount of such interest to which it was entitled. On the defendants' appeal, we affirm in part and reverse in part the judgment of the trial court. On the plaintiff's cross appeal, we reverse the judgment of the trial court and remand the case for further proceedings with instructions to recalculate the amount of offer of compromise interest to which the plaintiff is entitled in accordance with this opinion.

The following procedural history and facts, as found by the court and supported by the record, are relevant to this case. The plaintiff corporation, Medical Device Solutions, LLC (plaintiff or MDS), was formed in 2003, by William Lyons in Meriden to engage in the business of designing and developing medical device prototypes. At the time he formed MDS, Lyons was already the partial owner and operator of another company in Meriden called Lyons Tool & Die, which was engaged in the business of manufacturing medical components. MDS and Lyons Tool & Die were operated in the same physical premises, and MDS used Lyons Tool & Die employees to manufacture its prototypes. MDS initially had one other member, Wayne Young, who remained a 50 percent owner of the corporation until 2007.

The individual defendant, Joseph Aferzon, is an accomplished neurosurgeon and inventor who has owned and operated a private medical practice in Connecticut since 1996. Aferzon frequently partnered with Jeffrey A. Bash, an orthopedic spine surgeon, to perform complex spinal surgeries. Bash estimated that he and Aferzon had performed approximately 10,000 surgeries together by the time of trial. The defendant corporation, International Spinal Innovations, LLC (ISI), was formed in 2007 by Aferzon and Bash to develop medical devices for use in spinal surgery.

Aferzon was interested in making spinal fusion surgery safer and less invasive. In June, 2004, he conceived of a small spinal fusion device consisting of a cage and rotating blades. The trial court described the concept of the device as follows: "The cage is a sturdy tapering rectangle, open, without top or bottom. Within its four walls is a series of rotating, claw-like blades. Doctors insert this cage between the vertebrae of the spine and use a tool to thrust sets of the claws out of the cage's top and bottom. As the claws emerge from their cage, they dig themselves into the ends of the vertebrae, fixing the cage in place between them. This fuses the bones together, and they gradually heal into a single solid bone." Aferzon sketched some initial drawings of the device and, on September 27, 2004, applied for a provisional patent on it with the United States Patent and Trademark Office (patent office) on the basis of those drawings. The patent application titled the device a "CLAWFIX" and described it as a "novel method" for "direct intervertebral fixation." Attached to the application were the initial drawings of the device that Aferzon had sketched in June, 2004.

On November 4, 2004, Aferzon approached Lyons and Young at MDS to ask for their help in creating the device. He provided them with his initial drawings and asked them to create a prototype of the device. During

that visit, MDS gave Aferzon a one page document for his signature, which he and Lyons then signed. This document set forth an agreement that is central to the parties' dispute. The subject line of the document reads, "Reference invention: Spinal Cage with Rotating/OpposingBlades," and its text provides: "Joseph Aferzon (inventor/owner of above stated invention) agrees that [MDS] will receive 50% of the total compensation resulting from the sale and/or licensing of the above mentioned device, versions of this device, associated intellectual property and/or any intellectual property developed associated with this device and/or versions of this device. Any development, funding or financial commitments required will be part of a separate agreement and negotiated at a later date. [Aferzon] further agrees to promptly notify [MDS] of any compensation received for the above mentioned device, versions of the device, associated intellectual property and/or any intellectual property developed associated with this device and versions of this device. This agreement is limited to the above mentioned device, versions of this device, associated intellectual property and/or any intellectual property developed associated with this device and/or versions of this device. In signing this agreement, [Aferzon] agrees that he has not had prior contact with any company regarding this specific device and he is not under any contractual agreement with any other companies concerning this device."

Although the document provided that "[a]ny development, funding or financial commitments required will be part of a separate agreement and negotiated at a later date," the parties agree that no further written agreements were ever executed. The court instead found, as Lyons and Young both testified, that the parties agreed orally, on the same day they signed the written agreement, that MDS's obligation under the written agreement would be to create drawings and a

prototype of the new device conceived by Aferzon "as a part [of] an effort to prove the concept" of the device.[1]

Lyons and Young promptly began to work on producing a prototype. Young explained that the creation of a medical device prototype proceeds in stages. It begins with sketches, moves on to the creation of digital design files known as computer aided design (CAD) files, and ultimately concludes with the manufacture of a prototype. Lyons testified that, because Aferzon's drawings did not include an adequate mechanism for rotating the blades within the cage, he and Young had to come up with such a mechanism themselves. Young thus prepared a series of sketches based on Aferzon's ideas and eventually came up with a "center shaft design" for rotating the blades, in which the rotating blades were attached to a single shaft that ran through the cage of the device. MDS then created multiple digital design files for a center shaft device and manufactured a prototype of the device using the center shaft design.

Lyons and Young further testified that the center shaft design prototype was tested in a cadaver at the University of Connecticut Health Center in Farmington either toward the end of 2004 or in early 2005. They also testified that Aferzon and Bash were present during the test at the health center when the device was successfully installed in a cadaver using an Allen wrench to rotate the blades into place. Although Aferzon and Bash both testified that they had no recollection of the cadaver test, the court credited the testimony of Lyons and Young on this subject.

[1] There was some dispute between the parties as to what was expected of MDS under their oral agreement. Lyons and Young testified that their obligation was to "develop and manufacture a prototype," but Aferzon "insist[ed] there was more," claiming that he expected MDS to produce something "functional, reproducible, and manufacturable." It was undisputed, however, that MDS, at a minimum, had agreed to prepare design drawings and produce a prototype of the device.

After the cadaver test, MDS continued its work on the device, pivoting to a different design. Young began to work on a "rack and pinion"[2] design for the device that was safer and more versatile than its predecessor, as it allowed the blades to be reversed more efficiently and prevented them from disengaging. Rather than utilizing a single central shaft on which all of the blades rotated, this second design utilized two geared shafts running through the cage, with three blades affixed to each of them on geared teeth. Lyons explained that the "blades had slots that had teeth that would mesh with the pinions. And, again, when you rotated the pinions, that would engage the rack and rotate the blades. . . . One [pinion] would rotate the three . . . blades in one direction . . . and the other pinion would rotate the blades in the opposite direction." From December, 2004, to May, 2005, MDS prepared and modified several digital design files for the device using the rack and pinion concept. Eventually, MDS produced a prototype of the rack and pinion design, which it gave to Aferzon no later than October, 2005. According to Lyons and Young, they spent nearly 100 hours working on Aferzon's idea.

In the meantime, Aferzon became dissatisfied with MDS's work and continued to work on development of the device on his own without informing MDS that he was doing so. Aferzon never communicated to MDS that he was dissatisfied with their prototype. Aferzon began to work on the device with his talented sixteen year old son, Joshua Aferzon, who was then taking a CAD class in school, on different blade designs and a mechanism to rotate the blades within the cage. Ultimately, on December 22, 2005, three months after the provisional patent based on his initial design sketches

[2] A pinion is "a gear with a small number of teeth designed to mesh with a larger wheel or rack." Merriam-Webster's Collegiate Dictionary (11th Ed. 2014) p. 941.

had expired in September, 2005, Aferzon applied for a patent on the device he and his son had been working on. This application, which was filed in the names of Aferzon and his son, described the subject matter of the proposed patent as an "apparatus and method for anterior intervertebral spinal fixation and fusion."

On February 26, 2006, Aferzon wrote to Lyons, seeking to amend his agreement with MDS: "I respectfully request that we amend the agreement dated November [4], 2004 . . . . As of the date of this letter there has not been sufficient progress on this project to warrant the continuation of this agreement. I understand that both parties have invested time and resources into this project and I am proposing that we determine a fair market value for the services that were provided by you." Lyons did not respond to this letter in writing, but he believed that he spoke with Aferzon about the letter.

In July, 2007, Aferzon and Bash formed and incorporated ISI. The two were equal owners of the company and agreed to split any income it generated equally between them. On February 27, 2008, and again in May, 2008, Lyons e-mailed Aferzon to request an update on the project. His first e-mail stated: "It's been some time since the last activity with the cage. Have you abandoned? If so, I would consider a buyout. If not, let's discuss next steps." His second e-mail stated: "Would you consider selling your percentage of the subject device? We have not seen any activity and would like to continue developing." Aferzon did not respond to either e-mail. In the same month that Lyons sent his second e-mail, however, on May 9, 2008, Aferzon and his son assigned their ownership interest in their pending patent application to ISI without informing the plaintiff of their actions.

Because Aferzon and Bash were busy with their medical practices, they began to seek a business and engineering partner to help ISI bring their anterior spinal

fusion device to market. On May 29, 2009, Aferzon and his son received notice that their application for a patent on that device, which had been assigned to ISI, had been approved by the patent office and would shortly issue. Thereafter, on June 19, 2009, ISI entered into a cross license agreement with Alphatec Spine, Inc. (Alphatec), a medical device manufacturer, which allowed Alphatec to develop and sell any medical devices that, in the absence of the license agreement, would "infringe a [v]alid [c]laim of the [l]icensed ISI [p]atents." In exchange, ISI would receive an initial payment of 260,000 shares of Alphatec common stock and quarterly minimum royalty payments, a percentage of royalty payments over the minimum, and certain milestone payments triggered by aggregate sales figures. This was the only license agreement between ISI and Alphatec. On September 29, 2009, the patent office issued patent number 7,594,932 on an "apparatus for anterior intervertebral spinal fixation and fusion," listing Aferzon and his son as its inventors and ISI as their assignee.

After the patent was cross licensed to Alphatec, Aferzon and Bash worked with Alphatec to develop a spinal fusion device based on the patented design with the trade name "Solus," which Alphatec began marketing in 2011. Pursuant to the royalty schedule in the cross license agreement, Alphatec sent ISI a series of thirty-four distinct royalty payments between June, 2010, and August, 2019, including the initial payment in shares of Alphatec common stock. In addition to the royalty payments, Alphatec also sent ISI a payment of $50,000 that was intended to reimburse it for expenses it had incurred in developing and patenting the anterior spinal fusion device. These payments, including the cash value of the initial payment in Alphatec common stock and the expense reimbursement payment, totaled $3,274,578.[3]

[3] The court "consider[ed] the stock to have a cash value on its date of transfer that [was] the dollar value at a per share value judicially noticed

The defendants never notified the plaintiff that they had received any compensation for the sale and/or licensing of their anterior spinal fusion device.

In late summer or early fall of 2017, the plaintiff eventually became aware that Aferzon had developed a spinal fusion device that had been patented, assigned, marketed and become profitable, when Lyons visited his physical therapist in Middletown, whose practice was adjacent to Bash's office. The physical therapist told Lyons during that visit that Bash had been traveling and teaching surgeons how to use a successful medical device. Lyons knew that Aferzon and Bash had worked together previously on the original spinal fusion device that was the subject of Aferzon's agreement with MDS. Notice of Bash's involvement in teaching the use of a similar device prompted the plaintiff to retain counsel. The plaintiff's counsel sent letters to Aferzon on November 24, 2017, and February 6, 2018, requesting that Aferzon inform the plaintiff if he had sold or licensed the device on which MDS had been working, whether he had received any compensation for the device, and if he owned any intellectual property associated with the device. Aferzon did not respond to either letter.

The plaintiff commenced this action on July 16, 2018, and filed its initial complaint in the Superior Court on July 19, 2018. Thereafter, in its operative substitute complaint dated March 6, 2019, the plaintiff asserted claims against the defendants of breach of contract and unfair trade practices in violation of CUTPA. The defendants filed their answer and special defenses to the operative complaint on April 5, 2019, denying the plaintiff's material allegations against them and asserting various special defenses, including that the plaintiff's claims were

by the court and that MDS used in its damage calculation." This valuation has not been challenged on appeal by either party.

barred by applicable statutes of limitations.[4] Ultimately, on October 22, 2019, the plaintiff replied to the defendants' special defenses by denying them and pleading, in avoidance of the defendants' statutes of limitations defenses, that neither of its claims was barred by an applicable statute of limitations because the running of all statutes of limitations had been tolled under the fraudulent concealment doctrine and/or the continuing course of conduct doctrine.

In the meantime, on June 13, 2019, the plaintiff filed an application for a prejudgment remedy. The court held an initial evidentiary hearing on the application for a prejudgment remedy on September 18, 2019. Thereafter, however, on November 12, 2019, the parties agreed to convert the prejudgment remedy hearing into a full bench trial on the merits of the parties' claims and special defenses, and thus to continue with the presentation of evidence. The trial took place over the course of seven days, including the initial day of evidence at the prejudgment remedy hearing, and ended with the presentation of closing arguments on March 6, 2020.

The court issued its memorandum of decision on April 22, 2020, rendering partial judgment for the plaintiff on both of its claims. On the plaintiff's breach of contract claim, the court awarded $1,587,289 in expectation damages and $475,813.80 in statutory prejudgment interest through May 4, 2020, pursuant to General Statutes § 37-3a. On the plaintiff's CUTPA claim, the court declined to award either punitive damages or additional expectation damages but ruled that the plaintiff was nonetheless entitled to recover its attorney's fees in an amount to be determined at a later date.

[4] The defendants also asserted waiver, that there was reliance or performance on the part of the plaintiff, laches, unclean hands, and that the plaintiff failed to mitigate its damages.

In reaching its decision, the court first considered whether the parties had entered into an enforceable contract. The court concluded that the agreement embodied in the document signed by Lyons and Aferzon on November 4, 2004, as supplemented by their contemporaneous oral agreement as to the plaintiff's obligations under the agreement, was sufficiently definite to form a binding contract between them, as there was nothing conditional in that agreement, so supplemented.

After confirming the existence of a contract, the court considered whether the patented anterior spinal fusion device that the defendants cross licensed to Alphatec was a "version" of the device that MDS had worked on pursuant to the November 4, 2004 agreement, in which case MDS would be entitled to receive 50 percent of all compensation resulting from the sale and/or licensing of the patented device. The defendants made three arguments on this issue: (1) that the patented device was not a version of the device that MDS had worked on pursuant to the parties' compensation-sharing agreement of November 4, 2004, (2) that the compensation so generated was paid to ISI, not to Aferzon, so it was not subject to sharing with the plaintiff under the November 4, 2004 agreement, and (3) that substantial expenses incurred by the defendants to develop the patented device significantly reduced the profits generated by the sale and/or licensing of that device.[5] The court first

[5] Additionally, the defendants argued before the court that development expenses of a "lateral" device should also reduce the total compensation received. As the court explained, "[a] 'lateral' device goes into the body from the side. An 'anterior' device is inserted into the body through the front." Although Aferzon and Bash also patented a lateral device and assigned it to ISI, they did not license the lateral device to Alphatec, Alphatec never sold lateral devices, and the defendants never made money from the sale and/or licensing of that device. The court held that the parties' agreement covered only the anterior device and did not consider the development expenses of the lateral device, explaining that any expenses related to the lateral device were irrelevant. This ruling has not been challenged on appeal. Thus, any references to the "device" or the "patented device" throughout this opinion refer only to the anterior device.

found that the patented device was a version of the device for which MDS had created design drawings and a prototype for Aferzon. As to the second argument, the court found that ISI was founded as part of an "intentional plan to try to avoid liability to MDS in bad faith," and thus that ISI was liable to MDS under the doctrine of successor liability. Finally, the court found that, although the defendants' account of the expenses they had incurred for development of the patented device generally was not credible, they credibly established that the initial $50,000 payment that ISI received from Alphatec on October 1, 2009, was not compensation resulting from the sale and/or licensing of the patented device but a reimbursement for development expenses that they had incurred to obtain the patent for that device.[6] The court thus ruled that the plaintiff was not entitled to recover 50 percent of that $50,000 reimbursement payment as damages for breach of the agreement. Accordingly, the court ruled that the plaintiff was entitled to recover 50 percent of all payments that ISI had received from Alphatec except for the $50,000 reimbursement payment.

The court next considered whether the plaintiff's claims were barred by applicable statutes of limitations.[7] Because the defendants had received compensation from Alphatec resulting from the sale and/or licensing of the patented device from 2010 to 2019, but the plaintiff did not learn that it had a valid cause of action against the defendants for their failure to share such compensation with it until 2017, the statute of limitations could have had a significant impact on the plaintiff's recovery in this case. Concluding, however, that

[6] The defendants have not challenged on appeal the finding of successor liability or the court's conclusion that the defendants' calculation of expenses was not reliable.

[7] The court also considered, and denied, the defendants' special defenses of unconscionability and mistake. These rulings have not been challenged on appeal.

the running of any applicable statute of limitations had been tolled by both the fraudulent concealment doctrine and the continuing course of conduct doctrine, the court rejected the defendants' statute of limitations defense to the plaintiff's breach of contract claim without determining whether the three year or six year statute of limitations for contract actions applied to that claim. Accordingly, it concluded that the plaintiff was entitled to recover 50 percent of all thirty-four royalty payments that ISI had received from Alphatec from 2010 through 2019, including the initial payment in shares of Alphatec stock.

The court thus awarded the plaintiff $1,587,289 in expectation damages on its breach of contract claim plus $475,813.80 in prejudgment interest pursuant to § 37-3a, calculated for each unshared royalty payment at the rate of 4.5 percent per year on the plaintiff's 50 percent share of that payment, from the date the defendants received the unshared payment until May 4, 2020.[8]

The plaintiff also made claims for expectation damages, punitive damages, and attorney's fees and expenses under CUTPA. Although the court found that the defendants' repeated breaches of their contract with the plaintiff had been committed in bad faith, and thus constituted unfair trade practices in violation of CUTPA, it declined to award the plaintiff either punitive damages or additional expectation damages on the basis of such violations. Instead, it limited the plaintiff's

[8] The court does not explain why it initially calculated the amount of prejudgment interest to which the plaintiff was entitled under § 37-3a until May 4, 2020, even though it issued its memorandum of decision rendering partial judgment for the plaintiff on April 22, 2020. In the end, however, the court's initial selection of that end date for its calculation of prejudgment interest is of no significance because the court later extended the end date of its interest calculation until September 21, 2020, the date of final judgment herein.

right of recovery under CUTPA to the attorney's fees and expenses it reasonably incurred in prosecuting those claims, as authorized by General Statutes § 42-110g, in an amount to be determined at a later time.[9] On September 15, 2020, the court awarded the plaintiff $756,000 in attorney's fees and expenses. Finally, on September 21, 2020, the court rendered final judgment for the plaintiff after extending the end date for the calculation of prejudgment interest to that date, and recalculating the total amount of such prejudgment interest as $504,054. The court also determined that the plaintiff was entitled to recover postjudgment interest but reserved decision as to the amount of such interest until a later time.

Additionally, on October 10, 2019, before the parties agreed to convert the prejudgment remedy hearing into a full scale bench trial on the merits of their claims and special defenses, the plaintiff filed a unified offer of compromise pursuant to General Statutes § 52-192a, offering to settle its claims against the defendants for $1,150,000. The defendants did not accept the offer. Accordingly, the court awarded the plaintiff offer of compromise interest of $90,968, a much lesser amount than the plaintiff claims it was statutorily entitled to in this case. The plaintiff has cross appealed from the court's judgment challenging the amount of the court's offer of compromise interest award. In the end, the court rendered final judgment for the plaintiff in the total amount of $2,938,311.

This appeal followed. Additional facts will be set forth as necessary.

[9] The court also suggested, as follows, that it might be awarding attorney's fees both under the common law and under CUTPA: "It's worth noting that the court would award attorney's fees even without CUTPA." So understanding the court's ruling, the parties briefed the propriety of such an award before this court. The trial court, however, issued a supplemental order on October 16, 2020, clarifying that it did not award fees under the common law. Accordingly, that issue is not before this court.

I

THE DEFENDANTS' APPEAL

A

We first address the court's conclusion that the parties had an enforceable contract. The defendants argue that the written agreement signed by the parties was indefinite and that the court improperly used parol evidence to supplement its essential terms to form a contract. The plaintiff argues that the parol evidence rule does not apply to the written portion of the parties' agreement standing alone, and thus that it was not improper for the court to consider extrinsic oral evidence in interpreting it. We agree with the plaintiff.

As a preliminary matter, we set forth our standard of review. "The existence of a contract is a question of fact to be determined by the trier on the basis of all of the evidence. . . . To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. . . . 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. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *Tsionis* v. *Martens*, 116 Conn. App. 568, 576, 976 A.2d 53 (2009).

The following additional facts and procedural history are relevant to this issue. The court found that part of the contract between the parties was in writing and part of it was oral. The only part that was written was encapsulated in the document signed on November 4, 2004, which provided, in part, that "[a]ny development, funding or financial commitments required will be part

of a separate agreement and negotiated at a later date." In light of the previously quoted language, the defendants argued before the court that the parties "merely agreed to make a contract at some future date and that there was nothing definite enough between them to call a contract, especially because there was only an agreement to agree later about financial commitments." The court first rejected the defendants' argument that the document was only an "agreement to agree," finding that there was nothing conditional in the language of the agreement. The court next found that the essential terms of the agreement, that the plaintiff would create drawings and a prototype of the device and the defendants would pay the plaintiff 50 percent of the total compensation resulting from the sale and/or licensing of the device, were in fact agreed to on November 4, 2004, although the agreement as to the plaintiff's obligations was developed orally. There was substantial dispute over what the plaintiff's obligations were under the agreement, but the court credited the testimony of Lyons and Young over that of Aferzon. Thus, the court relied both on the writing signed by Lyons and Aferzon, and on the contemporaneous oral agreement between the parties as described by Lyons and Young as the basis for finding that the parties had formed a binding contract for MDS to build a prototype of Aferzon's device in exchange for 50 percent of all compensation received by Aferzon for the sale and/or licensing of that device or any version thereof. The court held that "the failure to provide specific terms about future financial commitments wasn't an essential term whose absence defeats the very existence of a contract for lack of definiteness."

1

We begin with the defendants' claim that the court improperly considered parol evidence in determining

whether, and on what terms, the parties reached a definite, enforceable contractual agreement. The plaintiff argues that, because the agreement was not integrated, the parol evidence rule did not apply. We agree with the plaintiff.

"Because the parol evidence rule is not an exclusionary rule of evidence . . . but a rule of substantive contract law . . . the defendants' claim involves a question of law to which we afford plenary review." (Internal quotation marks omitted.) *Colliers, Dow & Condon, Inc.* v. *Schwartz*, 77 Conn. App. 462, 466, 823 A.2d 438 (2003).

"The parol evidence rule is premised upon the idea that when the parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed, that the whole engagement of the parties, and the extent and manner of their understanding, was reduced to writing. After this, to permit oral testimony, or prior or contemporaneous conversation, or circumstances, or usages [etc.], in order to learn what was intended, or to contradict what is written, would be dangerous and unjust in the extreme. . . . The parol evidence rule does not of itself, therefore, forbid the presentation of parol evidence, that is, evidence outside the four corners of the contract concerning matters governed by an integrated contract, but forbids only the use of such evidence to vary or contradict the terms of such a contract." (Internal quotation marks omitted.) *Ravenswood Construction, LLC* v. *F. L. Merritt, Inc.*, 105 Conn. App. 7, 14–15, 936 A.2d 679 (2007).

"Parol evidence offered solely to vary or contradict the written terms of an integrated contract is, therefore, legally irrelevant. When offered for that purpose, it is inadmissible not because it is parol evidence, but because it is irrelevant. By implication, such evidence

may still be admissible if relevant (1) to explain an ambiguity appearing in the instrument; (2) to prove a collateral oral agreement which does not vary the terms of the writing; (3) to add a missing term in a writing which indicates on its face that it does not set forth the complete agreement; or (4) to show mistake or fraud. . . . These recognized exceptions are, of course, only examples of situations [in which] the evidence (1) does not vary or contradict the contract's terms, or (2) may be considered because the contract has been shown not to be integrated; or (3) tends to show that the contract should be defeated or altered on the equitable ground that relief can be had against any deed or contract in writing founded in mistake or fraud." (Internal quotation marks omitted.) *Schilberg Integrated Metals Corp.* v. *Continental Casualty Co.*, 263 Conn. 245, 277–78, 819 A.2d 773 (2003).

We first note that the court did not provide a justification for its consideration of extrinsic oral evidence because the defendants did not explicitly raise the parol evidence rule at trial, instead arguing primarily that the agreement was not binding in the first place. This does not preclude us from reviewing the issue. See *Heaven* v. *Timber Hill, LLC*, 96 Conn. App. 294, 308, 900 A.2d 560 (2006) ("[t]he parol evidence rule . . . prohibits the introduction of evidence that varies or contradicts an exclusive written agreement whether or not there is an objection" (internal quotation marks omitted)).

It was permissible for the court to look to extrinsic evidence because the November 4, 2004 agreement was not integrated. "In order for the bar against the introduction of extrinsic evidence to apply, the writing at issue must be integrated, that is, it must have been intended by the parties to contain the whole agreement . . . ." (Citation omitted; internal quotation marks omitted.) *Tallmadge Bros., Inc.* v. *Iroquois Gas Transmission System, L.P.*, 252 Conn. 479, 503, 746 A.2d 1277 (2000);

see 11 R. Lord, Williston on Contracts (4th Ed. May, 2021) § 33:14 ("The parol evidence rule applies only when the parties integrate their agreement, that is, when they mutually consent to a certain writing or writings as the final statement of the agreement or contract between them. . . . Only when an integrated contract exists and its meaning differs from extrinsic evidence offered by one of the parties does the parol evidence rule come into play." (Footnotes omitted.)).

"Whether the written contract was actually the final repository of the oral agreements and dealings between the parties depends on their intention, evidence as to which is sought in the conduct and language of the parties and the surrounding circumstances. If the evidence leads to the conclusion that the parties intended the written contracts to contain the whole agreement, evidence of oral agreements is excluded, that is, excluded from consideration in the determination of the rights and obligations of the litigants, even though it is admitted on the issue of their intention. . . . A written agreement is integrated and operates to exclude evidence of the alleged extrinsic negotiation if the subject matter of the latter is mentioned, covered or dealt with in the writing . . . if it is not, then probably the writing was not intended to embody that element . . . . If the evidence, however, does not indicate that the writing is intended as an integration, i.e., a final expression of one or more terms of an agreement . . . then the agreement is said to be unintegrated, and the parol evidence rule does not apply." (Citations omitted; internal quotation marks omitted.) *Associated Catalog Merchandisers, Inc.* v. *Chagnon*, 210 Conn. 734, 739–40, 557 A.2d 525 (1989).

The written portion of the November 4, 2004 agreement, which includes *no* obligation on the part of the plaintiff and explicitly states that another agreement will be negotiated, is clearly not a final repository of

the parties' dealings. The agreement itself demonstrates that the parties did not intend for it to "completely embody the contract between the parties." 11 R. Lord, supra, § 33:15. The defendants argue that integration must be assessed on an issue-by-issue basis and that the agreement was "integrated with respect to the issue of [the plaintiff's] development commitments insofar as it provides that those commitments would be the subject of a separate agreement to be negotiated at a later date." The defendants rely on language from *Cohn* v. *Dunn*, 111 Conn. 342, 149 A. 851 (1930), stating that, if a "particular element of the alleged extrinsic negotiation" is "mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transactions on that element . . . ." (Internal quotation marks omitted.) Id., 347; see also *Associated Catalog Merchandisers, Inc.* v. *Chagnon*, supra, 210 Conn. 740. But, in the present case, the "particular element of the alleged extrinsic negotiation" that the court relied on was that the plaintiff "was to create drawings and a prototype as a part [of] an effort to prove the concept . . . ." Again, the agreement states that "[a]ny development, funding or financial commitments required will be part of a separate agreement and negotiated at a later date." It cannot be said that the agreement was integrated as to the plaintiff's obligations when the sentence in question does not mention the plaintiff but merely that any development commitments will be negotiated at a later date.

The defendants also argue that the extrinsic evidence indicating that on the same day that the parties signed the written agreement they orally decided what the plaintiff's obligation would be thereunder varies from or contradicts the provision stating that such an agreement would be negotiated at a later date, and thus violates the parol evidence rule. That prohibition, however, only applies if the document is integrated. See *Weiss* v.

Smulders, 313 Conn. 227, 249, 96 A.3d 1175 (2014) (explaining that parol evidence rule forbids only use of evidence outside four corners of *integrated* contract " 'to vary or contradict the terms of such a contract' "). Because the document was not integrated, the court did not err in considering extrinsic evidence to determine whether there was a contract and, if so, what the parties' obligations were agreed to be thereunder.

2

Having concluded that it was not improper for the court to consider extrinsic oral evidence when determining if the parties entered into an enforceable contract, we next consider the correctness of the court's substantive conclusion that the parties' written agreement and contemporaneous oral agreement amounted to an enforceable contract.

"In order for an enforceable contract to exist, the court must find that the parties' minds had truly met. . . . If there has been a misunderstanding between the parties, or a misapprehension by one or both so that their minds have never met, no contract has been entered into by them and the court will not make for them a contract which they themselves did not make." (Internal quotation marks omitted.) *Tsionis* v. *Martens*, supra, 116 Conn. App. 577. "Under established principles of contract law, an agreement must be definite and certain as to its terms and requirements. . . . [W]here the memorandum appears [to be] no more than a statement of some of the essential features of a proposed contract and not a complete statement of all the essential terms, the plaintiff has failed to prove the existence of an agreement." (Citations omitted; internal quotation marks omitted.) *Glazer* v. *Dress Barn, Inc.*, 274 Conn. 33, 51, 873 A.2d 929 (2005). "So long as any essential matters are left open for further consideration, the contract is not complete." (Internal quotation marks omitted.) *L & R Realty* v. *Connecticut National Bank*, 53

Conn. App. 524, 535, 732 A.2d 181, cert. denied, 250 Conn. 901, 734 A.2d 984 (1999). Additionally, we reiterate that our review is limited to deciding whether the court's findings of fact were clearly erroneous. See, e.g., *Tsionis* v. *Martens*, supra, 576.

The defendants argue that the November 4, 2004 agreement was "indefinite on its face" as to an essential term, the plaintiff's obligations, and that the document was never finalized into an enforceable agreement. We have already concluded, however, that it was permissible for the court to look beyond the face of the document when making this determination, and the court's conclusion that the parties had a contract was premised on a factual finding that the plaintiff's obligations were orally agreed to on the same date that the document was signed. There is ample support in the record for this factual finding in the testimony of Lyons. The extent to which the parties agreed on the plaintiff's obligation was disputed at trial, but the court's factual finding that there was an agreement between them was based on a determination that the plaintiff's version of events was more credible than the defendants' version. "It is well established that [t]his court will not revisit credibility determinations. . . . The court was entitled, in its role as sole arbiter of credibility to discredit the [defendants' testimony]." (Citation omitted; internal quotation marks omitted.) *Sapper* v. *Sapper*, 109 Conn. App. 99, 108–109, 951 A.2d 5 (2008). Thus, in light of the court's credibility findings, we cannot conclude that the court's subsequent finding that the essential contract terms were agreed to on November 4, 2004, was clearly erroneous. The court appropriately concluded that the parties had an enforceable contract.

B

We next address the court's conclusion that the patented device was a version of the device depicted in

Aferzon's initial design sketches, thus entitling the plaintiff to 50 percent of all compensation resulting from the sale and/or licensing of that device. The defendants argue that the court misinterpreted the contract by disregarding important contractual language in it and failing to conduct an appropriate analysis under federal patent law. The plaintiff argues, in response, that the court properly analyzed the contractual language and that no analysis under federal patent law was necessary. We agree with the plaintiff.

We begin by setting forth the standard of review and legal principles relevant to this claim. "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 [subject to the clearly erroneous standard of review] . . . [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]." (Internal quotation marks omitted.) *Joseph General Contracting, Inc.* v. *Couto*, 317 Conn. 565, 575, 119 A.3d 570 (2015).

The defendants do not challenge any of the court's factual findings on this matter or the court's ultimate determination that the defendants breached that agreement, which would be reviewed for clear error. See, e.g., *Efthimiou* v. *Smith*, 268 Conn. 487, 493–94, 846 A.2d 216 (2004). Instead, the defendants challenge only the manner in which the court interpreted the contract.[10] In light of the fact that the defendants' claim

[10] Specifically, the defendants request that the issue should be remanded for the agreement to be reinterpreted based on its plain language: "The defendants are not challenging the trial court's factual findings but, rather, whether those findings are legally material to the fundamental question at hand: is the [patent] within the scope of the November 4, 2004 agreement? The defendants are entitled to a legal analysis that matches the terms of the contract. The trial court misinterpreted the contract, and, therefore, its factual findings do not add up to its conclusion of legal liability."

is largely directed at the court's interpretation of the agreement, as opposed to the court's factual findings, "our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Sun Val, LLC* v. *Commissioner of Transportation*, 330 Conn. 316, 325–26, 193 A.3d 1192 (2018). Additionally, a plenary standard of review is appropriate in light of the fact that neither party has argued that the contractual language at issue is ambiguous. *Nationwide Mutual Ins. Co.* v. *Allen*, 83 Conn. App. 526, 537, 850 A.2d 1047 (explaining that, "in the absence of a claim of ambiguity, the interpretation of [a] contract presents a question of law"), cert. denied, 271 Conn. 907, 859 A.2d 562 (2004).

"It is the general rule that a contract is to be interpreted according to the intent expressed in its language and not by an intent the court may believe existed in the minds of the parties." (Internal quotation marks omitted.) *Bank of Boston Connecticut* v. *Scott Real Estate, Inc.*, 40 Conn. App. 616, 621, 673 A.2d 558, cert. denied, 237 Conn. 912, 675 A.2d 884 (1996). "A contract is to be construed as a whole and all relevant provisions will be considered together. . . . In giving meaning to the terms of a contract, we have said that a contract must be construed to effectuate the intent of the contracting parties. . . . The intention of the parties to a contract is to be determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . In interpreting contract items, we have repeatedly stated that the intent of the parties is to be ascertained by a fair and reasonable construction of the written words and that the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract

is clear and unambiguous, the contract 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 contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." (Citation omitted; internal quotation marks omitted.) *HLO Land Ownership Associates Ltd. Partnership* v. *Hartford*, 248 Conn. 350, 356–57, 727 A.2d 1260 (1999).

The following additional facts and procedural history are relevant to this issue. We repeat that the written portion of the parties' November 4, 2004 agreement, as signed by Lyons and Aferzon, provided: "Joseph Aferzon (inventor/owner of above stated invention) agrees that [MDS] will receive 50% of the total compensation resulting from the sale and/or licensing of the above mentioned device, versions of this device, associated intellectual property and/or any intellectual property developed associated with this device and/or versions of this device. . . . This agreement is limited to the above mentioned device, versions of this device, associated intellectual property and/or any intellectual property developed associated with this device and/or versions of this device." The defendants argued before the court that the patented device, whose sale and/or licensing generated all compensation that the plaintiff claims a contractual right to share, was not covered by the parties' agreement.[11]

The court made the following factual findings before reaching its ultimate conclusion that the patented device was covered by the agreement: "Like the [plaintiff's] prototype, the patent applied for was for an anterior intervertebral spinal fixation and fusion apparatus.

[11] As mentioned previously, the defendants also argued that the plaintiff was barred from recovering because the profits went to a limited liability company and that they were negated by expenses. The court rejected both of these arguments, and they have not been advanced on appeal.

The versions illustrated in the patent have a cage and preloaded, oppositely rotating blades that the court is convinced began with Aferzon's crude sketch and then bear the mark of [the plaintiff's] work on the nature of the cage, the shape of the blade and . . . the preloading of those blades into the cage in substitution for Aferzon's original idea of adding them to the cage later. There are differences between the prototype and what appears in the patent application—principally a square actuating nut that Aferzon makes much of and may [accurately] be [attributed] to his son—but [the court] cannot pretend after seeing the patent drawings that what appears in them is not—as the contract says—a 'version' of the same device Aferzon promised to partner with [the plaintiff] on."

In reaching the conclusion that the patented device was a version of the device covered by the agreement, the court interpreted the agreement in three important ways. First, the court concluded that the agreement was "intentionally broad," and thus that it covered "related" devices and "the associated intellectual property with any 'related' device." The court then significantly based its analysis on whether the patented device was "related" to the device contemplated in the agreement. Second, the court compared Aferzon's initial design sketches to the drawings and figures in the patent application. Third, the court compared the plaintiff's prototype to the drawings and figures in the patent application. Ultimately, the court concluded: "[T]his matter all started with a crude sketch from Aferzon. Without charge, [the plaintiff] turned that crude sketch into drawings and a prototype that was tested on a cadaver. That device was unquestionably an anterior intervertebral spinal fixation and fusion apparatus. Before any other prototype was created, Aferzon described in a patent application an anterior intervertebral spinal fixation and fusion apparatus that included a cage and

blades sufficiently similar to what [the plaintiff] worked on for the court to find the device described in the patent to be 'related' to the device [the plaintiff] drew and prototyped. . . . All we have to do to see the relationship is to look at the drawings beginning with Aferzon's and ending with those in the patent application to see that they are at a minimum the same basic idea—a sturdy cage with oppositely rotating sets of blades to be inserted between the vertebrae. From that, you can see that they are at least 'related.' 'Related' only means having a 'relation' which itself means having 'an aspect or quality (such as a resemblance) that connects two or more things or parts as being or belonging or working together or as being of the same kind.' The MDS prototype and the device described in the patent are 'of the same kind.' . . . They are 'related' for purposes of the agreement. And from this patent is a direct path to the money." (Footnote omitted.)

We now turn to the defendants' arguments on appeal. The defendants first claim that the court erred by analyzing whether the patented device was "related" to the device contemplated in the agreement, arguing that the court "inserted that term into the contract" and "plainly failed to apply the actual language used by the parties in its decision." The defendants argue that the court instead should have strictly analyzed whether the licensed patent was "intellectual property *associated with*" the device in Aferzon's initial drawings or a "*version* thereof." (Emphasis added; internal quotation marks omitted.) The defendants are correct that the written portion of the agreement does not contain the word "related," but, although the court's memorandum of decision does not explicitly say so, we infer that the court's usage of that word reflects the court's interpretation of the agreement's operative language. We will not presume that the court misread the contract, particularly when the court elsewhere used the language of

the contract in stating that "[the court] cannot pretend after seeing the patent drawings that what appears in them is not—as the contract says—a '*version*' of the same device Aferzon promised to partner with [the plaintiff] on." (Emphasis added.)

The court's usage of "related" in interpreting the contract was not improper for two reasons. First, the defendants make much of the dictionary definitions of "associated" and "related," which the court cited, arguing that the supposedly broader definition of "related" tainted the analysis. "We often consult dictionaries in interpreting contracts . . . to determine whether the ordinary meanings of the words used therein are plain and unambiguous, or conversely, have varying definitions in common parlance." (Internal quotation marks omitted.) *Nation-Bailey* v. *Bailey*, 316 Conn. 182, 193, 112 A.3d 144 (2015). The online version of the Merriam-Webster Dictionary that the defendants cite, however, also defines "associated" as "*related*, connected, or combined together." (Emphasis added.) Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/associated (last visited September 17, 2021). The print version of Merriam-Webster's Collegiate Dictionary defines "associated"[12] as "to join or connect together," "to bring together or into *relationship* in any of various intangible ways"; (emphasis added) Merriam-Webster's Collegiate Dictionary (11th Ed. 2014) p. 75; and "related" as "connected by reason of an established or discoverable relation." Id., p. 1050. Random House Webster's Unabridged Dictionary provides similar definitions, defining "associate" as "to connect or bring into *relation*"; (emphasis added) Random House Webster's Unabridged Dictionary (2d Ed. 2001) p. 126; and "related" as "associated; connected."

[12] Associated is a participial adjective of the verb "associate." The definitions provided herein for "associated" are from the entry for the verb "associate."

Id., p. 1626. We are not convinced that the "common, natural, and ordinary meaning and usage" of "related" is significantly broader than "associated," as the defendants contend. See *HLO Land Ownership Associates Ltd. Partnership* v. *Hartford*, supra, 248 Conn. 357.

Second, even if the definition of "related" is broader than the definition of "associated," the interpretation of this contract is not as simple as defining the word "associated" and asking whether the two devices are "associated" with one another. The sentence in question is clearly broader than that, covering "versions of this device" and "any intellectual property developed associated with this device and/or versions of this device." The upshot of this wording is that the agreement can cover versions of the device or intellectual property, subsequently developed, that is associated with *versions* of the original device, not just directly associated with the original device. The court's usage of "related" results from a proper interpretation of this clause, which the court accurately described as "intentionally broad."

The defendants next claim that the court improperly relied on the drawings and figures contained in the defendants' patent. Specifically, the defendants argue that it was improper for the court to determine if the idea in the patent was "related" to the idea referenced in the parties' agreement by comparing Aferzon's 2004 sketches to the figures in the patent application and the subsequent patent. Instead, the defendants argue, the court should have looked to the "claims" in the patent, which is the well established standard by which claims of patent infringement are analyzed.[13] They thus

[13] "The issue of infringement focuses on whether a particular device falls within the particular boundaries of a patentee's invention, which are defined by the claims of the patent. *Lemelson* v. *United States*, 752 F.2d 1538, 1551 (Fed. Cir. 1985)." *Novametrix Medical Systems, Inc.* v. *BOC Group, Inc.*, 224 Conn. 210, 217–18 n.11, 618 A.2d 25 (1992).

argue that "the trial court's analysis in this respect is legally erroneous because the intellectual property that ISI licensed to Alphatec is not measured by the patent's drawings, but by its *claims*." (Emphasis in original.) The defendants are correct that the extent of the intellectual property licensed to Alphatec would be measured by the patent's claims,[14] but "a contract must be construed to effectuate the intent of the contracting parties." (Internal quotation marks omitted.) *HLO Land Ownership Associates Ltd. Partnership* v. *Hartford*, supra, 248 Conn. 356. There is nothing in the parties' agreement that suggests that they intended that a claims analysis be the method used to determine if a subsequent device was a version of the original device as to which the plaintiff was entitled to receive 50 percent of the total compensation resulting from its sale and/or licensing. Additionally, the scope of the patented invention and its subsequent license to Alphatec is simply not relevant to the analysis of whether the device is covered by the contract. This was the only patent that ISI ever licensed to Alphatec, and there is no question that the license generated compensation. The determinative question is whether the device that was patented and licensed is a version of the 2004 device or is intellectual property that was developed and associated with a version of the device. The scope of the patent has no bearing on that question. The defendants can cite to no authority,

[14] "It is a 'bedrock principle' of patent law that 'the claims of a patent define the invention to which the patentee is entitled the right to exclude.' [*Innova/Pure Water, Inc.* v. *Safari Water Filtration Systems, Inc.*, 381 F.3d 1111, 1115 (Fed. Cir. 2004)]; see also [*Vitronics Corp.* v. *Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)] ('we look to the words of the claims themselves . . . to define the scope of the patented invention'); [*Markman* v. *Westview Instruments, Inc.*, 52 F.3d 967, 980 (Fed. Cir. 1995) (en banc) ('The written description part of the specification itself does not delimit the right to exclude. That is the function and purpose of claims.') [aff'd, 517 U.S. 370, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996)]." *Phillips* v. *AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005), cert. denied, 546 U.S. 1170, 126 S. Ct. 1332, 164 L. Ed. 2d 49 (2006).

nor have we identified any, that suggests that a state court must resolve a contractual dispute over patent license profits by looking to federal patent law or a claims analysis. Lastly, we note that the court did not rely solely upon the figures in the patent, for it mentioned several times what was "described" in the patent. Accordingly, it was not improper for the court to determine if the devices were related by looking at the figures in the patent.

Finally, the defendants argue that the court erred by comparing the plaintiff's prototype and drawings with the figures in the patent, contending that "all of the parties agreed that the 'device' referenced in the November 4, 2004 agreement is the one contained in Aferzon's hand drawings that he filed as a provisional patent application. . . . [The plaintiff's] drawings and prototypes were created later and are not what the [agreement] is referring to in reciting 'this device.' " (Citations omitted.) The defendants' argument fails for two reasons. First, the court's decision makes clear that it considered the plaintiff's prototype to be a link in the chain going from the initial drawings to the Solus, but ultimately the decision rested on comparing the initial device to the patented device.[15] Second, the agreement clearly allows for consideration of the prototype. The defendants are correct that both Lyons and Aferzon testified that the "device" referenced in the agreement is that which is depicted in Aferzon's initial design sketches. When the agreement states that the plaintiff is entitled to 50 percent of the total compensation resulting from the sale and/or licensing of the "above mentioned *device*, [or] versions of *this device*," that portion of the agreement refers to Aferzon's initial design sketches. (Emphasis added.) The latter portion

[15] The court stated: "All we have to do to see the relationship is to look at the drawings beginning with Aferzon's and ending with those in the patent application to see that they are at minimum the same basic idea . . . ."

of the sentence, however, covers "intellectual property developed associated with this device and/or versions of this device." We read this portion of the agreement to cover intellectual property developed that is associated with *versions* of the device. Therefore, the court was not limited to considering the initial device but could also consider later versions of the initial device. The court thus looked at the prototype as just one link in a chain leading from the initial design sketches to the patent: "[T]his matter all started with a crude sketch from Aferzon. . . . [The plaintiff] turned that crude sketch into drawings and a prototype that was tested on a cadaver. That device was unquestionably an anterior intervertebral spinal fixation and fusion apparatus. Before any other prototype was created, Aferzon described in a patent application an anterior intervertebral spinal fixation and fusion apparatus that included a cage and blades sufficiently similar to what [the plaintiff] worked on for the court to find the device described in the patent to be 'related' to the device [the plaintiff] drew and prototyped." Because the court found the prototype to be related to Aferzon's initial design sketches, it was not improper for the court to consider the prototype as part of its analysis.

We find no error in the manner in which the court interpreted the contract, and the court's factual finding that the patented device is a version of the initial device stands unchallenged. Accordingly, we conclude that the court properly determined that the licensed patent and the device based on it are within the scope of the agreement.

C

The defendants next claim that the court improperly concluded that any applicable statute of limitations applicable to the plaintiff's claims had been tolled,

allowing the plaintiff to recover 50 percent of all compensation resulting from the sale and/or licensing of the patented device, dating back to 2010. The defendants argue that neither the fraudulent concealment doctrine nor the continuing course of conduct doctrine applies to the plaintiff's claims as a matter of law. The plaintiff argues that the court correctly concluded that both doctrines apply. We agree with the defendants.

We begin by setting forth the applicable standard of review. "Whether a particular action is barred by the statute of limitations is a question of law to which we apply a plenary standard of review." *Federal Deposit Ins. Corp.* v. *Owen*, 88 Conn. App. 806, 814, 873 A.2d 1003, cert. denied, 275 Conn. 902, 882 A.2d 670 (2005).

The following additional facts and procedural history are relevant to this claim. The defendants pleaded and argued before the court that the plaintiff's claims were barred by applicable statutes of limitations. As the court explained, this special defense could have had a significant impact on the plaintiff's right of recovery because the defendants had first received compensation from Alphatec for the sale and/or licensing of the patented device as early as 2010: "As our Supreme Court explained in [*Polizos* v. *Nationwide Mutual Ins. Co.*, 255 Conn. 601, 608–609, 767 A.2d 1202 (2001)], whatever the limitation period is, it ordinarily begins to run, not when the breach is discovered, but instead from the breach itself, that is, from 'the time when the plaintiff first could have successfully maintained an action.' This poses a problem for [the plaintiff] because here, the first breach of the agreement that could have justified a lawsuit was in 2010, and this lawsuit wasn't filed until 2018." The court declined, however, to rule on which statute of limitations applied to the plaintiff's cause of action for breach of contract on the basis of its conclusion that the running of either statute would have been tolled under either the fraudulent concealment doctrine

or the continuing course of conduct doctrine. By so ruling, the court rejected the defendants' special defense under the applicable statute of limitations and held that the plaintiff was entitled to recover damages from the defendants for all royalty payments they had received for the sale and/or licensing of the patented device but had not shared with the plaintiff since the first royalty payment was received by them in 2010. We will address each doctrine in turn.

1

We first address the court's conclusion that the fraudulent concealment doctrine tolled the running of the statute of limitations as to the defendants' cause of action for breach of contract. The fraudulent concealment doctrine is codified in General Statutes § 52-595, which provides: "If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence."

"The question before us is whether the [plaintiff] [has] adduced any credible evidence that any of the defendants fraudulently concealed the existence of the [plaintiff's] cause of action. To meet this burden, it was not sufficient for the [plaintiff] to prove merely that it was more likely than not that the defendants had concealed the cause of action. Instead, the [plaintiff] had to prove fraudulent concealment by the more exacting standard of clear, precise, and unequivocal evidence. . . . Under our case law, to prove fraudulent concealment, the [plaintiff] [was] required to show: (1) a defendant's actual awareness, rather than imputed knowledge, of the facts necessary to establish the [plaintiff's] cause of action; (2) that defendant's intentional concealment of these facts from the [plaintiff]; and (3) that defendant's concealment of the facts for the purpose of

obtaining delay on the [plaintiff's] part in filing a complaint on their cause of action." (Citations omitted; internal quotation marks omitted.) *Bartone* v. *Robert L. Day Co.*, 232 Conn. 527, 532–33, 656 A.2d 221 (1995). "[Additionally], the [defendants'] actions must have been directed to the very point of obtaining the delay [in filing the action] of which [the defendants] afterward [seek] to take advantage by pleading the statute." (Internal quotation marks omitted.) *Carson* v. *Allianz Life Ins. Co. of North America*, 184 Conn. App. 318, 326, 194 A.3d 1214 (2018), cert. denied, 331 Conn. 924, 207 A.3d 27 (2019).

In concluding that the defendants had fraudulently concealed the cause of action for breach of contract from the plaintiff, the court first explained that the "pertinent fact here was that Aferzon was making money on the device and not sharing it with [the plaintiff]. That first happened in 2010 when the ISI license to Alphatec resulted in the transfer of shares of Alphatec stock." The court then focused on the following actions of the defendants, which it found to constitute fraudulent concealment: (1) failing to inform the plaintiff whenever money was earned from the sale of the device, despite their contractual duty to so inform it under the agreement, (2) the 2006 letter that Aferzon sent to Lyons claiming that the project was dormant and seeking to amend the agreement, in which the court found that Aferzon "intentionally chose, not only to conceal the facts from [the plaintiff], but to lie about the status of the project and put [the plaintiff] off its guard," (3) Aferzon's failure to respond to the two e-mails that Lyons sent to him in 2008 requesting an update on the project, (4) Aferzon's and Bash's transfer of their rights in the patent to a limited liability company, (5) and Aferzon's failure to respond to the two presuit letters that the plaintiff's counsel sent to him

in 2017 and 2018.[16] Ultimately, the court concluded that "[t]he key factors permitting tolling for fraudulent concealment under the common law are all in place. [The plaintiff] diligently and repeatedly tried to discover from Aferzon—the most direct possible source—the status of the project. Aferzon knew the pertinent fact: the device was making money. Aferzon intentionally concealed that fact from [the plaintiff]. And not only did he conceal it, he deliberately threw [the plaintiff] off the scent by telling [it] the project wasn't making sufficient progress to warrant continuing his deal with [the plaintiff]. The court infers from this conduct that Aferzon was intentionally concealing this information from [the plaintiff] so that he might postpone the reckoning of a lawsuit for as many years as possible and, if possible, until it was too late. . . . Tolling under the doctrine of fraudulent concealment applies to the [plaintiff's] claims through the time [the plaintiff] first learned the facts needed to support a claim." (Footnote omitted.)

The trial court's conclusion is legally erroneous for two reasons. First, five of the six factual predicates on which the court relied legally cannot constitute fraudulent concealment because they occurred either before the plaintiff's cause of action accrued or after the plaintiff had become aware of that cause of action. To prove fraudulent concealment, the plaintiff must demonstrate the defendant's *actual awareness* of the facts necessary to establish the plaintiff's *cause of action* and its intentional concealment of these facts. See *Bartone* v. *Robert L. Day Co.*, supra, 232 Conn. 533. The court found, and neither party has challenged, that "the first breach of the agreement that could have justified a lawsuit was in 2010" when ISI first received a royalty payment from Alphatec in the form of a transfer of Alphatec common

[16] Aferzon testified that he did not recall receiving these letters or the 2008 e-mails. The court did not find this claim credible and presumed that they arrived. The defendants have not challenged this finding.

stock. Aferzon's letter in which he lied about the dormancy of the project, Lyons' two e-mails that Aferzon failed to respond to, and Aferzon's transfer of his patent rights to the ISI all occurred before any breach had occurred. The facts necessary to establish the cause of action did not exist when those events occurred, so it was impossible at those times for Aferzon either to have had actual awareness of the plaintiff's nonexistent cause of action for breach of contract or to have intentionally concealed such a cause of action from the plaintiff. See *Flannery* v. *Singer Asset Finance Co., LLC*, 128 Conn. App. 507, 517, 17 A.3d 509 (2011) (explaining that merely concealing existence of wrongdoing is insufficient to establish that defendant fraudulently concealed existence of plaintiff's causes of action with intention of delaying plaintiff in commencing lawsuit), aff'd, 312 Conn. 286, 94 A.3d 553 (2014). As for the two presuit letters sent by the plaintiff's counsel to Aferzon, to which Aferzon failed to respond, the trial court explicitly found that the plaintiff had already learned the facts necessary to establish a cause of action for breach of contract by the time those letters were mailed.[17] The statute of limitations can no longer be tolled from fraudulent concealment once the plaintiff has sufficient knowledge of the cause of action, as § 52-595 provides that the cause of action accrues once "the person entitled to sue thereon first discovers its existence."

As for the remaining factual predicate on which the court relied as a basis for finding fraudulent concealment, that Aferzon failed to notify the plaintiff whenever

[17] The court explained that "the [plaintiff] first learned what it needed to know to sue, at the earliest, in the late fall of 2017 when [the plaintiff's] CEO Lyons was told by his physical therapist that the device was making money and that Bash—whom Lyons knew to be associated with Aferzon—was training physicians about how to use it." The letters were sent on November 24, 2017, and February 6, 2018. We note that the first letter also states that "your conduct appears to constitute a breach of the [a]greement . . . ."

ISI received compensation resulting from the sale and/or licensing of the patented device, such conduct merely constituted nondisclosure, which, standing alone, cannot establish fraudulent concealment in the absence of a fiduciary duty. Generally, fraudulent concealment requires a showing of affirmative acts of concealment. See *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, 89 Conn. App. 459, 478, 874 A.2d 266 (2005), aff'd, 281 Conn. 84, 912 A.2d 1019 (2007). The defendants acknowledge that "[o]nly in the context of a fiduciary relationship is there a *possible* exception where nondisclosure may suffice." (Emphasis added.) The plaintiff describes the exception more definitively, stating that "a plaintiff may be able to prove the second 'intentional concealment' element by showing that 'a defendant owed him a fiduciary duty and failed to disclose information as that duty required.' " The defendants are closer to the mark, as our Supreme Court has not held that, in the context of a fiduciary relationship, mere nondisclosure can satisfy the second element of fraudulent concealment. See *Iacurci* v. *Sax*, 313 Conn. 786, 792 n.8, 99 A.3d 1145 (2014); *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 107–108, 912 A.2d 1019 (2007). In *Iacurci*, commenting on a trial court's citation to *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 107, for the proposition that "nondisclosure is sufficient to satisfy the second element of fraudulent concealment when the 'defendant has a fiduciary duty to disclose those facts' "; *Iacurci* v. *Sax*, supra, 791–92; our Supreme Court explained its view of the controlling law as follows: "This quotation cites a proposition that has gained general acceptance in federal cases applying Connecticut law. See, e.g., *Fenn* v. *Yale University*, 283 F. Supp. 2d 615, 636–37 (D. Conn. 2003). As the trial court acknowledged, however, this court has 'not yet decided whether affirmative acts of concealment are always

necessary' to satisfy the second element of fraudulent concealment under § 52-595. . . . *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 107. The trial court nonetheless proceeded as though a fiduciary's mere nondisclosure, if found, could supplant the need for evidence of acts of intentional concealment. The Appellate Court followed a similar course. See *Iacurci* v. *Sax*, [139 Conn. App. 386, 394 n.2, 57 A.3d 736 (2012)]. We emphasize that, in *Falls Church Group, Ltd.*, this court only explained, in the context of evaluating a vexatious litigation action, that a law firm had probable cause to believe that it could assert a fraudulent concealment claim in light of federal precedent allowing fiduciary nondisclosure to substitute for intentional concealment. *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 103–105, 107–108, 112. That is, in *Falls Church Group, Ltd.*, this court did not actually *adopt* the federal approach of allowing fiduciary nondisclosure to substitute for the second element of a fraudulent concealment claim. Nor do we adopt the federal approach in the present case, as the parties have not brought it directly into dispute. Rather, in the present case, we will assume without deciding that a fiduciary's nondisclosure could satisfy the second element of fraudulent concealment for the purpose of § 52-595." (Emphasis in original.) *Iacurci* v. *Sax*, supra, 792 n.8.

Our Supreme Court has not revisited this issue since *Iacurci*. "It is axiomatic that this court, as an intermediate body, is bound by Supreme Court precedent and [is] unable to modify it . . . . [I]t is not within our province to reevaluate or replace those decisions." (Internal quotation marks omitted.) *Coyle Crete, LLC* v. *Nevins*, 137 Conn. App. 540, 560–61, 49 A.3d 770 (2012). Accordingly, we follow our Supreme Court's lead and assume without deciding that a fiduciary's nondisclosure *could* satisfy the second element of

fraudulent concealment. Here, however, the trial court never held that Aferzon owed the plaintiff a fiduciary duty.[18] In the absence of such a duty, our Supreme Court's guidance supports the conclusion that mere nondisclosure paired with an ordinary contractual duty to disclose is insufficient to establish fraudulent concealment. *Iacurci* v. *Sax*, supra, 313 Conn. 792 n.8. The plaintiff argues, however, that the "[d]efendants . . . cite no binding authority holding that the second element of fraudulent concealment cannot also be proven by showing that a defendant intentionally, and for the specific purpose of delaying a plaintiff filing a complaint, violated an express contractual duty to disclose." The plaintiff is correct, but our review of the case law also confirms the contrary proposition—that no Connecticut court has ever found nondisclosure sufficient to toll the statute of limitations in the absence of a fiduciary relationship. Given that our Supreme Court has declined to hold that nondisclosure is sufficient *even with* a fiduciary duty; see *Iacurci* v. *Sax*, supra, 792 n.8; we decline to rule that violation of a contractual duty to disclose in the absence of a fiduciary duty is sufficient to constitute fraudulent concealment.

We stress that the statute in question tolls the statute of limitations when a defendant "*fraudulently* conceals

[18] The court, in its discussion of the continuing course of conduct doctrine, characterized the relationship between the parties as a "special relationship" that was akin to a fiduciary relationship, arising from a "specific, legally recognized duty in contract that was continuing and required Aferzon to report his gains from the device idea to [the plaintiff]." The plaintiff now argues that this relationship is "functionally equivalent to the duty to disclose arising out of a fiduciary relationship . . . ." For the reasons discussed in part I C 2 of this opinion, the court overstates the nature of the parties' relationship and, thus, this conclusion has no bearing on whether fraudulent concealment applies to the defendants' actions.

The plaintiff argues that the court should decide on remand whether the parties had a fiduciary relationship, but, as we explain in part I C 2 of this opinion, there is insufficient evidence for a special relationship, and the court was not able to point to any factors that would give rise to a special relationship. It would be fruitless to consider the issue on remand.

from [the plaintiff] the existence of the cause of such action . . . .'' (Emphasis added.) General Statutes § 52-595. Merriam-Webster's Collegiate Dictionary defines fraudulent as ''characterized by, based on, or done by fraud . . . .'' Merriam-Webster's Collegiate Dictionary, supra, p. 498; *Rivers* v. *New Britain*, 288 Conn. 1, 17, 950 A.2d 1247 (2008) (explaining that we look to dictionary definition of term to ascertain its commonly approved meaning in statutory interpretation). Fraud is defined as ''deceit, trickery; intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right; an act of deceiving or misrepresenting . . . .'' Merriam-Webster's Collegiate Dictionary, supra, p. 498. The defendants' failure to notify the plaintiff that the sale or licensing of the patented device had resulted in compensation was simply a breach of the agreement. There is no act of deceit, misrepresentation, or ''perversion of truth'' inherent in such conduct. Other than the actions discussed previously, which occurred before the plaintiff's cause of action for breach of contract accrued, the plaintiff can point to no evidence of additional fraudulent behavior by the defendants other than their repeated breaches of the agreement. Our review of the relevant case law and statutory language leads us to conclude that, in the absence of a fiduciary duty, there must be some fraudulent action beyond breaching one's contractual duty to toll the statute of limitations. Accordingly, we find that the court erred in concluding that the fraudulent concealment doctrine applied to the defendants' actions.

2

We next address the court's conclusion that the continuing course of conduct doctrine applied to the defendants' actions. The defendants argue that ''the repeated breach of a contractual obligation to pay money, whether periodically or as royalties are earned, is not

subject to the continuing course of conduct doctrine as a matter of law." The plaintiff argues that the doctrine applies because the parties had a special relationship. We agree with the defendants.

"In certain circumstances . . . we have recognized the applicability of the continuing course of conduct doctrine to toll a statute of limitations. Tolling does not enlarge the period in which to sue that is imposed by a statute of limitations, but it operates to suspend or interrupt its running while certain activity takes place. . . . Consistent with that notion, [w]hen the wrong sued upon consists of a continuing course of conduct, the statute does not begin to run until that course of conduct is completed." (Citation omitted; internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, supra, 312 Conn. 311. "[I]n order [t]o support a finding of a continuing course of conduct that may toll the statute of limitations there must be evidence of the breach of a duty that remained in existence after the commission of the original wrong related thereto. That duty must not have terminated prior to commencement of the period allowed for bringing an action for such a wrong. . . . Where [our Supreme Court has] upheld a finding that a duty continued to exist after the cessation of the act or omission relied upon, there has been evidence of either a special relationship between the parties giving rise to such a continuing duty or some later wrongful conduct of a defendant related to the prior act. . . . Furthermore, [t]he doctrine of continuing course of conduct as used to toll a statute of limitations is better suited to claims where the situation keeps evolving after the act complained of is complete . . . ." (Citations omitted; internal quotation marks omitted.) *Bellemare* v. *Wachovia Mortgage Corp.*, 94 Conn. App. 593, 608, 894 A.2d 335 (2006), aff'd, 284 Conn. 193, 931 A.2d 916 (2007).

Our Supreme Court has also recently clarified the difference between a continuing course of conduct and a related form of conduct called a "continuing violation." The court described the difference as follows: "Although this court has on occasion used both terms in a manner that would imply that they are interchangeable; see, e.g., *Watts* v. *Chittenden*, [301 Conn. 575, 587, 22 A.3d 1214 (2011)]; the difference between these theories is not simply the circumstances in which they apply, but also the scope of recovery they afford. When there is a continuing violation, each breach gives rise to a new statute of limitations, and the plaintiff is entitled to recover for only those breaches that occurred within the statute of limitations. See *Knight* v. *Columbus*, [19 F.3d 579, 581 (11th Cir.)] ('[w]here a continuing violation is found, the [plaintiff] can recover for any violations for which the statute of limitations has not expired') [cert. denied, 513 U.S. 929, 115 S. Ct. 318, 130 L. Ed. 2d 280 (1994)]; see also *State* v. *Commission on Human Rights & Opportunities*, [211 Conn. 464, 472–73, 559 A.2d 1120 (1989)]. Thus . . . the [plaintiff] would be entitled to [recovery] only for the six year period preceding the filing of [its] claim, as well as prospective relief. Conversely, when there is a continuing course of conduct, the accrual of the cause of action is delayed, and the plaintiff is entitled to recover the full extent of his or her injuries, irrespective of when they commenced. See *Handler* v. *Remington Arms Co.*, 144 Conn. 316, 321, 130 A.2d 793 (1957) ('[w]hen the wrong sued upon consists of a continuing course of conduct, the statute does not begin to run until that course of conduct is completed') . . . ." (Citations omitted.) *Bouchard* v. *State Employees Retirement Commission*, 328 Conn. 345, 374 n.14, 178 A.3d 1023 (2018).

"The question of whether a party's claim is barred by the statute of limitations is a question of law, which this court reviews de novo. . . . The issue, however,

of whether a party engaged in a continuing course of conduct that tolled the running of the statute of limitations is a mixed question of law and fact. . . . We defer to the trial court's findings of fact unless they are clearly erroneous." (Citations omitted.) *Giulietti* v. *Giulietti*, 65 Conn. App. 813, 833, 784 A.2d 905, cert. denied, 258 Conn. 946, 788 A.2d 95 (2001), and cert. denied, 258 Conn. 947, 788 A.2d 96 (2001), and cert. denied sub nom. *Giulietti* v. *Vernon Village, Inc.*, 258 Conn. 947, 788 A.2d 96 (2001), and cert. denied sub nom. *Vernon Village, Inc.* v. *Giulietti*, 258 Conn. 947, 788 A.2d 97 (2001).

In concluding that the continuing course of conduct doctrine applied in this case, the court first characterized the defendants' actions as a series of distinct breaches: "Under the contract, each time the device made money, Aferzon had to notify [the plaintiff] and pay it 50 percent of the total compensation. Aferzon's money depends on ISI's money, which, in turn, depends upon sales of the Alphatec Solus. As the record reflects, those sales vary. They might even cease. But in the meantime, Aferzon signed a contract that calls for him to account for them when and if they come in. Indeed, Aferzon's duty continues into the future, and he would commit no future breach so long as he honestly reports and shares the income. This means that each failure could easily be seen as its own breach with its own limitation period running from the point at which an installment of money was realized under the license." The court then engaged in a discussion of both continuing violation analysis and the continuing course of conduct doctrine, referring to them interchangeably,[19] citing both *Giulietti* v. *Giulietti*, supra, 65 Conn. App.

[19] We do not fault the court for its use of both terms, as our Supreme Court indicated in *Bouchard* that, until recently, our courts have used the terms in a manner that would imply that they are interchangeable. See *Bouchard* v. *State Employees Retirement Commission*, supra, 328 Conn. 374 n.14. The trial court also noted the distinction at first, explaining that "[s]ometimes this idea of multiple breaches is called a continuing violation

813, a case concerning the continuing course of conduct doctrine, and *Bouchard* v. *State Employees Retirement Commission*, supra, 328 Conn. 345, a case predominantly addressing a continuing violation theory and advising that the two theories are not interchangeable. Although the court initially stated that "[a]pplying the continuing violation doctrine to this case is attractive," it ultimately concluded that the continuing course of conduct doctrine applied. The court provided the following reasons for its application of the continuing course of conduct doctrine: (1) the claim concerned "continued and repeated" wrongs, not just a onetime violation; (2) the past wrongs are identical to more recent wrongs, and "[t]reating them as all part of a single continuing wrong is far more efficient than marking each missed payment and starting the clock running anew"; and (3) "allowing the claims to be brought now will likely head off future breaches [because] the violations have not only been continuous, they have been without judicial intervention and are thus likely to continue into the future unless dealt with." Additionally, the court held that Aferzon had a "specific, legally recognized duty in contract that was continuing . . . ." It likened this relationship to a "special relationship" of the sort that can establish a continuing duty to a party. See *Saint Bernard School of Montville, Inc.* v. *Bank of America*, 312 Conn. 811, 835, 95 A.3d 1063 (2014).

The court's conclusion is legally erroneous because the nature of the defendants' breaches is incompatible with the continuing course of conduct doctrine. We look first to the definition of a continuing course of

under the label of a 'separate accrual rule.' Other times, tolling is allowed under a version of this doctrine recognizing a series of acts as one long wrong that keeps going until the last wrong act, tolling the limitation period for everything from the first act to the last." Nevertheless, the court failed to distinguish the two in its analysis.

conduct. "[I]n order [t]o support a finding of a continuing course of conduct that may toll the statute of limitations there must be evidence of the *breach of a duty* that remained in existence after commission of the *original wrong* related thereto." (Emphasis added; internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, supra, 128 Conn. App. 513–14. Courts have found that such a duty continues to exist after the original wrong where there is "some later wrongful conduct of a defendant related to the prior act." (Internal quotation marks omitted.) *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 94 Conn. App. 608. Put another way, "a precondition for the operation of the continuing course of conduct doctrine is that the defendant must have committed an *initial wrong* upon the plaintiff. . . . A second requirement for the operation of [this doctrine] is that there must be evidence of the *breach of a duty* that remained in existence after commission of the original wrong related thereto." (Emphasis added; internal quotation marks omitted.) *Watts* v. *Chittenden*, supra, 301 Conn. 585.

This language suggests that a continuing course of conduct requires both an initial wrong and a subsequent continuing duty that are distinct from one another. In the present case, the breach of the duty to disclose *is* the initial wrong. After receiving compensation and failing to notify the plaintiff, the duty to disclose that compensation may continue into the future, but the breach of that duty is the initial wrong complained of. For example, in *Sanborn* v. *Greenwald*, 39 Conn. App. 289, 664 A.2d 803, cert. denied, 235 Conn. 925, 666 A.2d 1186 (1995), this court summarized several cases in which our Supreme Court upheld application of the doctrine, identifying a distinct initial action and breach of a subsequent duty for each: "In *Blanchette* v. *Barrett*, [229 Conn. 256, 640 A.2d 74 (1994)], the statute of limitations was tolled because of evidence that the defendant

physician had failed to satisfy his duty of monitoring the plaintiff's questionable breast condition. The court considered this to be later wrongful conduct that related to the defendant's [initial] diagnosis of the plaintiff. Id., 275. In *Cross* v. *Huttenlocher*, 185 Conn. 390, 440 A.2d 952 (1981), the statute of limitations was tolled because of the negligent failure of a physician to warn a patient of the harmful side effects of a drug that the physician had prescribed and that the patient had continued to ingest over a period of time. In *Giglio* v. *Connecticut Light & Power Co.*, 180 Conn. 230, 429 A.2d 486 (1980), the statute of limitations was tolled because the installer of a pilot light gave repeated instructions as to its use in response to multiple complaints by the plaintiff. In *Handler* v. *Remington Arms Co.*, supra, 144 Conn. 316, the statute of limitations was tolled by the defendant manufacturer's continuing failure to warn of the potential danger associated with an inherently dangerous cartridge of ammunition. In each of these cases, the plaintiff's injury was perpetuated, enhanced and even caused by the breach of a duty on the part of the defendant." *Sanborn* v. *Greenwald*, supra, 296. We also note that this court has expressed skepticism as to whether the doctrine should ever be applied to breach of contract claims: "[T]he continuing course of conduct doctrine is one classically applicable to causes of action in tort, rather than in contract. The doctrine concerns itself with 'wrongs,' the nomenclature of tort, not with 'breach,' the language of contract." *Fradianni* v. *Protective Life Ins. Co.*, 145 Conn. App. 90, 100 n.9, 73 A.3d 896, cert. denied, 310 Conn. 934, 79 A.3d 888 (2013).

These cases demonstrate that repeated and distinct violations of a duty to disclose are not what is contemplated by the definition of a continuing course of conduct. "[T]he continuing course of conduct doctrine recognizes that the act or omission that commences the

limitation period may not be discrete and attributable to a fixed point in time. [T]he doctrine is generally applicable under circumstances where [i]t may be impossible to pinpoint the exact date of a particular negligent act or omission that caused injury . . . .'' (Internal quotation marks omitted.) *Essex Ins. Co.* v. *William Kramer & Associates, LLC*, 331 Conn. 493, 503, 205 A.3d 534 (2019). Here, the defendants repeatedly breached the agreement, and every breach is readily identifiable. The plaintiff entered exhibits clearly delineating the date and amount of each distinct royalty payment which the defendants received from Alphatec without notifying the plaintiff. ''[T]he continuing course of conduct doctrine reflects the policy that, during an ongoing relationship, lawsuits are premature because specific tortious acts or omissions may be difficult to identify and may yet be remedied.'' (Internal quotation marks omitted.) *Saint Bernard School of Montville, Inc.* v. *Bank of America*, supra, 312 Conn. 837–38.

On the other hand, with respect to what constitutes a continuing violation, our Supreme Court cited with approval the following explanation: ''In between the case in which a single event gives rise to continuing injuries and the case in which a continuous series of events gives rise to a cumulative injury is the case in which repeated events give rise to discrete injuries, as in suits for lost wages. If our plaintiff were seeking [back pay] for repeated acts of wage discrimination (suppose that every [payday] for five years he had received $100 less than he was entitled to), he would not be permitted to reach back to the first by suing within the [limitation] period for the last. . . . [In such a case] the damages from each discrete act . . . would be readily calculable without waiting for the entire series of acts to end. There would be no excuse for the delay.'' (Citations omitted; internal quotation marks

omitted.) *Watts* v. *Chittenden*, supra, 301 Conn. 588–89. The case at hand is akin to the latter scenario.[20]

In *Fradianni* v. *Protective Life Ins. Co.*, supra, 145 Conn. App. 90, this court reviewed whether the continuing course of conduct doctrine applied to a life insurance company's conduct in annually overcharging the plaintiff. Citing the previously quoted passage from *Watts*, this court concluded that the defendant's actions were more accurately characterized as a series of distinct breaches, and thus held as follows that the continuing course of conduct doctrine did not apply to the

[20] The plaintiff takes issue with the defendants' citation of this passage, arguing that the "defendants incorrectly quote inapposite dicta in [*Watts* v. *Chittenden*, supra, 301 Conn. 588], regarding 'discrete injuries . . . in suits for lost wages' as if it were a statement of Connecticut law by the Connecticut Supreme Court. . . . In reality, that statement is a quotation attributable to the Seventh Circuit's decision in *Heard* v. *Sheahan*, 253 F.3d 316, 320 (7th Cir. 2001), which, in turn, was citing the Eleventh Circuit decision of *Knight* v. *Columbus*, [supra, 19 F.3d 581–82], discussing whether the 'continuing violation theory' was applicable to a violation of the Fair Labor Standards Act. [29 U.S.C. § 201 et seq.] Importantly, the 'continuing violation theory' is not the same as the 'continuing course of conduct doctrine.' " (Citation omitted.) The plaintiff is correct that these two cases discuss "continuing violations" but, as our Supreme Court has stated, the terms have been used interchangeably; *Bouchard* v. *State Employees Retirement Commission*, supra, 328 Conn. 374 n.14; and it is clear that these cases discuss what our courts refer to as a continuing course of conduct: "The term 'continuing violation' also implies that there is but one incessant violation and that the [plaintiff] should be able to recover for the entire duration of the violation, without regard to the fact that it began outside the statute of limitations window. That is not the case. Instead of one [ongoing] violation, this case involves a series of repeated violations of an identical nature. Because each violation gives rise to a new cause of action, each failure to pay overtime begins a new statute of limitations period as to that particular event." *Knight* v. *Columbus*, supra, 582.

Regardless of the terminology used by the courts in *Knight* and *Heard*, our Supreme Court clearly cited the passage as an example of what would *not* qualify as a continuing course of conduct. *Watts* v. *Chittenden*, supra, 301 Conn. 587–90. To argue that the passage is not Connecticut law because it was ultimately derived from federal cases is inaccurate, especially considering that the passage has since been cited in other Connecticut cases discussing the continuing course of conduct doctrine. See, e.g., *Saint Bernard School of Montville, Inc.* v. *Bank of America*, supra, 312 Conn. 838.

plaintiff's claim: "The case now before us, where the plaintiff alleges that the defendant breached the insurance contract annually, at precisely identifiable moments when it allegedly overcharged the plaintiff, is analogous to the suit for lost wages as described [in *Watts* v. *Chittenden*, supra, 301 Conn. 588–89]. The plaintiff's damages arising from the defendant's alleged breaches were readily calculable and actionable at the time of breach, unlike those cases where it is the cumulative effect of the defendant's behavior that gives rise to the injury. Simply put, the plaintiff's allegations do not constitute a 'course of conduct' by the defendant; but instead allege a series of repeated breaches over a period of years. Accordingly, the continuing course of conduct doctrine is inapplicable to the present case. We, therefore, conclude that the court properly found that the doctrine did not serve to toll the [statute of limitations]." (Footnote omitted.) *Fradianni* v. *Protective Life Ins. Co.*, supra, 100. The present case, like *Fradianni*, involves a series of separate breaches to which the continuing course of conduct doctrine does not apply because each such breach caused separate damages that were readily calculable at the time of breach.

Lastly, we address the court's conclusion that the parties had a special relationship. The existence of a special relationship between the parties is another basis for establishing the continuation of a duty between them after an initial wrong has been committed. See *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 94 Conn. App. 608. The court concluded that the parties had a special relationship because Aferzon "[had] a specific, legally recognized duty in contract that was continuing and required [him] to report his gains from the device idea to [the plaintiff]."

"Our appellate courts have not defined precisely what constitutes a special relationship for purposes of tolling

because the existence of such a relationship will depend on the circumstances that exist between the parties and the nature of the claim at issue. Usually, such a special relationship is one that is built upon a fiduciary or otherwise confidential foundation. A fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other. . . . The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him. . . . Fiduciaries appear in a variety of forms, including agents, partners, lawyers, directors, trustees, executors, receivers, bailees and guardians. . . . The fact that one [businessperson] trusts another and relies on [that person] to perform [his obligations] does not rise to the level of a confidential relationship for purposes of establishing a fiduciary duty. . . . [N]ot all business relationships implicate the duty of a fiduciary. . . . In the cases in which this court has, as a matter of law, refused to recognize a fiduciary relationship, the parties were either dealing at arm's length, thereby lacking a relationship of dominance and dependence, or the parties were not engaged in a relationship of special trust and confidence. . . . Accordingly, a mere contractual relationship does not create a fiduciary or confidential relationship." (Citations omitted; internal quotation marks omitted.) *Saint Bernard School of Montville, Inc.* v. *Bank of America*, supra, 312 Conn. 835–36.

The plaintiff and Aferzon clearly were dealing with each other at arm's length in the course of an ordinary contractual relationship. The court made no factual findings indicating that the parties had a confidential relationship or that there was a unique degree of trust and confidence between them. The court did make findings as to Aferzon's medical background and lengthy

surgical experience, but it did not make any finding that Aferzon had any "superior knowledge, skill or expertise" as to the development of medical devices, which is the subject of this agreement. The only justification that the court provided for this finding was that Aferzon had a specific and continuing duty to report any compensation to the plaintiff, but this is merely the contractual obligation imposed on him by the agreement. Such a duty alone is insufficient to establish a special relationship.

Because there was no evidence before the court that would have supported a finding that a special relationship existed between the parties, and Aferzon's breaches more accurately are characterized as a series of distinct, readily calculable breaches of the parties' agreement, the trial court erred in concluding that the continuing course of conduct doctrine tolled the running of the statute of limitations.

3

Our conclusion that the trial court improperly concluded that the running of the statute of limitations had been tolled as to the plaintiff's breach of contract claim now raises the necessary questions of what statute of limitations applies to that claim and to what extent can the plaintiff recover expectation damages for the defendants' proven breaches of the parties' contract. Rather than remand these issues to the trial court for consideration in the first instance, we review them now on the basis of the trial court's unchallenged factual findings.[21] We note that the record is adequate for review of these issues, and neither determination requires further factual development. We rely on the court's express factual findings, which were based on

[21] In so doing, we note that if the plaintiff's adjusted recovery falls below the amount of its unified offer of compromise pursuant to § 52-192a, the plaintiff's cross appeal would be rendered moot.

unchallenged facts and exhibits. We address each issue in turn.

a

We first address which statute of limitations applies to the plaintiff's claims. The determination of which statute of limitations applies to an action is a question of law over which our review is plenary. See, e.g., *Pasco Common Condominium Assn., Inc.* v. *Benson*, 192 Conn. App. 479, 501, 218 A.3d 83 (2019).

The court stated that, "[f]or written contracts, the limitation period is established as a six year period . . . . For oral contracts the limitation period is established as a three year period . . . ." The distinction, however, is not that simple. All contracts have a six year statute of limitations except for those that are *both* oral and executory. "General Statutes § 52-581 provides a three year statute of limitations for executory oral contracts. . . . All other contracts are governed by a six year statute of limitations pursuant to General Statutes § 52-576." (Citation omitted.) *Mitchell* v. *Guardian Systems, Inc.*, 72 Conn. App. 158, 161 n.3, 804 A.2d 1004, cert. denied, 262 Conn. 903, 810 A.2d 269 (2002). "This court has addressed the distinction between §§ 52-581 and 52-576. These two statutes, each establishing a different period of limitation, can both be interpreted to apply to actions on oral contracts. Our Supreme Court has distinguished the statutes, however, by construing § 52-581, the three year statute of limitations, as applying only to *executory* contracts. . . . A contract is *executory* when neither party has fully performed its contractual obligations and is *executed* when one party has fully performed its contractual obligations. . . . It is well established, therefore, that the issue of whether a contract is oral is not dispositive of which statute applies. Thus, the . . . argument that § 52-581 automatically applies to [an] oral contract

between . . . parties is incorrect. The determinative question is whether the contract was executed."(Emphasis in original; internal quotation marks omitted.) *Bagoly* v. *Riccio*, 102 Conn. App. 792, 799, 927 A.2d 950, cert. denied, 284 Conn. 931, 934 A.2d 245, and cert. denied, 284 Conn. 931, 934 A.2d 246 (2007).

The contract between the parties in the present case is not executory, as it cannot be said that neither party has fully performed its contractual obligations thereunder. There may have been some dispute as to the extent of the plaintiff's obligations before the trial court, but neither party has challenged the court's factual finding that the plaintiff fully performed its contractual obligations thereunder. Accordingly, the six year statute of limitations set forth in § 52-576 applies to the plaintiff's breach of contract claim.

b

We next address the extent of the plaintiff's recovery for breaches of contract occurring within the applicable six year period of limitation.

The court characterized the defendants' breaches as distinct and readily calculable: "[T]his case involves a series of breaches, not just one. . . . [E]ach failure could easily be seen as its own breach with its own limitation period running from the point at which an installment of money was realized under the license." As we have previously explained, such conduct constitutes what our Supreme Court in *Bouchard* has called a continuing violation rather than a continuing course of conduct: "When there is a continuing violation, each breach gives rise to a new statute of limitations, and the plaintiff is entitled to recover for only those breaches that occurred within the statute of limitations." *Bouchard* v. *State Employees Retirement Commission*, supra, 328 Conn. 374 n.14. Accordingly, determining what portion of the plaintiff's expectation

damages, as awarded by the court, were properly awarded to it for breaches that occurred within the six year limitation period is a simple matter of drawing a line six years back from the date the plaintiff commenced this action, adding together all payments received by the defendants since that date from the sale and/or licensing of the patented device, and dividing that sum in half to calculate the plaintiff's 50 percent share of such payments. The resulting total of such properly awarded expectation damages for breach of contract is $996,039.97.

Service was effectuated on July 16, 2018. See *Doe* v. *West Hartford*, 328 Conn. 172, 177 n.4, 177 A.3d 1128 (2018) ("[t]ypically, an action is 'commenced,' for purposes of determining compliance with a statute of limitations, when the defendant is served with a summons and complaint"). Thus, the plaintiff was properly awarded its 50 percent share of all royalty payments received by the defendants for sale and/or licensing of the Solus as far back as July 16, 2012. The plaintiff submitted, and the court credited the facts presented in, plaintiff's exhibit 16, which lists every payment ISI received from Alphatec, after they entered into their cross license agreement, from 2010 to 2019. For each such payment, exhibit 16 sets forth the amount of the payment, the date on which it was received by ISI, a calculation of 50 percent of its total value representing the plaintiff's share of the payment under the parties' agreement, and the plaintiff's proposal for an award of prejudgment interest under § 37-3a based on the defendants' wrongful detention of the plaintiff's share of that payment from the date of its receipt until May 4, 2020, calculated at the maximum statutory rate of 10 percent per year. These facts and figures are not in dispute. The parties had the opportunity to challenge the court's adoption of the facts set forth in exhibit 16 as its basis

for awarding the plaintiff expectation damages and prejudgment interest at the lesser rate of 4.5 percent per year, but neither party did so.

Starting in July, 2012, the first payment made by Alphatec to the defendants as compensation for the sale and/or licensing of the patented device within the six year limitation period, was received by ISI on July 26, 2012. The plaintiff was properly awarded expectation damages totaling 50 percent of the sum of that first payment and of all subsequent payments of royalties for the sale and/or licensing of the patented device that the defendants received within the six year limitation period. The total of all expectation damages awarded by the court on the basis of the defendants' failure to pay the plaintiff its 50 percent share of all compensation that they had received for the sale and/or licensing of the patented device within the six year limitation period was $996,039.97. Accordingly, the court's judgment for the plaintiff on its claim of breach of contract must be adjusted downward to that amount.

This also raises the issue of whether the court appropriately subtracted $50,000 for development expenses from the plaintiff's recovery. On October 1, 2009, ISI received a $50,000 payment from Alphatec that the defendants claimed was reimbursement for expenses related to acquiring the patent for the device. The court credited the defendants' characterization of this payment and did not allow the plaintiff to recover on it, explaining that the contract did not contemplate recovery by the plaintiff based on any payment that was not actually a royalty payment: "[T]he evidence does show that Alphatec denominated $50,000 of the money it paid as an expense reimbursement. The evidence also shows expenses that amount to nearly $50,000 for patent related expenses incurred at a time when they were most likely legitimate expenses associated with acquiring the anterior patent. Knowing that the agreement

called for future agreement about 'financial commitments,' the court concludes that this is a reasonable sum for expenses under the [plaintiff's] contract terms and would have been part of the bargain had it been carried out. . . . On the breach of contract claim, [the plaintiff] is due only what it could reasonably expect to have received under the contract. If the court were to punish Aferzon rather than hold him as best we can to his bargain, it would have to apply a different standard, not ordinary damages analysis. In the meantime, despite problems posed by Aferzon himself, the court's job is to give [the plaintiff] the benefit of its bargain. That benefit was expected to exclude required financial commitments, and the court is convinced that, unlike the other sums claimed, this $50,000 sum is more likely than not a genuine expense reimbursement associated with the anterior patent. This means [the plaintiff's] expectation damages are $1,637,389 minus $50,000 or $1,587,289."

The court's foregoing explanation makes it clear that the plaintiff requested total expectation damages of $1,637,289 for breach of contract on the basis of the defendants' failure to pay it all sums listed in exhibit 16, each of which it claimed to have been its 50 percent share of a payment received by the defendants from Alphatec in the course of their cross license agreement. Although the court recognized that one such listed sum, in the amount of $25,000, was not recoverable for breach of contract because it constituted 50 percent of the initial $50,000 reimbursement payment, it unaccountably included that sum in its calculation of the plaintiff's total expectation damages award, then subtracted twice that amount—the full $50,000 reimbursement payment on which it was based—from the plaintiff's total award.

Whether the court erred in including the $25,000 improperly claimed by the plaintiff as unshared compensation resulting from the sale and/or licensing of

the patented device or in subtracting from that award the entire $50,000 reimbursement payment from which that $25,000 sum was calculated, we need not make similar modifications of the plaintiff's adjusted award of expectation damages to reflect what the defendants failed to pay it under the November 4, 2004 agreement from compensation it received within the six year limitation period. The reason for this conclusion is simply that the $50,000 reimbursement payment was received by the defendant before that six year limitation period began. Accordingly, there is no reason to subtract any amount from the plaintiff's expectation damages to account for that payment because it is not included in the new total to begin with. The plaintiff's recoverable expectation damages for breach of contract must therefore be reduced to $996,039.97, as previously noted, in light of our conclusion as to the viability of the defendants' special defense under the statute of limitations.

Lastly, we must determine what portion of the prejudgment interest awarded to the plaintiff under § 37-3a for the defendants' allegedly wrongful detention of money due and owing to the plaintiff prior to judgment was properly based on the defendants' actionable failure to pay the plaintiff its 50 percent share of all compensation received by the defendants for the sale and/or licensing of the patented device within the six year limitation period. When the court made its initial award of prejudgment interest in its memorandum of decision of April 22, 2020, it improperly awarded interest on all sums claimed by the plaintiff as expectation damages for breach of contract in exhibit 16, including several sums claimed on the basis of payments received by the defendants outside of the six year limitation period. The total interest so awarded must also be adjusted downward to exclude all sums improperly awarded to the plaintiff for the detention of moneys to which the plaintiff did not become entitled within the six year

limitation period. The court later compounded this error by awarding the plaintiff an additional sum of prejudgment interest on the basis of the defendants' further alleged detention of those same sums for an additional 140 days beyond May 4, 2020, until final judgment was rendered on September 21, 2020. That additional award of prejudgment interest must also be reduced to exclude from it all interest improperly awarded on the basis of the alleged detention of sums which the plaintiff was barred from recovering by the statute of limitations.

The total prejudgment interest properly awarded by the court on the basis of the defendants' wrongful detention of the plaintiff's 50 percent shares of compensation received for the sale and/or licensing of the patented device within the six year limitation period must be determined in two steps. First, as to sums properly awarded to the plaintiff in the court's memorandum of decision through May 4, 2020, we need only add together all awards of prejudgment interest on those sums, as proposed by the plaintiff on exhibit 16 at the rate of 10 percent per year, and multiply that total by 0.45 to refigure such interest, as the court did, at the lower rate of 4.5 percent per year. The total of such properly awarded interest through May 4, 2020, as included in the larger award of interest ordered by the court in its memorandum of decision, is $191,748.60.

Finally, we must adjust the end date for the calculation of prejudgment interest from May 4, 2020, to September 21, 2020, which the court did when it rendered final judgment for the plaintiff. The court, however, did not calculate separate awards of additional prejudgment interest for each payment to which it found that the plaintiff was entitled on the basis of the defendants' further detention of the plaintiff's recoverable damages until September 21, 2020. Instead, it ordered an increase

in the total award of prejudgment interest it had previously ordered in its memorandum of decision on the basis of the further detention of all sums requested by the plaintiff as expectation damages, as listed in exhibit 16. To calculate what portion of that additional prejudgment interest award was ordered appropriately on the basis of the further wrongful detention of moneys to which the plaintiff became entitled during the six year limitation period, we must first determine what percentage of all expectation damages requested by the plaintiff in exhibit 16 the plaintiff's wrongfully withheld damages represented. Then, we must multiply the court's total additional prejudgment interest award by the decimal equivalent of that percentage to determine how much of such additional interest was properly awarded. Here, where the total expectation damages requested by the plaintiff in exhibit 16 was $1,637,289.04 and the total expectation damages lawfully claimed by the plaintiff for the defendants' breaches of contract within the limitation period was $996,039.97, the percentage of all requested damages which the plaintiff's recoverable damages represented was 60.8347 percent. By multiplying the court's total award of additional prejudgment interest, $28,240.20, by the decimal equivalent of that percentage, 0.608347, we calculate that the additional prejudgment interest that the court properly awarded to the plaintiff based on the defendants' continuing wrongful detention of moneys recoverable by it from May 4, 2020, to September 21, 2020, was $17,179.84. By adding that sum to the $191,748.60 in prejudgment interest that the court properly awarded to the plaintiff in its memorandum of decision on the basis of the defendants' previous wrongful detention of those same recoverable expectation damages until May 4, 2020, we have determined that the court properly awarded the plaintiff a total of $208,928.44 in prejudgment interest. By adding that adjusted, $208,928.44 award of prejudgment interest to the plaintiff's adjusted, $996,039.97

award of expectation damages for breaches of contract occurring within the six year limitation period for breach of contract claims, we calculate the plaintiff's proper adjusted total award for breaches of contract occurring within that limitation period as $1,204,968.41.

D

We next address whether the court appropriately awarded the plaintiff attorney's fees and costs under CUTPA. The defendants argue that, because the two tolling doctrines that the court improperly applied in rejecting their statute of limitations defense to the plaintiff's breach of contract claim are inapplicable to claims under CUTPA, the court improperly considered evidence of conduct occurring outside of the three year statute of limitations for CUTPA claims set forth in § 42-110g as a basis for concluding that they had violated CUTPA. The plaintiff responds that, even if the running of the CUTPA statute of limitations was not tolled by the fraudulent concealment doctrine and/or the continuing course of conduct doctrine, a substantial number of the defendants' bad faith breaches of contract on which the court based its finding of a CUTPA violation occurred within the three year CUTPA statute of limitations. Although we have already found that there is insufficient evidence to support the plaintiff's claims of tolling under either the fraudulent concealment doctrine or the continuing course of conduct doctrine, and thus agree with the defendants that its conduct outside of the three year limitation period cannot be found to have constituted an actionable CUTPA violation in this case, we agree with the plaintiff that the court's finding of a CUTPA violation must still be upheld on the basis of the defendants' proven bad faith breaches of contract that occurred within the statute of limitations, and thus that attorney's fees were properly awarded to it for the prosecution of that claim. Even so, because the court awarded attorney's fees for prosecution of both the

timely and the untimely portions of the plaintiff's CUTPA claim, we conclude that the case must be remanded to the trial court for a determination, if possible, of what portion of such attorney's fees were reasonably incurred to prosecute the timely portion of the plaintiff's claim.

The following additional facts and procedural history are relevant to this claim. In reviewing the plaintiff's CUTPA claim, the court first concluded that the parties' transactions were subject to CUTPA: "There can't be any doubt that this was a business transaction between the parties and that [the plaintiff] came out the financial loser. So, the real focus of inquiry here should be whether what Aferzon did and made ISI do was culpable enough to label an unfair trade practice." The court then concluded that Aferzon had violated CUTPA by breaching the agreement in bad faith, and listed several actions by him that supported its conclusion that he had so acted: "The court believes the evidence is clear and convincing that Aferzon breached his agreement not prompted by an honest mistake as to his rights or duties, but by an interested or sinister motive. Specifically, the court concludes that Aferzon knew he had an obligation to [the plaintiff] but contrived a variety of unscrupulous means to deprive [the plaintiff] of what it was due. He lied to [the plaintiff] about the status of the project. He ignored [its] requests for information. He disregarded two demands from lawyers. He contrived [a limited liability company] at least in part as a way to frustrate his agreement. He fabricated expenses to cause it to appear that the idea at issue wasn't profitable. He concealed his activities until the normal statute of limitations period expired and then invoked it in his defense." The court declined to award punitive damages or further compensatory damages for the violation but awarded attorney's fees under CUTPA. On September 15, 2020, the court awarded the plaintiff $756,000 in

attorney's fees and expenses. The defendants do not challenge the amount of the award but argue that the award of attorney's fees was legally erroneous.

We first set forth our standard of review. Section 42-110g (d) provides in relevant part: "In any action brought by a person under this section, the court may award, to the plaintiff, in addition to the relief provided in this section, costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery. . . ." "Awarding . . . attorney's fees under CUTPA is discretionary [pursuant to] § 42-110g (a) and (d) . . . and the exercise of such discretion will not ordinarily be interfered with on appeal unless the abuse is manifest or injustice appears to have been done. . . . The salient inquiry is whether the court could have reasonably concluded as it did. . . . [T]he term abuse of discretion does not imply a bad motive or wrong purpose but merely means that the ruling appears to have been made on untenable grounds." (Internal quotation marks omitted.) *MedValUSA Health Programs, Inc.* v. *MemberWorks, Inc.*, 109 Conn. App. 308, 315, 951 A.2d 26 (2008).

Because a finding of liability under CUTPA is a necessary prerequisite to an award of attorney's fees under CUTPA, we also set forth the applicable standard of review for a finding that a defendant violated CUTPA. See *Winakor* v. *Savalle*, 198 Conn. App. 792, 811, 234 A.3d 1122 ("[g]iven our conclusion that the defendant did not violate CUTPA, there is no basis for the plaintiff's recovery of any attorney's fees in the present case"), cert. granted, 335 Conn. 958, 239 A.3d 319 (2020). Section 42-110g (a) provides in relevant part: "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by [§] 42-110b, may bring an action . . . to recover actual damages. . . ." In other words, "CUTPA provides that

[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." (Internal quotation marks omitted.) *Landmark Investment Group, LLC* v. *Chung Family Realty Partnership, LLC*, 125 Conn. App. 678, 699, 10 A.3d 61 (2010), cert. denied, 300 Conn. 914, 13 A.3d 1100 (2011).

"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. . . . To the extent that [an appellant] is challenging the trial court's interpretation of CUTPA, our review is plenary. . . . [W]e review the trial court's factual findings under a clearly erroneous standard." (Citation omitted; internal quotation marks omitted.) *National Waste Associates, LLC* v. *Scharf*, 183 Conn. App. 734, 751, 194 A.3d 1 (2018). "[W]hether a defendant's acts constitute . . . deceptive or unfair trade practices under CUTPA, is a question of fact for the trier, to which, on appellate review, we accord our customary deference." (Internal quotation marks omitted.) *Landmark Investment Group, LLC* v. *Chung Family Realty Partnership, LLC*, supra, 125 Conn. App. 699.

The defendants are correct that the court engaged in no discussion of whether a statute of limitations applied to the plaintiff's CUTPA claim. Rather, when it discussed fraudulent concealment and continuing course of conduct, the court generally concluded, without narrowing its focus to particular claims, that "[*t*]*his lawsuit* is not barred by the statute of limitations." (Emphasis added.) Section 42-110g (f) provides that "[a]n action under this section may not be brought more than three years after the occurrence of a violation of this chapter." The court did not discuss the applicable statute of limitations or whether fraudulent concealment or a continuing course of conduct by the defendants could toll the running of that statute of limitations.[22] The defendants argue that neither fraudulent concealment nor a continuing course of conduct can toll the statute of limitations for a claim under CUTPA. See *Fichera* v. *Mine Hill Corp.*, 207 Conn. 204, 216, 541 A.2d 472 (1988). Although it does not appear that our courts have squarely addressed this issue, we need not reach the issue here because we have concluded that neither doctrine applies to the defendants' conduct in this case, nor, by extension, to their special defenses under any pleaded statute of limitations. See part I C of this opinion.

Accordingly, the defendants argue that, of the conduct described by the court in its discussion of CUTPA, "[t]he only activities occurring within the three years prior to [the plaintiff's] suit are Aferzon's disregarding of [the plaintiff's] lawyers' letters and his alleged litigation conduct," which actions assertedly cannot constitute CUTPA violations. It is clear from the court's memorandum of decision, however, that not all of the defendants' actions, as described by the court, were claimed to constitute unfair trade practices in violation of CUTPA

[22] The defendants did plead in their answer that the plaintiff's claims were barred by the statute of limitations set forth in § 42-110g.

but instead were described as evidence supporting the court's conclusion that Aferzon's breaches of the parties' agreement were made in bad faith, and that such bad faith breaches of contract are what constituted the alleged CUTPA violations. The court explained that "[o]rdinary contract breaches are not unfair trade practices. Breaches made in bad faith can be unfair trade practices. . . . This court believes the evidence is clear and convincing that Aferzon breached his agreement not prompted by an honest mistake as to his rights or duties, but by an interested or sinister motive." As the court explained, the defendants breached the agreement every time ISI received a payment from Alphatec and failed to notify or compensate the plaintiff per the agreement. ISI received thirty-four royalty payments for the sale and/or licensing of the patented device between 2010 and 2019, which it failed to share with the plaintiff in breach of the parties' agreement. Thirteen of those breaches occurred within the three year limitation period preceding the date of commencement of this action on July 16, 2018. Therefore, we review the court's decision awarding attorney's fees for the prosecution of the plaintiff's claim by addressing whether those thirteen breaches of contract are sufficient to establish a CUTPA violation.

First, we note that the court is correct that bad faith breaches of contract, but not ordinary breaches, can be found to constitute unfair trade practices under CUTPA. "[T]he same facts that establish a breach of contract claim may be sufficient to establish a CUTPA violation"; *Lester* v. *Resort Camplands International, Inc.*, 27 Conn. App. 59, 71, 605 A.2d 550 (1992); but not every contractual breach will rise to the level of a CUTPA violation. *Hudson United Bank* v. *Cinnamon Ridge Corp.*, 81 Conn. App. 557, 571, 845 A.2d 417 (2004). "[W]e never have suggested that . . . CUTPA claims are barred if the plaintiff suffered only an economic

loss and the loss arose solely from the breach of the contract. Rather, our focus in such cases has been on whether the defendant's breach of contract was merely negligent or incompetent, in which case the CUTPA claim was barred, or whether the defendant's actions would support a finding of intentional, reckless, unethical or unscrupulous conduct, in which case the contractual breach will support a CUTPA claim under the second prong of the cigarette rule." (Emphasis omitted.) *Ulbrich* v. *Groth*, 310 Conn. 375, 410, 78 A.3d 76 (2013).

Our Supreme Court has cited with approval language employed by federal courts indicating that "absent substantial aggravating circumstances, [a] simple breach of contract is insufficient to establish [a] claim under CUTPA . . . ." *Lydall, Inc.* v. *Ruschmeyer*, 282 Conn. 209, 248, 919 A.2d 421 (2007); id., 247 (defendant employee's breach of employment agreement and attempted takeover of plaintiff publicly traded corporation was insufficient to establish CUTPA violation in absence of showing that employee's attempted takeover was "in and of itself" unlawful). "In the absence of aggravating unscrupulous conduct, mere incompetence does not by itself mandate a trial court to find a CUTPA violation." *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 229, 990 A.2d 326 (2010); id., 230–31 (trial court's finding of no CUTPA violation was not clearly erroneous where defendant's breaches of contract "constituted nothing other than mere incompetence"); see also *IN Energy Solutions, Inc.* v. *Realgy, LLC*, 114 Conn. App. 262, 274–75, 969 A.2d 807 (2009) (breach of sales contract did not constitute CUTPA violation when trial court specifically found that plaintiff failed to prove that defendant's breach was unethical, unscrupulous, wilful or reckless); *Gaynor* v. *Hi-Tech Homes*, 149 Conn. App. 267, 279–80, 89 A.3d 373 (2014) (reversing trial court's award of CUTPA attorney's fees where evidence failed to support claim beyond mere breach of contract).

In *Landmark Investment Group, LLC* v. *Chung Family Realty Partnership, LLC*, supra, 125 Conn. App. 678, this court upheld a finding that the defendant had violated CUTPA by terminating an agreement in bad faith. The trial court listed nine factual findings in support of this conclusion. Id., 705–706. This court ruled that none of those findings was clearly erroneous, and affirmed the finding of bad faith. Id., 708. The court's ultimate conclusion was as follows: "The [trial] court's findings reveal that the defendant engaged in a pattern of bad faith conduct, seeking to escape its contractual obligations unfairly while negotiating a more favorable offer with . . . a third party. Given the wrongful termination and the aggravating circumstances, there is ample support for the trial court's conclusion that the defendant's actions violated CUTPA. Therefore, the court's finding of a CUTPA violation was not clearly erroneous." Id.

We begin with the court's finding that the defendants breached the contract in bad faith. "[I]t is axiomatic that the . . . duty of good faith and fair dealing is a covenant implied into a contract or a contractual relationship. . . . In other words, every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement. . . . The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's discretionary application or interpretation of a contract term. . . . To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith." (Internal quotation marks omitted.) *Renaissance Management*

Co. v. *Connecticut Housing Finance Authority*, 281 Conn. 227, 240, 915 A.2d 290 (2007).

"Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." (Internal quotation marks omitted.) *Keller* v. *Beckenstein*, 117 Conn. App. 550, 563–64, 979 A.2d 1055, cert. denied, 294 Conn. 913, 983 A.2d 274 (2009). "Whether a party has acted in bad faith is a question of fact, subject to the clearly erroneous standard of review." *Harley* v. *Indian Spring Land Co.*, 123 Conn. App. 800, 837, 3 A.3d 992 (2010).

First, we note that the facts supporting the court's conclusion that Aferzon acted in bad faith in breaching the agreement are not subject to the three year statute of limitations for CUTPA claims. The three year statute of limitations applies to the particular conduct that the court found to constitute unfair trade practices in violation of CUTPA, not to the subordinate factual findings supporting its conclusion that when Aferzon engaged in such conduct he was acting in bad faith. They are separate determinations. As we have explained, a number of the defendants' bad faith breaches of contract occurred within the three year limitation period, and each successive breach occurred in the course of and in furtherance of the same bad faith scheme.

On the basis of our review of the record, we conclude that the court's finding that Aferzon breached the agreement in bad faith is supported by the evidence. The court explained that Aferzon lied about the status of the project, ignored the plaintiff's requests for information, disregarded letters from the plaintiff's counsel, created ISI as a way to get around the agreement, and attempted

to fabricate expenses during litigation. There is support for each of these findings in the record. Therefore, it was not clearly erroneous for the court to conclude that Aferzon's repeated breaches of the agreement after engaging in such conduct were made in bad faith.

We next consider the court's subsequent conclusion that the defendants' bad faith breaches of the agreement constituted CUTPA violations. We iterate that a trial court's decision as to whether a defendant's acts constitute deceptive or unfair trade practices in violation of CUTPA is a question of fact that we review for clear error. *Landmark Investment Group, LLC* v. *Chung Family Realty Partnership, LLC*, supra, 125 Conn. App. 699–708.

The court's conclusion that the defendants committed unfair trade practices was not clearly erroneous. Breaches of contract can constitute CUTPA violations when found to have been committed in aggravating circumstances, with unscrupulous conduct, or in bad faith. See *Ulbrich* v. *Groth*, supra, 310 Conn. 410; *Landmark Investment Group, LLC* v. *Chung Family Realty Partnership, LLC*, supra, 125 Conn. App. 708. The defendants breached the agreement thirteen times within the applicable limitation period, and the court listed several aggravating circumstances, for which we have found support in the record, supporting its conclusion that these breaches were made in bad faith. In *Landmark Investment Group, LLC*, this court explained that even a single act of misconduct can constitute a CUTPA violation. See *Landmark Investment Group, LLC* v. *Chung Family Realty Partnership, LLC*, supra, 708.

Therefore, we affirm the court's finding of a CUTPA violation and its decision to award the plaintiff its attorney's fees. Because, however, the court engaged in no discussion of the applicable statute of limitations, and

several breaches on which it did rely in finding such a violation occurred outside of the three year limitation period, we must remand the case to the court with instructions to determine, if possible, what portion of the fees and costs it awarded under CUTPA were reasonably incurred to litigate that portion of the CUTPA claim that was not barred by the statute of limitations. The court should consider only the time spent litigating and establishing the breaches for which a recovery is permissible under CUTPA and the time spent establishing the factual basis for its finding that such actionable breaches were committed in bad faith. We recognize that it may be impracticable for the court to apportion the fees in this fashion; see *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 333, 63 A.3d 896 (2013) ("when certain claims provide for a party's recovery of contractual attorney's fees but others do not, a party is nevertheless entitled to a full recovery of reasonable attorney's fees if an apportionment is impracticable because the claims arise from a common factual nucleus and are intertwined"); see also *Heller* v. *D. W. Fish Realty Co.*, 93 Conn. App. 727, 734–36, 890 A.2d 113 (2006); but, this is not something that we can determine in the first instance on appeal. There may be some portion of the attorney's time that was definitively spent on violations occurring outside of the limitation period, for example, any time spent determining or litigating the cash value of the Alphatec stock transfer, which occurred in 2010, outside of the limitation period for CUTPA claims. Accordingly, we remand this case to the trial court with instructions to determine the amount of attorney's fees and costs that the plaintiff is entitled to recover, limited to those fees and costs reasonably incurred to prosecute the portion of its claim under CUTPA that was based on the defendants' bad faith breaches of the parties' contract within the three year

limitation period applicable to such claims under § 42-110g (f).

II

THE PLAINTIFF'S CROSS APPEAL

The plaintiff cross appeals from the court's award of offer of compromise interest. The plaintiff argues that the court committed multiple errors in its calculation of the amount of interest to which it is entitled based on the defendants' failure to accept its offer of compromise. The defendants have not filed an answering brief on the plaintiff's cross appeal. We agree with the plaintiff that the court erred in determining the amount of offer of compromise interest to which it was entitled in this case, and thus reverse the court's judgment with respect to that issue and remand this case with instructions to recalculate its award of offer of compromise in a manner consistent with this opinion.

The following additional facts and procedural history are relevant to this issue. On October 10, 2019, the plaintiff filed a unified offer of compromise pursuant to § 52-192a, offering to settle its claims against the defendants for $1,150,000.[23] The parties do not dispute

[23] General Statutes § 52-192a provides in relevant part: "(a) Except as provided in subsection (b) of this section, after commencement of any civil action based upon contract or seeking the recovery of money damages, whether or not other relief is sought, the plaintiff may, not earlier than one hundred eighty days after service of process is made upon the defendant in such action but not later than thirty days before trial, file with the clerk of the court a written offer of compromise signed by the plaintiff or the plaintiff's attorney, directed to the defendant or the defendant's attorney, offering to settle the claim underlying the action for a sum certain. For the purposes of this section, such plaintiff includes a counterclaim plaintiff under section 8-132. The plaintiff shall give notice of the offer of compromise to the defendant's attorney or, if the defendant is not represented by an attorney, to the defendant himself or herself. Within thirty days after being notified of the filing of the offer of compromise and prior to the rendering of a verdict by the jury or an award by the court, the defendant or the defendant's attorney may file with the clerk of the court a written acceptance of the offer of compromise agreeing to settle the claim underlying the action for the sum certain specified in the plaintiff's offer of compromise. Upon

that the offer was appropriately made more than 180 days after the defendants were served with legal process in this action, more than 30 days prior to the first day of trial and within 18 months of the filing of the complaint. The defendants did not accept the offer. On April 22, 2020, the court rendered judgment for the plaintiff, ultimately awarding it $1,587,289 in expectation damages on its breach of contract claim, prejudgment interest in the amount of $504,054 under § 37-3a, and $756,000 in expenses and attorney's fees under CUTPA. On May 21, 2020, the plaintiff moved for the court to award offer of compromise interest, claiming "[the plaintiff] is entitled to mandatory offer of compromise interest at the rate of 8 percent per year on the total of (1) [the plaintiff's] expectation damages, (2)

such filing and the receipt by the plaintiff of such sum certain, the plaintiff shall file a withdrawal of the action with the clerk and the clerk shall record the withdrawal of the action against the defendant accordingly. If the offer of compromise is not accepted within thirty days and prior to the rendering of a verdict by the jury or an award by the court, the offer of compromise shall be considered rejected and not subject to acceptance unless refiled. Any such offer of compromise and any acceptance of the offer of compromise shall be included by the clerk in the record of the case. . . .

"(c) After trial the court shall examine the record to determine whether the plaintiff made an offer of compromise which the defendant failed to accept. If the court ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain specified in the plaintiff's offer of compromise, the court shall add to the amount so recovered eight per cent annual interest on said amount, except in the case of a counterclaim plaintiff under section 8-132, the court shall add to the amount so recovered eight per cent annual interest on the difference between the amount so recovered and the sum certain specified in the counterclaim plaintiff's offer of compromise. The interest shall be computed from the date the complaint in the civil action or application under section 8-132 was filed with the court if the offer of compromise was filed not later than eighteen months from the filing of such complaint or application. If such offer was filed later than eighteen months from the date of filing of the complaint or application, the interest shall be computed from the date the offer of compromise was filed. The court may award reasonable attorney's fees in an amount not to exceed three hundred fifty dollars, and shall render judgment accordingly. This section shall not be interpreted to abrogate the contractual rights of any party concerning the recovery of attorney's fees in accordance with the provisions of any written contract between the parties to the action."

prejudgment interest and (3) attorney's fees and expenses awarded, calculated from July 19, 2018[24] (the date [the plaintiff] filed its complaint) through the date this court enters final judgment." (Footnote added.)

The court rendered final judgment for the plaintiff on September 21, 2020, awarding it $90,968.00 in offer of compromise interest. Before explaining its calculations, the court expressed its concern that the offer of compromise interest it awarded would be too severe: "The court is concerned that the 8 percent interest rate dictated by the offer of compromise statute is today extraordinary. It is a penalty whose severity has markedly increased. . . . The idea is to provide compensation for the wrongful detention of the money and a significant but not draconian consequence for failing to accept the offer of compromise." To address these concerns, the court deviated from the statutory language of § 52-192a in three ways. First, it awarded the plaintiff interest on the difference between the amount it recovered in the action and the amount of the settlement proposed in the offer of compromise, rather than on the total amount of the plaintiff's recovery. Second, the court did not include its award of prejudgment interest to the plaintiff under § 37-3a in the total amount of the court's award of money damages for the purpose of calculating the amount of offer of compromise interest it should award.[25] Third, not wanting to award "interest on the interest," the court subtracted 4.5 percent, representing the interest it had already awarded to the

[24] Section 52-192a specifies that the interest should be calculated from the date the complaint was filed. The court appropriately used this date.

[25] The court stated: "To make this adjustment, for purposes of the offer of compromise statute, the court treats as the amount recovered the damages award in the amount of $1,587,289 and the attorney's fee award of $756,000 for a total recovery of $2,343,289. The offer of compromise was for $1,150,000. The extra amount recovered gets the 8 percent rate. It is derived by subtracting from the total recovery of $2,343,289 the $1,150,000 offer of compromise amount yielding an amount in excess of the offer of $1,193,289."

plaintiff under § 37-3a, from the 8 percent interest rate established by statute for the calculation of offer of compromise interest in § 52-192a, and thus applied an interest rate of 3.5 percent when calculating the amount of the plaintiff's offer of compromise award. Ultimately, applying a 3.5 percent annual interest rate to the reduced sum of $1,193,289, which did not include the prejudgment interest it had awarded to the plaintiff, the court awarded the plaintiff a total of $90,968 in offer of compromise interest.

Each of the three adjustments detailed previously was improper. We address each in turn, but first set forth our standard of review. "[The purpose of § 52-192a] is to encourage pretrial settlements and, consequently, to conserve judicial resources. . . . [T]he strong public policy favoring the pretrial resolution of disputes . . . is substantially furthered by encouraging defendants to accept reasonable offers of judgment.[26]. . . Section 52-192a encourages fair and reasonable compromise between litigants by penalizing a party that fails to accept a reasonable offer of settlement. . . . In other words, interest awarded under § 52-192a is solely related to a defendant's rejection of an advantageous offer to settle before trial and his subsequent waste of judicial resources." (Citations omitted; footnote added; internal quotation marks omitted.) *Blakeslee Arpaia Chapman, Inc.* v. *EI Constructors, Inc.*, 239 Conn. 708, 742, 687 A.2d 506 (1997). "The question of whether the trial court properly awarded interest pursuant to § 52-192a is one of law subject to

[26] We note that § 52-192a was amended in 2005 by, inter alia, the substitution of "offer of compromise" for "offer of judgment" and other technical changes. See Public Acts 2005, No. 05-275, § 4. The general function of the statute remains the same and, thus, case law from before the amendment is still applicable. See, e.g., *Georges* v. *OB-GYN Services, P.C.*, 335 Conn. 669, 680–81, 240 A.3d 249 (2020) (applying case law that predates amendment in discussion concerning offer of compromise interest).

de novo review. . . . It is well established that [§] 52-192a provides for interest until the date of judgment. . . . Section 52-192a (b) requires a trial court to award interest to the prevailing plaintiff from the date of the filing of a complaint to the date of judgment whenever: (1) a plaintiff files a valid offer of judgment within eighteen months of the filing of the complaint in a civil complaint for money damages; (2) the defendant rejects the offer of judgment; and (3) the plaintiff ultimately recovers an amount greater than or equal to the offer of judgment." (Citations omitted; internal quotation marks omitted.) *Aubin* v. *Miller*, 64 Conn. App. 781, 800, 781 A.2d 396 (2001). "The interest awarded is in no way discretionary." *Paine Webber Jackson & Curtis*, *Inc.* v. *Winters*, 22 Conn. App. 640, 653, 579 A.2d 545, cert. denied, 216 Conn. 820, 581 A.2d 1055 (1990).

We first address the court's decision to apply the interest rate to the difference between the amount recovered by the plaintiff and the amount of the settlement proposed in the offer of compromise, rather than to the total amount recovered by the plaintiff. Section 52-192a (c) expressly provides that "the court *shall* add to the *amount so recovered* eight per cent annual interest on said amount." (Emphasis added.) The statute further sets forth, however, that in the case of a counterclaim plaintiff under General Statutes § 8-132, the court "*shall* add to the amount so recovered eight per cent annual interest *on the difference* between the amount so recovered and the sum certain specified in the counterclaim plaintiff's offer of compromise." (Emphasis added.) General Statutes § 52-192a (c). Under the statute, the court must calculate interest on the difference *only* when the offer of compromise was filed by a counterclaim plaintiff under § 8-132. The plaintiff is not a counterclaim plaintiff. The statute mandates that the court apply offer of compromise interest "on the amount so recovered." "[B]ased upon the statutory

language of § 52-192a, it [would be] plain error for the trial court to compute interest only on a portion of the award. . . . The plain language of . . . § 52-192a specifies that the court shall add to the *amount so recovered* [8] percent annual interest on said amount. . . . The trial court clearly did not act in accordance with the mandate of § 52-192a when it awarded interest only on the damages portion of the award. . . . [I]nterest must be awarded on the entire award, that is, the amount so recovered." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Gillis* v. *Gillis*, 21 Conn. App. 549, 556, 575 A.2d 230, cert. denied, 215 Conn. 815, 576 A.2d 544 (1990); see also C*ardenas* v. *Mixcus*, 264 Conn. 314, 323, 823 A.2d 321 (2003) (holding that offer of compromise interest must be calculated on total amount of jury verdict rather than amount remaining after apportionment to employer to satisfy amount it had paid plaintiff as workers' compensation benefits). It was error for the court to calculate the plaintiff's award of offer of compromise interest on the basis of the difference between the amount of its recovery and the amount of its offer of compromise.

We next address the court's failure to include the prejudgment interest awarded under § 37-3a in the plaintiff's total recovery when calculating its award of offer of compromise interest. This court has explicitly held that an award under § 37-3a must be included in the calculation of interest awarded under § 52-192a. "Unlike § 37-3a, § 52-192a does not depend on an analysis of the underlying circumstances of the case or a determination of the facts. Section 52-192a applies only to civil actions on contracts or for the recovery of money. Wrongful detention of money need not be found. *The interest awarded is in no way discretionary*. The statute provides that the court shall examine the record after trial, and if the plaintiff's recovery exceeds the rejected offer of judgment found in the record, the court

shall add interest to that recovery. In an appropriate case, both statutes could apply; the defendant could owe interest as damages on the debt and then owe interest on the total amount based on his refusal to settle." (Emphasis altered.) *Paine Webber Jackson & Curtis, Inc.* v. *Winters*, supra, 22 Conn. App. 653. An offer of compromise, like the offer of judgment that preceded it, is "an offer to settle the entire case, including claims both known and unknown, and both certain and uncertain. . . . In addition to money saved by avoiding litigation expenses, a defendant might also save the discretionary interest of § 37-3a. A defendant must assess the degree of possibility that interest may be awarded in the event that the trier determines that money has been detained by a defendant after it became due. The defendants here risked that a judgment would not include § 37-3a interest. The vagaries of the components of settlement include a possibility that § 37-3a interest will be awarded in some cases. In the present case, the possibility became reality." (Citation omitted; internal quotation marks omitted.) *Flynn* v. *Kaumeyer*, 67 Conn. App. 100, 107–108, 787 A.2d 37 (2001); see also *Gillis* v. *Gillis*, supra, 21 Conn. App. 556 (finding that prejudgment interest awarded under § 37-3a must be included in total amount recovered when calculating offer of judgment interest). Therefore, interest must be awarded on the total amount recovered, including prejudgment interest.

Lastly, we discuss the court's reduction of the percentage of the plaintiff's recovery awarded as offer of compromise interest. "[Section] 52-192a provides for *mandatory* imposition of interest at a set rate, unlike § 37-3a . . . and affords no allowance for the discretion of the court. (Citation omitted; emphasis in original.) *Ceci Bros., Inc.* v. *Five Twenty-One Corp.*, 81 Conn. App. 419, 430, 840 A.2d 578, cert. denied, 268 Conn. 922, 846 A.2d 881 (2004). As we have stated, "[t]he interest

awarded is in no way discretionary." *Paine Webber Jackson & Curtis, Inc.* v. *Winters*, supra, 22 Conn. App. 653. A comparison between §§ 37-3a and 52-192a informs our conclusion. Section 37-3a provides that "interest at the rate of ten per cent a year, and no more, *may* be recovered and allowed in civil actions . . . as damages for the detention of money after it becomes payable." (Emphasis added.) This statute gives trial courts the discretion to decide whether to award prejudgment interest at all and the rate to apply. See *Riley* v. *Travelers Home & Marine Ins. Co.*, 173 Conn. App. 422, 461–62, 163 A.3d 1246 (2017), aff'd, 333 Conn. 60, 214 A.3d 345 (2019). By contrast, § 52-192a provides that "the court *shall* add to the amount so recovered eight per cent annual interest on said amount . . . ." (Emphasis added.) Unlike § 37-3a, which establishes 10 percent as an optional maximum, § 52-192a states that the court shall apply 8 percent. Our Supreme Court has stated that use of the word shall generally evidences an intent that the statute be interpreted as mandatory; see, e.g., *DeMayo* v. *Quinn*, 315 Conn. 37, 43, 105 A.3d 141 (2014); and, indeed, this court has consistently interpreted § 52-192 as mandatory. See, e.g., *Ceci Bros., Inc.* v. *Five Twenty-One Corp.*, supra, 430. It was improper for the court to calculate the offer of compromise award at the reduced rate of 3.5 percent per year instead of at the mandatory statutory rate of 8 percent per year.

Accordingly, on the plaintiff's cross appeal, we reverse the court's judgment awarding offer of compromise interest to the plaintiff and remand this case to the trial court with instructions to recalculate the amount of that award in a manner consistent with this opinion after determining the amount of attorney's fees and costs to which the plaintiff is entitled under CUTPA and adding that amount to the plaintiff's adjusted total damages for breach of contract.

The judgment is reversed only with respect to the determination that the statute of limitations was tolled as to the plaintiff's breach of contract claim, the amount of damages awarded on the plaintiff's breach of contract claim, the amount of attorney's fees and costs awarded on the plaintiff's CUTPA claim, and the amount of the award of offer of compromise interest, and the case is remanded with direction (1) to render judgment in favor of the plaintiff on the breach of contract claim in the modified amount of $1,204,968.41, (2) to determine, if possible, the amount of attorney's fees and costs that were reasonably incurred by the plaintiff to prosecute that portion of its CUTPA claim that was based on unfair trade practices committed by the defendants within the three year statute of limitations applicable to such claims, and (3) to recalculate the award of offer of compromise interest in a manner consistent with this opinion, after determining the amount of attorney's fees and costs to be awarded on the plaintiff's CUTPA claim and recalculating the total amount of the plaintiff's recovery herein; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOSEPH FIELDS (AC 43115)

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

Syllabus

Convicted, after a jury trial, of the crimes of operating a motor vehicle while under the influence of intoxicating liquor or drugs and operating a motor vehicle while having an elevated blood alcohol content, the defendant appealed to this court, claiming that the trial court improperly declined to suppress evidence of his performance of a field sobriety test, a search warrant application and his blood alcohol content because that evidence was the tainted fruit of an illegal detention of him by the police. Following a report of a one vehicle accident on Interstate 84, O, a state trooper, was dispatched to the scene. While en route, O was informed by the

dispatcher, who was watching the site through live feed cameras, that the two occupants of the vehicle were running from the scene. When O arrived at the scene, she observed the defendant and another person walking along the highway approximately 300 feet from the crashed vehicle. O approached them and briefly placed them in handcuffs for her safety and to prevent them from fleeing further. When another trooper arrived, O removed the handcuffs and began to administer field sobriety tests to the defendant, who was the driver of the vehicle. While O was speaking with him, she detected the odor of alcohol coming from his breath and noticed that his speech was slow and slurred and that his eyes were "glossy." The defendant failed the first test and declined to perform another. Thereafter, the defendant was transported to a hospital. O remained at the scene where she obtained an account of the accident by the person who had reported it. He told O that he had observed the defendant's vehicle travelling at a high rate of speed, slide out of control and crash and that, when he spoke with the defendant, he could smell alcohol on his breath. O also inspected the defendant's vehicle and found an empty beer bottle and an empty bottle of liqueur. Subsequently, O prepared an application for a search and seizure warrant with a supporting affidavit to obtain the toxicology test results from blood and urine samples taken from the defendant while he was in the emergency department of the hospital. The trial court issued the warrant, and O obtained the toxicology test results, which showed that the defendant's blood alcohol content was two and one-half times the statutory limit. Prior to trial, the defendant filed a motion to suppress any evidence that had been unlawfully obtained by the police. The trial court granted the motion as to any evidence obtained by the police while the defendant was handcuffed and denied it as to any evidence obtained after the handcuffs were removed, including evidence of the failed field sobriety test and the defendant's blood alcohol content. *Held* that, contrary to the defendant's contention that evidence of the field sobriety test, the search warrant application and his blood alcohol content were the tainted fruit of an illegal detention, O's detention of the defendant was constitutionally permissible, as the totality of the circumstances gave rise to a reasonable and articulable suspicion that a crime had been committed, and, therefore, O was permitted to detain the defendant to maintain the status quo for a brief period to enable her to investigate; moreover, even if this court assumed that the field sobriety test was the fruit of an illegal detention and should have been suppressed, evidence of the defendant's blood alcohol content was not subject to suppression, as it was admissible under the independent source doctrine because the search warrant contained ample independent evidence supporting a finding of probable cause and, in light of that untainted evidence, it was inconceivable that O would not have sought a search warrant for the defendant's blood test results, irrespective of the additional information purportedly gained from the allegedly tainted field sobriety test.

Argued May 17—officially released September 28, 2021

Procedural History

Substitute information charging the defendant with the crimes of operating a motor vehicle while under the influence of intoxicating liquor or drugs, operating a motor vehicle while having an elevated blood alcohol content and evasion of responsibility in the operation of a motor vehicle, brought to the Superior Court in the judicial district of New Haven, geographical area number seven, where the court, *Grossman*, *J.*, denied in part the defendant's motion to suppress certain evidence; thereafter, the case was tried to the jury before *Grossman*, *J.*; verdict and judgment of guilty of operating a motor vehicle while under the influence of intoxicating liquor or drugs and operating a motor vehicle while having an elevated blood alcohol content, from which the defendant appealed to this court. *Affirmed.*

Kirstin B. Coffin, assigned counsel, with whom, on the brief, was *David J. Reich*, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *James Dinnan*, supervisory assistant state's attorney, for the appellee (state).

Opinion

NORCOTT, J. The defendant, Joseph Fields, appeals from the judgment of conviction, rendered after a jury trial, of operating a motor vehicle while under the influence of intoxicating liquor or drugs and operating a motor vehicle while having an elevated blood alcohol content in violation of General Statutes § 14-227a (a) (1) and (2), respectively. The defendant claims that the trial court improperly declined to suppress evidence of his performance of a field sobriety test and evidence

of his blood alcohol content, the latter of which was obtained pursuant to a search warrant application,[1] because that evidence was the tainted fruit of his unlawful detention by the police. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our discussion. On August 2, 2017, at approximately 11:30 p.m., Glenn L. Bossie was operating his company's dump truck on Interstate 84. As he was driving down the right-hand lane, Bossie observed through the truck's mirrors a car approaching from behind at a high rate of speed. He then watched the car pull behind him, immediately pass his truck sideways, strike the center barrier, cross back over the highway, and then come to rest in a grassy area off of the highway. Bossie stopped his truck and approached the damaged, heavily smoking car to determine if its passengers were hurt. He observed a female, later identified as Kori Charette, walking up the embankment to the Route 691 interchange. Bossie contacted the police to report the accident.

Bossie then approached the defendant, who was in the driver's seat of the car. Bossie noticed that the

[1] In his principal appellate brief, the defendant continually argues that the *arrest warrant* application was the tainted fruit of the poisonous tree and should have been suppressed. The defendant argues, inter alia, that he "should be able to suppress the field sobriety test and the arrest warrant, which allowed the state to test [the] alcohol levels in his blood" and that "the arrest warrant application and the blood alcohol findings should also be suppressed considering the fact that the judge would have considered the field sobriety test in signing the warrant to seize his medical records." It is undisputed, however, that the search warrant application, rather than the arrest warrant application, was used to seize the evidence of the defendant's blood alcohol content. Accordingly, we conclude that the defendant's references to the arrest warrant application are mistaken, and we will refer in this opinion to the allegedly tainted application as the search warrant application. See *Papagorgiou* v. *Anastopoulous*, 29 Conn. App. 142, 148–49, 613 A.2d 853 ("Neither this court nor our Supreme Court is bound by the issues as framed by the parties in their statement of the issues. Rather, our

defendant strongly smelled of alcohol. As Bossie spoke with the defendant, Charette began yelling, "hey, hey . . . we got to get outta of here, we got to get outta of here." The defendant, after assuring Bossie that he was unharmed, followed Charette up the embankment and started hitchhiking on the ramp to Route 691. Bossie relayed this information to the 911 dispatcher. A truck stopped, and the defendant and Charette began running to get to the vehicle. The police, however, arrived at the scene as they were running to the truck, and the truck left the scene.

Trooper Fawn Ouellette was dispatched to the scene of the accident. As she was traveling to the scene, the dispatcher was watching the site through live feed cameras of the Department of Transportation (department). The dispatcher informed Trooper Ouellette that there was "a one car accident into the guardrail and that there were . . . two occupants running from the scene." When Trooper Ouellette arrived at the scene, she observed the defendant and Charette walking down the right shoulder of the highway approximately 300 feet from where the vehicle involved in the crash was stopped. She approached them and briefly placed them in handcuffs for her safety and to prevent them from fleeing further. Another trooper arrived shortly thereafter to assist her.

Trooper Ouellette removed the handcuffs from the defendant and Charette, and she began administering field sobriety tests to the defendant. While speaking with the defendant, Trooper Ouellette noticed that his eyes were "glossy" and that his speech was slow and slurred. She also detected the odor of an alcoholic beverage coming from his breath. Trooper Ouellette administered the horizontal gaze nystagmus test[2] to the defen-

analysis is addressed to the contents of the brief."), cert. denied, 224 Conn. 919, 618 A.2d 527 (1992).

[2] Trooper Ouellette testified that the horizontal gaze nystagmus test checks for signs of impairment by showing involuntary eye movements that are indicative of alcohol or drug consumption.

dant, and he failed all three portions of the test. Trooper Ouellette then asked the defendant to perform another field sobriety test, the walk and turn test, but the defendant declined, citing neck pain. Thereafter, the defendant was transported to Saint Mary's Hospital in Waterbury. Trooper Ouellette remained at the scene, where she obtained Bossie's account of the accident. She also examined the defendant's car and found inside an empty bottle of beer, an empty bottle of Jägermeister liqueur, and two unopened bottles of vodka.

While the defendant was in the emergency department of the hospital, hospital personnel took blood and urine samples from him. Trooper Ouellette sought to obtain the toxicology test results from these samples through a search and seizure warrant. Trooper Ouellette prepared an affidavit as part of an application for a search and seizure warrant and attested that (1) she was dispatched to a motor vehicle accident and was advised en route that the two occupants in the vehicle were running from the scene, (2) when she arrived at the scene, she saw the defendant and Charette walking down the right shoulder of the highway approximately 300 feet from the vehicle, (3) upon speaking with the defendant, she immediately detected the odor of alcohol coming from his breath and noticed that his speech was slow and slurred and his eyes were glossy, (4) after the defendant was transported to the hospital, she inspected the vehicle and observed an empty bottle of beer, an empty bottle of Jägermeister, and two full bottles of vodka, and (5) a witness told Trooper Ouellette at the scene that he had observed the defendant's vehicle traveling at a high rate of speed, slide out of control, and crash and that, when he spoke to the defendant, he could smell alcohol on his breath. Thereafter, the court issued the warrant, and Trooper Ouellette obtained the toxicology test results. The toxicology report showed that the defendant had a blood alcohol

content of 0.20 percent, two and one-half times the statutory limit of 0.08 percent. See General Statutes § 14-227a (a) (2).

The defendant was charged by way of a long form information with operating a motor vehicle while under the influence of intoxicating liquor or drugs in violation of § 14-227a (a) (1), operating a motor vehicle with an elevated blood alcohol content in violation of § 14-227a (a) (2), and evasion of responsibility in the operation of a motor vehicle in violation of General Statutes § 14-224 (b) (3).[3]

On February 5, 2019, the defendant filed a motion to suppress any evidence that had been unlawfully obtained by the police. The defendant's motion to suppress was broad and sought suppression of "any and all evidence, whether tangible or intangible, and including statements and identifications . . . seized or obtained illegally, without a warrant or probable cause, or in violation of the Connecticut or United States constitution." The motion further stated that the defendant "is presently unable to be more specific and detailed in the present motion" and reserved the right to amend and particularize it after defense counsel completed her investigation of the case. A suppression hearing was held by the court, *Grossman*, *J.*, on April 25 and 26, 2019. During the hearing, Trooper Ouellette testified regarding her investigation of the accident and her detention of the defendant at the scene. Following the evidentiary portion of the hearing, the defendant moved to suppress all evidence obtained after he was detained by Trooper Ouellette, including the field sobriety test and his blood test results. The defendant argued that

[3] The defendant also was charged with operation of a motor vehicle without minimum insurance in violation of General Statutes § 14-213b (a). The court granted the defendant's motion for a judgment of acquittal on that charge in the absence of an objection from the state, and the charge was omitted from the substitute information that was submitted to the jury.

Trooper Ouellette's handcuffing of him constituted an illegal detention because she lacked a particular suspicion that he was engaged in any criminal wrongdoing. As a result, in the defendant's view, all of the evidence that followed this illegal detention was tainted fruit of the poisonous tree and was subject to suppression.[4] In response, the state conceded that Trooper Ouellette had detained the defendant. The state argued, however, that the detention was lawful because Trooper Ouellette had a reasonable and articulable suspicion that criminal activity was afoot. The state also contended that Trooper Ouellette's use of handcuffs was reasonable under the circumstances because she had received information that individuals were fleeing the scene of the accident and she was alone and dealing with two suspects at night.

The court granted in part and denied in part the defendant's motion to suppress. The court granted the motion with respect to evidence of any statements that the defendant had made while he was handcuffed on the ground that Trooper Ouellette was not justified in handcuffing the defendant because there was no indication that such force was necessary. The court denied the motion to suppress with respect to any evidence obtained after the handcuffs were removed, including evidence of the failed field sobriety test and the defendant's blood alcohol content. The court found that it was not unreasonable for Trooper Ouellette to suspect that the accident might have been related to an incident of drunk driving and that she was justified in requesting that the defendant perform field sobriety tests. It further found that evidence of the defendant's blood alcohol content was not subject to suppression for the additional reason that it had been obtained through a valid

[4] "It is axiomatic that [u]nder the exclusionary rule, evidence must be suppressed if it is found to be the fruit of prior police illegality." (Internal quotation marks omitted.) *State* v. *Heck*, 128 Conn. App. 633, 642–43, 18 A.3d 673, cert. denied, 301 Conn. 935, 23 A.3d 728 (2011).

search warrant that would have been granted regardless of any reference therein to the defendant's performance of field sobriety tests.

Trial began on April 30, 2019. On May 2, 2019, the jury found the defendant guilty of operating a motor vehicle while under the influence of intoxicating liquor or drugs and operating a motor vehicle with an elevated blood alcohol content. The jury found him not guilty of evasion of responsibility in the operation of a motor vehicle. On May 9, 2019, the court sentenced the defendant to a term of six months of incarceration, execution suspended after thirty days, and twenty-four months of probation. This appeal followed.

On appeal, the defendant argues that Trooper Ouellette illegally detained him because he was not committing any crime at the time that she handcuffed him. As a result, the defendant claims that the court erred by not suppressing evidence of his field sobriety test, the search warrant application, and his blood alcohol content because they were the fruits of an illegal detention. In response, the state agrees that the defendant was detained when Trooper Ouellette handcuffed him. The state contends, however, that the defendant's detention was not illegal because Trooper Ouellette possessed a reasonable and articulable suspicion that criminal activity, namely driving while intoxicated, had occurred. Additionally, the state argues that, even if evidence of the field sobriety test was fruit of an unlawful detention, the evidence of the defendant's blood alcohol content was untainted by any illegality because the search warrant application contained ample independent evidence supporting a finding of probable cause for the seizure of the defendant's blood test results. We agree with the state that the defendant's detention was not illegal and that evidence of his blood alcohol content was untainted.

We are guided by the following standard of review and relevant legal principles. "Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts [found by the trial court] . . . ." (Internal quotation marks omitted.) *State* v. *Davis*, 331 Conn. 239, 246, 203 A.3d 1233 (2019).

"Under the fourth amendment to the United States constitution, and under article first, [§§ 7 and 9, of the] Connecticut constitution, a police officer may briefly detain an individual for investigative purposes if the officer has a reasonable and articulable suspicion that the individual has committed or is about to commit a crime." (Internal quotation marks omitted.) Id., 247. "Reasonable and articulable suspicion is an objective standard that focuses not on the actual state of mind of the police officer, but on whether a reasonable person, having the information available to and known by the police, would have had that level of suspicion. . . . Whether a reasonable and articulable suspicion exists depends on the totality of the circumstances. . . .

"[I]n justifying [a] particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. . . . In determining whether a detention is justified in a given case, a court must consider if, relying on the whole picture, the detaining officers had a particularized and objective basis for suspecting the particular person stopped of criminal activity. When reviewing the legality of a stop, a court must examine the specific information available to the police officer at the time

of the initial intrusion and any rational inferences to be derived therefrom. . . . A recognized function of a constitutionally permissible stop is to maintain the status quo for a brief period of time to enable the police to investigate a suspected crime. . . .

"[E]ffective crime prevention and detection . . . [underlie] the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. . . . Therefore, [a]n investigative stop can be appropriate even where the police have not observed a violation because a reasonable and articulable suspicion can arise from conduct that alone is not criminal. . . . In evaluating the validity of such a stop, courts must consider whether, in light of the totality of the circumstances, the police officer had a particularized and objective basis for suspecting the particular person stopped of criminal activity." (Citations omitted; internal quotation marks omitted.) *State* v. *Barone*, 154 Conn. App. 543, 555–56, 107 A.3d 490, cert. denied, 315 Conn. 928, 112 A.3d 778 (2015).

We conclude that Trooper Ouellette's detention of the defendant was constitutionally permissible. As Trooper Ouellette was traveling to the scene of the accident, she received information from the dispatcher that there was a single car accident into a guardrail and that the two occupants of the car were fleeing from the scene. The dispatcher's information that the two occupants were running from the scene was based both on the dispatcher's firsthand viewing of the scene through the department's live feed cameras and on Bossie's statements over the phone that the occupants were attempting to hitchhike. On arriving at the scene, Trooper Ouellette also observed the defendant and Charette walking down the right shoulder of the highway

approximately 300 feet from where the vehicle involved in the crash was stopped. The totality of the circumstances, which included an unexplained single car accident late on a summer night and reports of the two occupants of the vehicle attempting to leave the scene, thus gave rise to a reasonable and articulable suspicion that a crime had been committed.[5] See *State* v. *Dotson*, 154 Conn. App. 621, 623–25, 108 A.3d 1143 (2015) (police had reasonable and articulable suspicion that criminal activity was afoot when defendant drove at higher than normal rate of speed, failed to heed flashlight beam shined on him by officer, and made K-turn during which his front tire mounted sidewalk); *State* v. *Jensen*, 109 Conn. App. 617, 625–26, 952 A.2d 95 (2008) (police had reasonable and articulable suspicion that defendant was operating vehicle under influence of intoxicating liquor or drugs when identifiable citizen informant reported erratic driving and details of defendant's vehicle was corroborated by police); *State* v. *Kimble*, 106 Conn. App. 572, 598, 942 A.2d 527 ("[f]light from the police properly can be considered in determining whether a reasonable and articulable basis of suspicion exists [when] the defendant flees before the police attempt to stop him" (internal quotation marks omitted)), cert. denied, 286 Conn. 912, 950 A.2d 1289 (2008).

[5] In his appellate brief, the defendant argues that the fact that the jury found him not guilty of evasion of responsibility means that Trooper Ouellette did not have a reasonable and articulable suspicion that a crime had been committed when she detained him. The defendant has cited no authority in support of his proposition that an acquittal on that charge compels the conclusion that Trooper Ouellette did not have a reasonable and articulable suspicion that the defendant had committed a crime, nor are we aware of any Connecticut authority that stands for such a proposition. Indeed, it is well established that the standards of proof for a reasonable and articulable suspicion and a conviction are different. See *State* v. *Johnson*, 165 Conn. App. 255, 289, 138 A.3d 1108 ("[i]t is axiomatic that the state is required to prove all the essential elements of the crimes charged beyond a reasonable doubt in order to obtain a conviction" (internal quotation marks omitted)), cert. denied, 322 Conn. 904, 138 A.3d 933 (2016); *State* v. *Barone*, supra, 154 Conn. App. 555–56 (setting forth reasonable and articulable suspicion standard). The defendant's argument, therefore, has no basis in law.

As a result, Trooper Ouellette was permitted to detain the defendant to maintain the status quo for a brief period of time to enable her to investigate. See *State* v. *Barone*, supra, 154 Conn. App. 555–56.

The defendant relies on *State* v. *Davis*, supra, 331 Conn. 239, for his contention that his field sobriety test, the search warrant application, and his blood alcohol content were the tainted fruit of an illegal detention. Specifically, he argues that Trooper's Ouellette's use of handcuffs to detain him was illegal because he was not committing any crime at the time of the restraint and that, as a result, the fruits of that illegal detention were subject to suppression. We disagree.

In *Davis*, the police received an anonymous 911 telephone call regarding " 'a young man [who] ha[d] a handgun.' " Id., 242. The caller reported that he could see " 'a whole bunch of men' " gathered around a black Infiniti and that one of these men was carrying a handgun. Id. The caller, however, could not identify the specific person who was carrying the gun because all of the men were wearing dark clothing. Id. When the police arrived at the scene, they observed six men standing around a black Infiniti. Id., 243. As they approached the men, the men walked away, until the police ordered them to stop. Id. Five of the men stopped but one of them, the defendant, continued walking away from the police. Id. As he was walking away, the defendant held his right hand at his waist in front of his body, extended his arm, and dropped an object into a garbage can. Id. Shortly after dropping the object, the defendant turned around and said something to the effect of " 'who, me?' " Id. The police arrested the defendant, and a subsequent search of the garbage can produced a nine millimeter handgun. Id.

The defendant was charged with criminal possession of a pistol and carrying a pistol without a permit. Id.

Thereafter, he filed a motion to suppress the handgun, claiming that his detention violated the fourth amendment to the United States constitution and article first, §§ 7 and 9, of the Connecticut constitution, and that the search of the garbage can was tainted by his unconstitutional seizure. Id. The defendant argued that the anonymous telephone tip was not sufficiently reliable to give rise to a reasonable and articulable suspicion that he was engaged in criminal activity. Id. The trial court denied the defendant's motion to suppress, and the defendant entered a conditional plea of nolo contendere to the gun charges. Id., 244–45.

On appeal, our Supreme Court concluded that the trial court improperly denied the defendant's motion to suppress. Id., 257. Our Supreme Court concluded that the anonymous tip was not sufficiently detailed to enable the police to know which one of the six individuals they had detained possessed the handgun. Id., 256. Because the tip was not sufficiently detailed, the tip "did not give rise to a reasonable suspicion that any of the individuals gathered in the vicinity of the black Infiniti, including the defendant, was in possession of a handgun," justifying an investigative stop. Id., 257. Accordingly, our Supreme Court concluded that the seizure of the defendant violated his fourth amendment rights and reversed the trial court's judgment. Id., 257–58.

The facts of *Davis* are markedly distinguishable from those in the present case. Here, Bossie provided the dispatcher with specific information about the accident in which he identified the defendant and Charette as the occupants of the vehicle. Bossie also explained to the dispatcher that the defendant and Charette were attempting to leave the scene by hitchhiking. The dispatcher confirmed this through the department's live feed cameras and relayed this information to Trooper Ouellette as she was traveling to the scene. Unlike in

Davis, there was no question in the present case about the identity of the individuals involved in the accident. Trooper Ouellette, therefore, upon arriving at the scene, was able to form a reasonable and articulable suspicion under the totality of the circumstances that the defendant was involved in criminal activity.[6] Accordingly, the defendant's reliance on *Davis* is misplaced.

Even if we were to assume, however, that evidence of the defendant's field sobriety test was the fruit of an illegal detention and should have been suppressed, evidence of the defendant's blood alcohol content was not subject to suppression because the search warrant contained ample independent evidence supporting a finding of probable cause. "[I]t is well recognized that the exclusionary rule has no application [when] the [g]overnment learned of the evidence from an independent source. . . . Independent source, in the exclusionary rule context, means that the tainted evidence was obtained, in fact, by a search untainted by illegal police activity. . . . The doctrine is based on the premise that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position [than] they would have been in if no police

[6] To the extent that the defendant argues that Trooper Ouellette's detention of him was illegal because he was not committing any crime when she arrived at the scene and was cooperating with her, the defendant misconstrues the reasonable and articulable suspicion standard. "[A] police officer may briefly detain an individual for investigative purposes if the officer has a reasonable and articulable suspicion that the individual *has committed or is about to commit a crime*." (Emphasis added; internal quotation marks omitted.) *State* v. *Davis*, supra, 331 Conn. 247. Whether the defendant was committing a crime at the time of Trooper Ouellette's arrival, therefore, is irrelevant as long as Trooper Ouellette had a reasonable and articulable suspicion that the defendant already had committed a crime. As previously observed, under the totality of the circumstances, Trooper Ouellette could have formed a reasonable and articulable suspicion that the defendant had committed a crime. The defendant's argument, thus, is unpersuasive.

error or misconduct had occurred. . . . In the case of a search conducted pursuant to a search warrant, [t]he two elements that must be satisfied to allow admission [under the independent source doctrine] are: (1) the warrant must be supported by probable cause derived from sources independent of the illegal [conduct]; and (2) the decision to seek the warrant may not be prompted by information gleaned from the illegal conduct." (Emphasis in original; internal quotation marks omitted.) *State* v. *Bardales*, 164 Conn. App. 582, 612–13, 137 A.3d 900 (2016).

In the present case, the trial court declined to suppress evidence of the defendant's blood alcohol content, concluding that the search warrant was not defective in any way and that it "would have been signed [and] the blood test results would have been provided to the state." In the affidavit attached to the search warrant application, Trooper Ouellette attested that (1) she was dispatched to a motor vehicle accident and was advised en route that the two occupants in the vehicle were running from the scene, (2) upon speaking with the defendant, she immediately detected the odor of alcohol coming from his breath and noticed that that his speech was slow and slurred and his eyes were glossy, (3) she inspected the defendant's vehicle and observed an empty bottle of beer, an empty bottle of Jägermeister, and two full bottles of vodka, and (4) a witness told her at the scene that he had observed the defendant's vehicle traveling at a high rate of speed, slide out of control, and crash and that, when he spoke to the defendant, he could smell alcohol on his breath. The defendant does not challenge the admission of any of this evidence on appeal. We conclude, therefore, that the first element of the independent source doctrine was satisfied because the search warrant contained ample evidence that established the requisite probable

cause independent of the defendant's field sobriety test. See *State* v. *Bardales*, supra, 164 Conn. App. 613.

The second element of the independent source doctrine also was satisfied. In light of the significant amount of untainted evidence suggesting that the defendant had been operating his motor vehicle while under the influence of intoxicating liquor, it is inconceivable that Trooper Ouellette would not have sought a search warrant for his blood test results, irrespective of the additional information purportedly gained from the allegedly tainted field sobriety test. See *State* v. *Cobb*, 251 Conn. 285, 336, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000) (inconceivable that police would not have sought search warrant when warrant affidavit contained ample evidence of criminal activity irrespective of additional information purportedly gained in illegal manner). Accordingly, the trial court properly denied the motion to suppress as to evidence of the defendant's blood alcohol content because it was untainted by any alleged illegality.

The judgment is affirmed.

In this opinion the other judges concurred.

BETH E. ANKETELL *v.* MARTIN KULLDORFF
(AC 42452)

Alvord, Prescott and Lavine, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff. At the time of the dissolution trial, the plaintiff worked as a per diem nurse with hours that varied considerably. The defendant worked as a biostatistician, and his income was dependent on the number of his employer's ongoing grant funded projects. At the time of the trial, his salary was approximately 50 percent of what his annual income had been during the five preceding years due to the expiration of at least three grants, which he and his colleagues were working to replace. The defendant remained in the parties' marital

home in Ashford, which he had purchased prior to their marriage. The parties also jointly owned a home in Nicaragua. During the marriage, the defendant made two payments in excess of the scheduled monthly payments on the Ashford home mortgage without the plaintiff's consent. Additionally, after the filing of the dissolution action and the issuance of the automatic orders, the defendant transferred funds into education trust accounts for the parties' two minor children and the defendant's minor child from a previous marriage without consulting the plaintiff. The trial court, inter alia, dissolved the marriage, awarded the parties' joint legal and physical custody of their two children, entered a parenting time schedule, and permitted the plaintiff to relocate to Worcester, designating her residence as primary for purposes of school following the relocation. The trial court ordered the defendant to pay child support in the amount of $325 per week, which it stated was a downward deviation from the guideline amount. The trial court also ordered the defendant to pay to the plaintiff a lump sum property settlement, which it stated included settlement for the plaintiff's share of the Nicaragua property, along with partial reimbursement for the funds transferred into the children's education trust accounts and the overpayments on the Ashford home mortgage. The defendant appealed, and the plaintiff filed a motion for order of attorney's fees, requesting that the defendant pay the retainer for her appellate attorney. Following a hearing on the matter, the trial court granted the motion and the defendant amended his appeal to include a challenge to the attorney's fees award. *Held*:

1. The trial court did not err by failing to identify the presumptive child support obligation under the child support guidelines, as set forth in the applicable regulations (§ 46b-215a-1 et seq.), nor did it improperly calculate the presumptive amount for the defendant: the trial court explicitly stated that it had found the presumptive amount associated with each party's then current income to be $300 per week, determined that the presumptive amount was unfair and inequitable, deviated the amount upward on the basis of the defendant's earning capacity to $473 per week, and then deviated the amount downward to $325 per week in the interest of fairness to reflect the parties' shared custody, the defendant's variable income, and his increased commuting expenses resulting from the plaintiff's relocation; moreover, the trial court provided sufficient justification for its application of the deviation criteria of earning capacity, as it found that the presumptive support amount calculated with the defendant's then current income would be unfair and inequitable, the defendant's earnings were at or near the top of his salary range during the five years preceding the trial before his annual income dropped nearly 50 percent to its then current level, and it was not credible that the defendant would be unable to earn more than he was then making.
2. The trial court did not err in its calculation of the parties' incomes: the trial court's finding regarding the defendant's earning capacity was

supported by evidence in the record of the defendant's prior earnings, and its determination that the defendant could expect to earn more than he was earning at the time of trial was reasonable; moreover, the trial court did not abuse its discretion in calculating child support on the basis of the plaintiff's actual income rather than attributing to her a greater earning capacity that was reflective of a work week of more than eighteen hours because its findings that, due to the intense nature of the nursing profession, it was not necessarily advisable for the plaintiff to work as many hours as were available and that her per diem employment both maximized her hourly rate and allowed her flexibility to care for the parties' children, were supported by the record.

3. The trial court did not abuse its discretion in awarding the plaintiff a lump sum property settlement: contrary to the defendant's claim, the trial court did not make an effective finding of dissipation by awarding the lump sum property settlement to the plaintiff, as, in doing so, the trial court used language that was consistent with the equitable determinations involved in the distribution of marital property, did not reference "dissipation" in its memorandum of decision or its articulations, and made its finding on the basis of its determination that the defendant had unilaterally allocated portions of the marital estate in accordance with his own financial priorities; moreover, the trial court's order dividing the parties' property was not an abuse of discretion because it determined that the defendant's overpayments on the Ashford home mortgage and his deposits into the children's education trust accounts were made without the input of the plaintiff and had the effect of reducing the liquid assets available for distribution.

4. The trial court did not err in awarding the plaintiff appellate counsel fees: many of the assets awarded to the plaintiff in the dissolution judgment were not easily liquidated and her attorney's appellate retainer amounted to almost 40 percent of her liquid assets; moreover, the trial court found that requiring the plaintiff to pay the retainer would undermine the financial awards made in the dissolution judgment, the defendant did not demonstrate that such finding was unreasonable, and the trial court explicitly stated that it had considered the criteria set forth in the applicable statute (§ 46b-82) in making its determination.

5. The trial court did not abuse its discretion in entering its custodial orders: with respect to its orders designating the Worcester home as primary for school enrollment purposes, because the trial court had before it testimony from both parties relating to their positions on the Ashford and Worcester school systems and the recommendation of the family services counselor, the defendant essentially was requesting that this court reweigh the evidence in his favor, which it declined to do, as it was not this court's role to retry the facts or evaluate the credibility of witnesses; moreover, the trial court's order relating to the 6:15 a.m. transfer time for the physical custody of the parties' children was supported by the record, which included evidence that the children wake

up early and that such transfer time would permit the plaintiff to work day shifts; furthermore, in its memorandum of decision, the trial court stated that, in making its orders, it took the criteria set forth in the applicable statute (§ 46b-56 (c)) and applicable case law into consideration and had applied the same to the evidence before it.

Argued May 18—officially released September 28, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Windham and tried to the court, *Green, J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court. *Affirmed.*

Campbell D. Barrett, with whom were *Johanna S. Katz* and, on the brief, *Jon T. Kukucka*, for the appellant (defendant).

Scott T. Garosshen, with whom were *Karen L. Dowd* and, on the brief, *Kenneth J. Bartschi*, for the appellee (plaintiff).

Opinion

ALVORD, J. The defendant, Martin Kulldorff, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Beth E. Anketell. On appeal, the defendant claims that the trial court (1) erred by failing to identify the presumptive child support obligation under the child support guidelines, as set forth in § 46b-215a-1 et seq. of the Regulations of Connecticut State Agencies (guidelines), before entering a support order based on a deviation, (2) erred in calculating the parties' incomes, (3) erred in awarding the plaintiff a lump sum property settlement, (4) abused its discretion in awarding appellate attorney's fees to the plaintiff, and (5) abused its discretion in entering its custodial orders. We affirm the judgment of the court.

The following facts and procedural history are relevant to our resolution of the present appeal. The parties married on July 16, 2011, and have two minor children together. The plaintiff commenced this dissolution action on October 5, 2016. A trial was held on September 13 and 14, 2018. On December 3, 2018, the court, *Green*, *J.*, issued its memorandum of decision in which it made the following relevant factual findings. Both parties had been married once before. The defendant has a teenaged child from his first marriage, and he shares joint custody of that child with his first spouse. The defendant has primary physical custody of his first child and lives in Ashford, as the defendant determined that his first child should live there in order to complete his high school education at E.O. Smith High School. The home in Ashford (Ashford home) was purchased by the defendant prior to the parties' marriage, and the parties lived there during the marriage.

In 2012, the defendant paid for the plaintiff's nursing education at the University of Connecticut. Prior to the birth of the parties' children in 2015, the plaintiff worked twenty-nine hours per week, which was considered a full-time position, as a nurse at UMass Memorial Medical Center in Worcester, Massachusetts. While working full time, the plaintiff elected not to participate in her employer's retirement plans. Following the birth of the parties' children, the plaintiff returned to work as a per diem nurse. Because her position is per diem, it is without fringe benefits, and her income depends on the number of hours she works. During the pendency of the dissolution proceedings, the plaintiff's work hours varied considerably.

The defendant has earned a PhD and works as a biostatistician for Brigham and Women's Hospital in Boston. The defendant receives income from drug safety research grants. The grants direct overhead funds to the defendant's employer, which then pays the defen-

dant's salary. His income depends on the number of grant-funded projects that are ongoing at any particular time.

At the time of the dissolution trial, the plaintiff had moved to a rental property in Tolland, but she owns a home in Worcester, Massachusetts (Worcester home). The Worcester home is occupied by tenants, and their rental payments cover the mortgage and taxes and provide a modest income. The plaintiff planned to move to the Worcester home following the dissolution of the parties' marriage. During the marriage, a $15,000 balloon payment became due on a second mortgage on the Worcester home. The plaintiff and the defendant disputed whether the decision for the plaintiff to opt out of her employer's retirement benefit plan in order to focus on utilizing her employment earnings toward the balloon payment was made as a couple or unilaterally by the plaintiff. The parties agreed, however, that the balloon payment was to be made out of funds the plaintiff had saved and allocated. Following the balloon payment on the Worcester home, the defendant made two $10,000 mortgage payments, over and above the usual monthly payments due on the mortgage, on the Ashford home. The decision to make additional mortgage payments on the Ashford home was made unilaterally by the defendant.

After the filing of this dissolution action and following the issuance of the automatic orders, the defendant transferred funds into Connecticut Higher Education Trust (CHET) accounts for the parties' children and transferred additional funds into a CHET account for the defendant's older child. The decision to transfer funds into the CHET accounts was made unilaterally by the defendant.

The parties own a home and attached business in Nicaragua, which they purchased in 2015. Because of unrest in the country, estimates of the value of any

equity in the property vary substantially. The parties agreed that if the country became more stable, discussions of the property and its possible disposition would be less theoretical. The parties also each own ten cows and their calves in Nicaragua, although the welfare of the animals is not known.

Attorney Rachel Sarantopoulos, the family services counselor, conducted an evaluation. Her overall assessment was that both parties are able, loving parents. Sarantopoulos recommended that the plaintiff be permitted to relocate to Worcester and that her Worcester home be designated as primary for school purposes. Sarantopoulos otherwise recommended that the parties' pendente lite shared custody plan, which had been entered into by agreement and managed by the parties with few conflicts, be continued.

The court dissolved the marriage on the ground of irretrievable breakdown and entered the following orders relevant to this appeal. The court awarded no alimony to either party. The court awarded the parties' joint legal and physical custody of their children and entered a parenting time schedule. The court permitted the plaintiff to relocate to Worcester and designated the plaintiff's residence as primary for purposes of school.[1] The court ordered the defendant to continue to maintain the CHET accounts for the benefit of the parties' children.

The court ordered the defendant to pay child support in the amount of $325 per week. The court stated that such amount was "a downward deviation from the guideline amount of $473 based on the shared parenting plan, the increased commute associated with [the plaintiff's] residence in Worcester, [the defendant's] variable

[1] Prior to the planned relocation to Worcester and for so long as the plaintiff continued to reside in Tolland and the defendant in Ashford, the defendant's residence was designated as primary.

income as well as his demonstrated earning capacity, which is very near or at the top of his salary range."

The court ordered the defendant to pay the plaintiff "a lump sum property settlement of $52,500," which, the court stated, "includes settlement for the plaintiff's marital share of the Nicaragua house, partial reimbursement for funds transferred to the children's CHET accounts and mortgage overpayments on the Ashford [home] made by the defendant."

With respect to other property orders, the court ordered the defendant to transfer $175,000 to the plaintiff from his "retirement funds/accounts of his choice . . . ." The court ordered the plaintiff to transfer her interest in the property in Nicaragua to the defendant and awarded the defendant ownership of all the cows and calves in Nicaragua.[2] The court ordered that the parties retain all assets presently in their respective names, including the Ashford home, which would remain the property of the defendant, and the Worcester home, which would remain the property of the plaintiff.[3]

On January 4, 2019, the defendant filed the present appeal. On January 14, 2019, the plaintiff filed a motion for order of attorney's fees, requesting that the court order the defendant to pay the $25,000 retainer of her appellate attorney. The court granted the motion on August 23, 2019. The defendant thereafter amended his appeal to include a challenge to the court's award of attorney's fees.

After filing this appeal, the defendant filed a motion for articulation, which the trial court denied. The defendant then filed a motion for review with this court. This court granted the motion in part and ordered the trial

[2] The defendant was ordered to transfer to the plaintiff $5000, which was equal to the amount of money held by a caretaker of the Nicaragua property.

[3] On December 19, 2018, the defendant filed a motion to reargue, which was denied.

court "to articulate as to its determination of the parties' respective annual incomes and/or earning capacity, and the value at the time of the dissolution judgment of all assets that have been distributed, and the court's rationale for its financial orders in light of the articulated findings."

In response, the trial court issued a December 5, 2019 articulation setting forth its findings (first articulation). The court stated that "shorter work weeks seemed appropriate" for the plaintiff, given the nature of her work. It credited the plaintiff's explanation of her pay structure and evidence that full-time employment with her employer constituted less than forty hours per week. The court found that "[m]aintaining per diem employment maximizes the plaintiff's hourly rate and allows for flexibility for caring for the children depending on the access schedule . . . ."[4] (Citation omitted.) The court rejected the defendant's position at trial that it would be inequitable to allow the plaintiff to work less than forty hours per week and noted that the defendant's proposed parenting plan had been designed to maximize opportunity for the plaintiff to work more hours.

The court articulated that, although the defendant worked forty to forty-five hours per week, the number of hours he worked did not determine his income. Rather, the defendant's income was dependent on the number of grant-funded projects being worked on at a particular time. The court stated that the defendant "works for an organization that caps his income at the nearly $200,000 per year that he was making at the time

[4] The court also found that "[t]he rationale for having a full-time nursing schedule of less than forty hours was credible and uncontroverted. The court note[d] that the nature of nursing as a profession can require intense interaction with others which would argue against the propriety of each nurse working as many hours and shifts as might be theoretically available . . . ." (Citation omitted.)

of the filing for dissolution and not the nearly $100,000 that he was making at the time of the trial . . . .'' (Citation omitted.) It articulated its finding that the defendant ''cannot make more than the salary cap but can make substantially less if there are fewer or no grant-funded projects. Line items in the active grants provide direct payments to the organization and the organization then pays the defendant.'' The court stated that the defendant also consistently had earned nearly $200,000 in a similar role with a prior employer.

The court credited the defendant's testimony that the nature of his work and associated compensation will be somewhat variable. The court referenced testimony regarding the expiration of at least three grants and that the defendant and his colleagues were making efforts to replace those grants. The court found that the defendant's earnings were at or near the top of his salary range from 2013 through 2017, before ''dropping nearly 50 percent to its current level.''[5] The court ''did not find it credible that the defendant will be unable to earn more than he is making currently.''

The court articulated that, ''[t]hroughout the marriage, the defendant continued to save for his retirement at a rate of roughly $500 per week . . . but declined to consider improvements on the marital home, a larger home, a larger and more comfortable family car and resisted the plaintiff's urging for items to prepare for the arrival of the twins . . . .'' (Citations omitted.)

With respect to the court's child support award, the court articulated: ''In light of the court's determination of earning capacity, child support based on the presumptive amount associated with each party's current income ($300 / week payable to [the plaintiff]) was

[5] The court noted that the plaintiff was aware of the defendant's pay structure but that he had not discussed any anticipated, precipitous drop in income with her.

determined to be unfair and inequitable. The court also determined that child support based upon the defendant's consistent, prior income and the plaintiff's current income would also be unfair and inequitable ($473 per week payable to [the plaintiff]) given the defendant's current income. Child support was awarded to [the plaintiff] at a rate of $325 per week, which is the same amount that the parties had agreed to pendente lite. This figure takes into account both earning capacity and variability of income on the defendant's part as well as other factors including shared custody and increased commuting expenses previously cited within the judgment. Child support was awarded to [the plaintiff] because she makes less money than the defendant with credible reasons therefore. There was no evidence adduced that either party was inclined towards extravagances and [the defendant] raised sincere and credible concerns about the urgency of fully funding his retirement given the eight year age difference between himself and the plaintiff . . . . He has both paid child support at this rate and has continued to save roughly $500 / week towards his retirement." (Citation omitted.)

The court also articulated its decision with respect to the lump sum property settlement of $52,500. Specifically, it stated: "[The additional mortgage payments on the Ashford home] came as a surprise to the plaintiff. The decision to make these payments as well as the deposits to CHET accounts held by the defendant were made unilaterally. The court noted that the plaintiff was not seeking that monies placed in [the defendant's older child's] account and in the accounts designated for each of the twins be returned but in the interest of equity and fairness the court's cash settlement order included reimbursement for the use of marital funds transferred without the input of the plaintiff." The court further stated: "[T]he defendant had made several significant, unilateral financial decisions during the course of the

marriage and during the pendency of the dissolution. The court credited testimony that the defendant did not discuss his decision to make a $20,000 payment on the Ashford [home] mortgage . . . . After the filing for divorce, the defendant transferred $20,000 into [the parties' children's] CHET accounts and $40,000 into [the defendant's older child's] account . . . . These transfers were also not discussed with the plaintiff . . . ." (Citations omitted.) The court stated that it had entered "no orders regarding the parties' respective home[s] other than endorsing sole ownership without any claim by the other."

The court also articulated that the defendant "had demonstrated inflexibility and that his loving support of [the plaintiff] had given way to hostility and parsimony." The court stated that the defendant "was protective of his own finances to the detriment of his relationship with the plaintiff and was resentful of challenges to his financial priorities and decisions." The court concluded by stating that it had made its financial awards "based on financial inequities within their marital partnership."

The defendant thereafter filed with this court a second motion for review, which was granted. This court ordered the trial court to articulate "specifically what dollar amount the court found for the parties' earning capacities and/or annual incomes and the specific value found for each of the assets." On January 24, 2020, the trial court issued its articulation (second articulation),[6]

[6] As to the valuation of property, the court stated in its second articulation that the house in Nicaragua was purchased for $167,000, $145,000 of which came from an account the defendant had established prior to the marriage. The court found the house in Nicaragua to have a value of "at least $50,000," and determined that it would increase in value should the country's unrest subside. The court valued the defendant's interest in the cows at $5000 and awarded the plaintiff $5000 for her interest in the cows that were awarded to the defendant. The court valued the defendant's retirement accounts at $601,673 and found that there had been a $350,000 increase in the value of those accounts during the course of the marriage.

in which it stated that it found the defendant to have an earning capacity of $198,536 per year. It stated: "[C]alculations were based on this figure and a net income of $138,424, as reported on his financial affidavit of September, 2017. [The defendant] reported having earned: $184,000 in 2016; $180,000 in 2015; $202,000 in 2014 and $195,000 in 2013." The court articulated that it found the plaintiff's income to be $56,576, with a net income of $49,192, and explained that this income was reported in the plaintiff's financial affidavit of September, 2018. See part II of this opinion. The court found the value of the CHET accounts for each of the parties' children to be $11,656.07 and the value of the CHET account for the defendant's older child to be $11,656.07. See footnote 11 of this opinion. Additional facts will be set forth as necessary.

I

The defendant's first claim on appeal is that the court erred in calculating the presumptive child support amount pursuant to the guidelines. Specifically, he contends that the court improperly calculated the presumptive amount on the basis of his earning capacity rather than his actual income. We disagree.

We first set forth applicable legal principles. "Under the [child support] guidelines, the child support obligation first is determined without reference to earning capacity, and earning capacity becomes relevant only if a deviation from the guidelines is sought" under § 46b-215a-5c (b) (1) (B) of the Regulations of Connecticut State Agencies. (Internal quotation marks omitted.) *Fox* v. *Fox*, 152 Conn. App. 611, 635, 99 A.3d 1206, cert. denied, 314 Conn. 945, 103 A.3d 977 (2014). "[T]he amount of support determined without reference to the deviation criteria is presumed to be the correct amount of support, and that presumption may only be rebutted by a specific finding on the record that the application

of the guidelines would be inequitable or inappropriate under the circumstances of a particular case. When the latter is true, [§ 46b-215a-5c (b) (1) (B)] allows deviation from the guidelines on the basis of a parent's earning capacity." (Internal quotation marks omitted.) Id.

"Our courts have interpreted this statutory and regulatory language as requiring three distinct findings in order for a court to properly deviate from the child support guidelines in fashioning a child support order: (1) a finding of the presumptive child support amount pursuant to the guidelines; (2) a specific finding that application of such guidelines would be inequitable and inappropriate; and (3) an explanation as to which deviation criteria the court is relying on to justify the deviation." *Righi* v. *Righi*, 172 Conn. App. 427, 436–37, 160 A.3d 1094 (2017).

"This court has stated that the reason why a trial court must make an on-the-record finding of the presumptive support amount before applying the deviation criteria is to facilitate appellate review in those cases in which the trial court finds that a deviation is justified. . . . In other words, the finding will enable an appellate court to compare the ultimate order with the guideline amount and make a more informed decision on a claim that the amount of the deviation, rather than the fact of a deviation, constituted an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *Budrawich* v. *Budrawich*, 132 Conn. App. 291, 300, 32 A.3d 328 (2011).

We next set forth our standard of review, which the parties dispute. The defendant contends that his claim involves the question of whether, and to what extent, the child support guidelines apply, which he maintains is a question of law subject to plenary review. The plaintiff responds that, because the issue in the present case is the application, not the interpretation, of the

guidelines, the proper standard of review is abuse of discretion. We conclude that resolution of the defendant's claim requires us to interpret the language used in the court's memorandum of decision and subsequent articulations to determine whether the court calculated the presumptive support amount on the basis of the defendant's earning capacity, as the defendant claims, or on the basis of his actual income. "Because [t]he construction of a judgment is a question of law for the court . . . our review of the . . . claim is plenary. As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.) *Cunningham* v. *Cunningham*, 204 Conn. App. 366, 373, 254 A.3d 330 (2021).

We conclude that the defendant's claim fails on the basis of the plain language used by the court. In its first articulation, the court expressly stated that it had found "the presumptive amount associated with each party's current income . . . ." That presumptive amount was $300 weekly. This language demonstrates that the court used the defendant's actual income in calculating the presumptive support amount. Accordingly, we reject the defendant's claim to the contrary.

Having concluded that the court calculated the presumptive amount on the basis of the defendant's actual income, we note the subsequent findings of the court. The court found that the presumptive amount "was determined to be unfair and inequitable" and turned to the application of deviation criteria. It deviated upward

on the basis of the defendant's earning capacity. Using the "defendant's consistent, prior income and the plaintiff's current income," the court calculated a support amount of $473 weekly. It determined that that amount, too, was unfair and inequitable. It then deviated downward, mentioning the parties' shared custody, the defendant's variability of income and his increased commuting expenses in connection with the plaintiff's move to Worcester. The court arrived at a child support amount of $325 weekly, which it noted was the same amount that the parties had agreed to pendente lite. The court further noted that the defendant had been able to comply with paying child support at this rate while also contributing approximately $500 per week to fund his retirement.

The defendant, in his principal appellate brief, omits any reference to or discussion of the court's explanation in its articulation that it had found a presumptive support amount of $300 on the basis of the parties' current incomes.[7] In his reply brief, the defendant argues for the first time on appeal that "[t]he fact that the court was able in one of its articulations to identify the presumptive amount based on [the defendant's] actual income does not mean that the court used this number in calculating child support, or deviated from this number to arrive at its child support order." He further argues in his reply brief that the articulation is inconsistent with the court's memorandum of decision. We decline to address these contentions because the defendant raised them for the first time on appeal in his reply brief. See *Radcliffe* v. *Radcliffe*, 109 Conn. App. 21, 27, 951 A.2d 575 (2008) ("It is a well established principle that arguments cannot be raised for the first time in a reply brief. . . . Our practice requires an appellant to raise claims of error in his original brief, so that the

[7] The defendant does not raise any claim of error on appeal that the $300 presumptive support amount was improperly calculated.

issue as framed by him can be fully responded to by the appellee in its brief, and so that we can have the full benefit of that written argument." (Internal quotation marks omitted.)); see also *Grimm* v. *Grimm*, 276 Conn. 377, 394 n.19, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006).

Lastly, the defendant argues that the court also failed to make a specific finding on the record as to *why* an obligation calculated in accordance with the defendant's actual income would be inequitable or inappropriate. We disagree with the defendant that the court's findings were deficient in this respect.

In support of his argument, the defendant relies on *Barcelo* v. *Barcelo*, 158 Conn. App. 201, 215, 118 A.3d 657, cert. denied, 319 Conn. 910, 123 A.3d 882 (2015). In that case, the trial court found that the defendant, at the time of the dissolution, was earning a salary of $70,000 and a " 'discretionary bonus in an undetermined amount.' " Id., 205. In awarding child support, the court failed to identify a presumptive support amount calculated on the basis of the defendant's current income. Id., 215. Instead, the court reviewed the defendant's prior annual net earnings and imputed an earning capacity to the defendant of $250,000. Id. The court based its child support order on that earning capacity. Id. The court then further ordered the defendant to pay the plaintiff 15 percent of any bonus he earned. Id.

On appeal, the plaintiff in *Barcelo* claimed that "the court erred by entering a supplemental child support order that awarded her 15 percent of the defendant's future bonus income without adequately considering the financial needs of the parties' minor children or abiding by the child support guidelines." Id., 207. This court found the trial court's supplemental child support order improper for several reasons, stating in part: "The court in the present case failed to cite the presumptive

support amount calculated with the defendant's actual net income, and then did not invoke the defendant's earning capacity as a deviation criterion in calculating his child support obligation. It also did not explain why an obligation calculated in accordance with the defendant's actual income, pursuant to the child support guidelines, would be inequitable or inappropriate, thus warranting instead an obligation calculated in accordance with his earning capacity." Id., 215.

In *Barcelo*, the trial court failed to identify the presumptive amount of child support, imputed to the defendant a $250,000 earning capacity, and then "ordered the defendant to pay 15 percent of any of his bonus income, not 15 percent of any bonus income in excess of his $250,000 earning capacity." Id., 215. "As a result of this apparent ambiguity, the court, without justifying a deviation, permitted the plaintiff to 'double dip' and collect child support in excess of the child support guidelines with respect to whatever bonus income the defendant earned above his $70,000 salary but below his imputed earning capacity of $250,000." Id., 215–16.

The defendant also relies on *Fox* v. *Fox*, supra, 152 Conn. App. 637, another case in which the trial court imputed income to the defendant and calculated his child support obligation on the basis of that imputed income, without ever having calculated the defendant's presumptive child support obligation on the basis of his actual income. This court stated: "Because the court did not treat the defendant's earning capacity as a deviation criterion, it did not subject the plaintiff's position that the court should base the defendant's modified child support obligation on his earning capacity instead of his actual income to the rigorous requirement of a specific finding on the record that the presumptive support amount would be inequitable or inappropriate. . . . Such a finding must include a statement of the presumptive support amount and [an explanation of]

how application of the deviation criteri[on] justifies the variance. . . . Even though the court spoke generally of certain factors on which it relied in deciding to impute employment and investment income to the defendant . . . it did not articulate why the defendant's imputed income would be a more appropriate or equitable basis for calculating the defendant's modified child support obligation than the defendant's actual income or the presumptive support amount range . . . calculated in accordance with the defendant's actual income. The court's rationale for using the defendant's imputed income instead of his actual income in its calculations also lacks any reference to the demonstrated needs of the minor children, which further undermines any justification for the variance. Affirming the judgment with respect to the child support orders would amount to sanctioning the court's bypassing of and noncompliance with the guidelines' clear and firm requirements regarding the use of deviation criteria and presumptive support amounts." (Citations omitted; internal quotation marks omitted.) Id., 639–40.

Unlike the courts in *Barcelo* and *Fox*, the court in the present case provided sufficient justification for application of the deviation criteria of earning capacity. Specifically, the court calculated the presumptive support amount using the defendant's then current income and found such amount to be "unfair and inequitable." It found in its memorandum of decision that the defendant possessed an earning capacity that was "very near or at the top of his salary range." The court expressly stated in its first articulation that the defendant's earnings were "at or near the top of his salary range in 2013 . . . 2014 . . . 2015 . . . 2016 . . . and 2017 . . . before dropping nearly 50 percent to its current level." (Citations omitted.) The court referenced the plaintiff's testimony that the defendant had not discussed with her any anticipated, precipitous drop in his income. The

court "did not find it credible that the defendant will be unable to earn more than he is making currently," which, at the time of trial, was approximately $100,000 annually. The court then expressly deviated from the presumptive amount on the basis of the defendant's earning capacity. In light of these findings, we are not persuaded that the court provided insufficient justification for applying the deviation criteria of earning capacity. See *Syragakis* v. *Syragakis*, 79 Conn. App. 170, 177, 829 A.2d 885 (2003) (court made all necessary findings when it found presumptive amount, determined that such amount "would be inequitable or inappropriate in this particular case," and identified proper criteria for deviating from guidelines' presumptive amount (internal quotation marks omitted)).

II

The defendant's second claim on appeal is that the court erred in basing its child support award on improper incomes for both parties. First, he argues that the court's determination of his earning capacity was clearly erroneous. Second, he argues that the court used the wrong actual income for the plaintiff, and third, he argues that the court should have imputed an earning capacity to the plaintiff reflective of more than an eighteen hour work week. We disagree.

We first set forth our standard of review. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . It is within the province of the trial court to find facts and draw proper inferences from the evidence presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . [T]o conclude that the

trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Milazzo-Panico* v. *Panico*, 103 Conn. App. 464, 467–68, 929 A.2d 351 (2007).

A

The defendant first argues that the court's determination of his earning capacity was clearly erroneous. Specifically, he argues that the evidence at trial established that the defendant's income is "dependent on factors outside of his control." In support of this argument, he references the trial court's finding that his income "depends on the number of grant-funded projects that are extant at any particular time." He further points to the expiration of three grants following the defendant's submission of his September, 2017 financial affidavit.

"It is well established that the trial court may under appropriate circumstances in a marital dissolution proceeding base financial awards on the earning capacity of the parties rather than on actual earned income. . . . Earning capacity, in this context, is not an amount which a person can theoretically earn, nor is it confined to actual income, but rather it is an amount which a person can realistically be expected to earn considering such things as his vocational skills, employability, age and health." (Internal quotation marks omitted.) *Milazzo-Panico* v. *Panico*, supra, 103 Conn. App. 468.

We are not persuaded that the court's determination of the defendant's earning capacity was clearly erroneous. Specifically, the court's finding that the defendant

has an earning capacity of $198,536 is supported by evidence in the record of the defendant's prior earnings. The court found that the defendant reported having earned "$184,000 in 2016; $180,000 in 2015; $202,000 in 2014, and $195,000 in 2013."

Moreover, the court reasonably determined that the defendant realistically could be expected to earn more than he was currently earning at the time of trial. The court found that the defendant's income depends on the number of grants that he applies for and receives. The court considered the expiration of three grants and noted the defendant's testimony that he and his colleagues were making efforts to replace those grants. The court expressly "did not find it credible that the defendant will be unable to earn more than he is making currently," which, at the time of trial, was approximately $100,000. "[T]he sifting and weighing of evidence is peculiarly the function of the trier [of fact]. [N]othing in our law is more elementary than that the trier [of fact] is the final judge of the credibility of witnesses and of the weight to be accorded to their testimony. . . . The trier has the witnesses before it and is in the position to analyze all the evidence. The trier is free to accept or reject, in whole or in part, the testimony offered by either party." (Internal quotation marks omitted.) *Elia* v. *Elia*, 99 Conn. App. 829, 835, 916 A.2d 845 (2007).

Because the court's finding is supported by the evidence and we are not left with the definite and firm conviction that a mistake has been committed, we will not disturb the court's finding.

B

The defendant's second argument is that the court erred in its calculation of the plaintiff's income. We conclude that the court misstated the plaintiff's income

but that such misstatement amounted to a scrivener's error and is therefore of no consequence.

The following additional facts are relevant. In its second articulation, the court stated that it found the plaintiff's income to be $56,576, with a net income of $49,192, and explained that this income was reported in the plaintiff's financial affidavit of September, 2018. As the defendant points out in his brief, the plaintiff's September 4, 2018 financial affidavit reported annual gross income of $41,600 and net income of $34,944. The plaintiff's May 7, 2019 financial affidavit, which was filed on May 13, 2019, reported significantly higher annual gross income of $56,576 and net income of $49,192.

The defendant argues that, "based on the court's articulation, it is clear that it did not in fact base its child support award on the plaintiff's actual income at the time of the dissolution. Indeed, the court could not possibly have based its child support award on actual income of $56,576 gross because, at the time of the decision, the plaintiff had not yet filed that financial affidavit and instead reported actual income of $41,600." (Emphasis omitted.) The plaintiff agrees that the court misstated the plaintiff's income in its second articulation but contends that such misstatement was a scrivener's error. The plaintiff maintains that the court could not have used the income numbers from a financial affidavit that did not yet exist when it performed the calculations. She argues that "[t]he only logical reading is that the trial court correctly stated that it had 'found [the plaintiff's] annual income to be [the net and gross amounts] reported in her financial affidavit of September, 2018,' but accidentally wrote the wrong numbers, after correctly using the September, 2018 numbers in its actual calculations performed over a year before." (Emphasis omitted.) See *In re S.D.*, 115 Conn. App. 111, 120, 972 A.2d 258 (2009) (trial court's finding that respondent had not visited with child since

child was five months old was clearly erroneous but that word "month" appeared to be scrivener's error). We agree with the plaintiff that the court's misstatement of the plaintiff's income amounted to a scrivener's error, where it properly referenced the applicable financial affidavit but improperly recorded the numbers reported on the later affidavit.

C

The defendant's third argument related to his claim of improper income determinations by the trial court is that the court abused its discretion in failing to impute an earning capacity to the plaintiff reflective of more than an eighteen hour work week. We disagree.

In its first articulation, the court stated that "[m]uch was made during the trial of whether or not it would be equitable to allow [the plaintiff] to work less than forty hours per week if [the defendant] was expected to work forty or more hours per week." Ultimately, the court found that the "nature of nursing as a profession can require intense interaction with others which would argue against the propriety of each nurse working as many hours and shifts as might be theoretically available . . . ." (Citation omitted.) The court found that "[m]aintaining per diem employment maximizes the plaintiff's hourly rate and allows for flexibility for caring for the children depending on the access schedule . . . ." (Citation omitted.)

As explained previously in this opinion, "[i]n marital dissolution proceedings, *under appropriate circumstances* the trial court *may* base financial awards on the earning capacity rather than the actual earned income of the parties . . . ." (Emphasis in original; internal quotation marks omitted.) *Brown* v. *Brown*, 148 Conn. App. 13, 21, 84 A.3d 905, cert. denied, 311 Conn. 933, 88 A.3d 549 (2014). Having thoroughly reviewed the record, we conclude that it supports the trial court's findings and that the court did not abuse

its discretion in calculating child support on the basis of the plaintiff's actual income, rather than attributing to her a greater earning capacity.

On the basis of the foregoing, we reject the defendant's claim that the court erred in determining the parties' income.

III

The defendant's third claim on appeal is that, "[b]y ordering [him] to reimburse the plaintiff for making voluntary payments toward the principal mortgage on the marital home and for making contributions to the children's CHET accounts, the court effectively made a finding of dissipation, but failed to meet the necessary elements for such a finding." The plaintiff responds that the court properly divided the assets in the marital estate considering the defendant's "unilateral financial decisions, made with marital assets when the marriage was in trouble or after the plaintiff filed for divorce, [which] aggravated the parties' difficulties, and sought to restrict how the marital estate could be divided." We agree with the plaintiff.

The following additional facts and procedural history are relevant to this claim. The plaintiff, in her proposed orders, requested that the court order the defendant to pay her a lump sum property settlement of $60,000, which, the plaintiff maintained, "shall equalize the [parties'] cash assets and reimburse the plaintiff, in part, for the defendant's withdrawal of some $100,000 over the course of the past two years." In its memorandum of decision, the court ordered the defendant to pay the plaintiff "a lump sum property settlement of $52,500," which, the court stated, "includes settlement for the plaintiff's marital share of the Nicaragua house,[8] partial

[8] In its first articulation, the court stated that the defendant was credited with having provided the majority of funds for the purchase of the house in Nicaragua. The court stated: "At the time of the marriage the account from which the funds were eventually drawn contained approximately $145,000 including $20,000 that had originally been set aside from the couple's wed-

reimbursement for funds transferred to the children's CHET accounts and mortgage overpayments on the Ashford [home] made by the defendant." (Footnote added.) The funds transferred to the children's CHET accounts included $10,000 into each of the CHET accounts for the parties' children and $40,000 into the CHET account for the defendant's older child. The mortgage "overpayments" included two $10,000 mortgage payments on the Ashford home. The court found that the decisions to transfer marital assets, into the children's CHET accounts and into additional mortgage payments on the Ashford home, were made unilaterally by the defendant. In its first articulation, the court noted "that the plaintiff was not seeking that [moneys] placed in [the defendant's older child's] account and in the accounts designated for each of the twins be returned but in the interest of equity and fairness the court's cash settlement order included reimbursement for the use of marital funds transferred without the input of the plaintiff."

We first must resolve the parties' dispute regarding the applicable standard of review of this claim. The defendant contends that our standard of review is plenary because this court must address the question of what, as a matter of law, constitutes dissipation.[9] The

ding in Sweden . . . . There was, however, some time that passed prior to the purchase of the Nicaragua house for $167,000. Because the majority of the funds used to buy the house were the defendant's from before the marriage, the court divided the amount of the additional funds used to buy the house as a part of a cash settlement for [the plaintiff]." (Citation omitted.)

[9] Moreover, in his reply brief, the defendant relies on *O'Brien* v. *O'Brien*, 326 Conn. 81, 95–96, 161 A.3d 1236 (2017), in which our Supreme Court engaged in plenary review of the question of law regarding whether the trial court, in distributing marital property, had the authority, in the absence of a finding of contempt, to consider certain stock transactions made by the plaintiff during the pendency of the appeal from the judgment of dissolution in violation of the automatic orders. *O'Brien* is distinguishable from the present case. In *O'Brien*, the court had before it the distinct question of whether the trial court properly could remedy the plaintiff's violations of the automatic orders by adjusting in the defendant's favor the distribution

plaintiff contends that we must review the court's ultimate orders for an abuse of discretion and its factual findings for clear error. We conclude that the defendant's claim first requires us, as a preliminary matter, to interpret the judgment of the trial court. "Because [t]he construction of a judgment is a question of law for the court . . . our review of the . . . claim is plenary. As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.) *Cunningham* v. *Cunningham*, supra, 204 Conn. App. 373.

We begin our analysis by addressing the defendant's contention that, "[a]lthough the court did not use the word 'dissipation,' it is clear that is what the court intended." "Generally, dissipation is intended to address the situation in which one spouse conceals, conveys or wastes marital assets in anticipation of a divorce. . . . Most courts have concluded that some type of improper conduct is required before a finding of dissipation can be made. Thus, courts have traditionally recognized dissipation in the following paradigmatic contexts: gambling, support of a paramour, or the transfer of an asset to a third party for little or no consideration. Well-defined contours of the doctrine are somewhat elusive, however, particularly in more factually ambiguous situations." (Internal quotation marks omitted.) *Powell-Ferri* v. *Ferri*, 326 Conn. 457, 469–70, 165 A.3d 1124 (2017).

of marital assets to account for the losses caused by the plaintiff's actions. Id., 95.

In determining whether the trial court's order, in effect, constituted a finding that the defendant had engaged in dissipation of marital assets, we first note that the term "dissipation" does not appear anywhere in the court's memorandum of decision or subsequent articulations. Moreover, the language that the court did use—describing the award to the plaintiff as being made "in the interest of equity and fairness"—is consistent with the equitable determinations involved in the distribution of marital property. Lastly, we do not conclude that the court's use of the term "reimbursement" was an indication that it was relying on the dissipation doctrine. Indeed, the defendant was not ordered to "reimburse" the plaintiff for the loss of funds that no longer existed because of financial misconduct on the part of the defendant. Rather, the marital property merely had been changed into another form. In sum, the trial court's order rested not on a finding that the defendant had engaged in financial misconduct or intentionally had wasted marital assets but rather on its finding that the defendant unilaterally had allotted portions of the marital estate solely in accordance with his own financial priorities. Thus, we conclude that the court's order did not invoke the doctrine of dissipation.

Having determined that the court's order did not, in effect, constitute a finding of dissipation, we consider whether the court's order that the defendant pay the plaintiff $52,500 constituted an abuse of discretion.

General Statutes § 46b-81 governs the distribution of the assets in a dissolution case. Section 46b-81 (a) authorizes the court to "assign to either spouse all or any part of the estate of the other spouse. . . ." Section 46b-81 (c) provides for the court's consideration of "the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the oppor-

tunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

"[A] fundamental principle in dissolution actions is that a trial court may exercise broad discretion in . . . dividing property as long as it considers all relevant statutory criteria. . . . While the trial court must consider the delineated statutory criteria [when allocating property], no single criterion is preferred over others, and the court is accorded wide latitude in varying the weight placed upon each item under the peculiar circumstances of each case. . . . In dividing up property, the court must take many factors into account. . . . A trial court, however, need not give each factor equal weight . . . or recite the statutory criteria that it considered in making its decision or make express findings as to each statutory factor." (Internal quotation marks omitted.) *Kent* v. *DiPaola*, 178 Conn. App. 424, 431–32, 175 A.3d 601 (2017).

The specified criteria in § 46b-81 are not exhaustive, and the court properly may consider other equitable factors when crafting its property distribution orders. "Although created by statute, a dissolution action is essentially equitable in nature. . . . The power to act equitably is the keystone to the court's ability to fashion relief in the infinite variety of circumstances which arise out of the dissolution of a marriage. . . . [Section] 46b-81 sets forth certain criteria for the court to consider in making an assignment of property. Although in making its financial determinations the court is required to consider these criteria . . . in the exercise of its inherent equitable powers it may also consider any other factors which may be appropriate for a just and equitable resolution of the marital dispute." (Citations omitted; internal quotation marks omitted.) *Robinson* v. *Robinson*, 187 Conn. 70, 71–72, 444 A.2d 234 (1982).

In the present case, the court found that "[t]he evidence elicited supported the court's determination that [the defendant] was protective of his own finances to the detriment of his relationship with the plaintiff and was resentful of challenges to his financial priorities and decisions." Moreover, the court specifically found that the additional mortgage payments for the Ashford home and the CHET deposits into the three accounts were unilateral decisions of the defendant. These findings are supported by evidence in the record. Specifically, the defendant testified that he had made two $10,000 payments on the Ashford home mortgage in June and August, 2016. When questioned regarding the $20,000 sum of the mortgage payments, the defendant testified that he probably did not discuss the payments with the plaintiff before making them but that, when he did discuss them with her, she was "very angry about it." With respect to the deposits into the CHET accounts for the parties' children, the defendant was asked whether he discussed them with the plaintiff and he responded, "[W]hen I put in the $10,000 [each], that was after her filing for divorce and I figured then I would just decide that on my own." As to his older child's CHET account, the defendant testified that he deposited $40,000 into it and that he did not remember whether he told the plaintiff he had made such a deposit.

The plaintiff, both in her proposed orders and in her testimony at trial, sought a lump sum property distribution award in consideration of these unilateral financial transactions.[10] She testified that she believed a $60,000 lump sum award would be fair because she "fe[lt] that

[10] The plaintiff clarified that she was not asking the court to return the CHET deposits to her or making a claim to the equity in the Ashford home. Specifically, she acknowledged that funding the CHET accounts is a desirable thing for a parent to do and testified that she was not making a claim against the equity in the Ashford home, even acknowledging that the defendant previously had made additional payments of $20,000 on the mortgage during the course of the marriage.

[the defendant] has systematically withdrawn large sums of money in order to pay down his personal debt, his mortgage, increase the CHET funds of [his older child]. [The defendant] stated in the past . . . while divorcing . . . his first wife, this was a pattern he had created in order to avoid paying her any money, and I believe he's doing the same here." She further clarified, when asked whether she was "still looking for $60,000 even though [the defendant had] been funding the children's education," that her "desire to have the $60,000 did not factor on the CHET account[s] alone."

In rendering its property division orders, the court considered the defendant's several unilateral financial transactions, which, although they increased the equity in the Ashford home and set aside funds for the three children's college education, were made without the input of the plaintiff and had the effect of reducing the liquid assets available for distribution. Having reviewed the evidence before the court, we cannot conclude that the court abused its broad discretion in dividing the parties' property as it did.[11]

[11] The defendant states in his principal brief that the court provided in its articulations different values for the children's CHET accounts. The court's first articulation refers to the transactions made by the defendant—the deposits into the accounts for the parties' children in the total amount of $20,000 and the deposit into the account for the defendant's older child in the amount of $40,000. The second articulation values the CHET accounts for the parties' children at $11,656.07 each and for the defendant's older child at $11,656.07. We note that the defendant's September, 2018 financial affidavit values the account for the defendant's older child at $115,179, and the defendant testified at trial that the value of that account was "over [$100,000]." We are convinced that the value identified in the second articulation for the CHET account for the defendant's older child constitutes a scrivener's error. First, it is identical to the value of the accounts for the parties' children, suggesting that the court merely improperly repeated the value. Second, the trial court previously had articulated that it found that the defendant had transferred $40,000 into his older child's account. Thus, it clearly recognized the significantly greater value of that account.

In his reply brief, the defendant notes that his September, 2018 financial affidavit values the CHET accounts for the parties' children at $12,322 each. We note that the values identified by the trial court for the accounts for

IV

The defendant's fourth claim on appeal is that the court erred in awarding the plaintiff appellate counsel fees. We disagree.

The following additional procedural history is relevant to this claim. Following the defendant's appeal to this court, the plaintiff filed a motion for an order of attorney's fees, in which she requested that the defendant be ordered to pay the $25,000 retainer required by the plaintiff's appellate attorney. The court held a hearing on the plaintiff's motion on May 13, 2019. Both parties submitted financial affidavits and testified. The defendant testified that he had borrowed money from his brother to pay his appellate attorney. He testified that he did not have any liquid assets, had incurred credit card debt, and thought that he could not access his retirement funds without incurring taxes and penalties. He testified that the estate of his mother was being handled by his two siblings and that he did not know the monetary value of it. The plaintiff also testified that she had borrowed funds from her siblings to pay her appellate attorney's retainer. She testified that she anticipated owing anywhere between $50,000 and, more likely, $80,000 in attorney's fees by the end of the appellate process.

On August 23, 2019, the court issued its memorandum of decision in which it granted the plaintiff's motion for attorney's fees. The court made the following findings of fact in support of its award: the defendant has a demonstrated earning capacity that far exceeds his current income, and, even with the reduced income, he

the parties' children correspond with those identified on the CHET account statements entered into evidence during trial. Any discrepancy in the values of the CHET accounts for the parties' children is immaterial to our analysis, as the only order of the court pertaining to the CHET accounts is the order that the defendant "shall continue to maintain the current CHET accounts for the benefit of the minor children."

still has maintained a higher income than the plaintiff; the defendant has access to substantial retirement funds; the defendant's assets are nearly double those of the plaintiff, including the defendant's substantial equity in his real estate holdings; the amount required to retain appellate counsel is nearly one half of the amount of the financial award made to the plaintiff in the dissolution judgment, and requiring the plaintiff to spend those funds on appellate counsel to defend the appeal of the defendant, who has substantially greater assets available to him, would undermine the court's purpose in making the financial award; and the plaintiff lacked sufficient liquid funds to defend against the appeal. Taking into consideration the criteria contained in General Statutes §§ 46b-62 (a) and 46b-82 and in our Supreme Court's decision in *Hornung* v. *Hornung*, 323 Conn. 144, 169–70, 146 A.3d 912 (2016), the court ordered the defendant to pay the plaintiff $25,000 for the retainer costs of her appellate counsel.

"Section 46b-62 (a) authorizes the trial court to award attorney's fees in a dissolution action when appropriate in light of the respective financial abilities of the parties and the equitable factors listed in § 46b-82. . . . [W]e [have] stated three broad principles by which these statutory criteria are to be applied. First, such awards should not be made merely because the obligor has demonstrated an ability to pay. Second, where both parties are financially able to pay their own fees and expenses, they should be permitted to do so. Third, where, because of other orders, the potential obligee has ample liquid funds, an allowance of [attorney's] fees is not justified. . . .

"A determination of what constitutes ample liquid funds . . . requires . . . an examination of the total assets of the parties at the time the award is made. . . . We have recognized, however, that [t]he availability of sufficient cash to pay one's attorney's fees is not an

absolute litmus test . . . . [A] trial court's discretion should be guided so that its decision regarding attorney's fees does not undermine its purpose in making any other financial award. . . .

"Whether to allow [attorney's] fees, and if so in what amount, calls for the exercise of judicial discretion by the trial court. . . . An abuse of discretion in granting [attorney's] fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did." (Citations omitted; internal quotation marks omitted.) *Hornung* v. *Hornung*, supra, 323 Conn. 169–70.

The defendant contends that the court's award of attorney's fees runs afoul of our Supreme Court's decision in *Hornung*. In *Hornung*, the court awarded the plaintiff $100,000 in trial attorney's fees and $40,000 in appellate attorney's fees. Id., 168. The defendant claimed on appeal that "the plaintiff received ample liquid funds from the trial court's judgment with which to pay her attorney's fees, and that the trial court's conclusion that not awarding her attorney's fees would undermine its other awards to her was unreasonable." Id., 168–69. Our Supreme Court agreed with the defendant. It first considered that the trial attorney's fees award "represent[ed] a very small portion of the liquid assets awarded to the plaintiff in the trial court's judgment." Id., 173. Specifically, this court noted that "the plaintiff [was to] receive liquid assets totaling $2,577,000 within three months of the judgment" and that the fee award "represent[ed] only 4 percent of this amount." Id. The plaintiff was to receive "$2,082,000, the amount owed to her under the [parties' prenuptial] agreement, within sixty days of the judgment; $40,000 per month in periodic alimony and child support, starting twelve days from the judgment; and $7.5 million in lump sum alimony, payable in biannual installments of $375,000, starting two and one-half months from the judgment." Id. The Supreme Court concluded that, "given the vast

liquid assets awarded to the plaintiff, and the modest nature of the attorney's fees when compared with those assets, the equitable factors in § 46b-82, as incorporated into § 46b-62, do not justify the award." Id., 177.

We conclude that *Hornung* is distinguishable from the present case in which, as the defendant recognizes, "neither party had the liquid funds available to pay their respective appellate counsel fee retainers." The present case is more akin to *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 386–87, 999 A.2d 721 (2010), in which our Supreme Court rejected the defendant's argument that the trial court abused its discretion in awarding attorney's fees. Our Supreme Court determined that the majority of assets awarded to the plaintiff in the dissolution were not liquid, noting that "$2.6 million of the approximately $3.2 million in assets awarded to the plaintiff consisted of the family home in which the plaintiff and the parties' three minor children resided" and "also included her interest in a trust . . . certain retirement accounts, vested stock and vested stock options." Id.

In the present case, the court expressly found that the plaintiff lacked the liquid assets to pay her attorney's appellate retainer. Indeed, several of the assets awarded to the plaintiff in the dissolution judgment were not easily liquidated. Specifically, she was awarded her Worcester home, in which she reported $68,858 in equity, $175,000 in retirement accounts to be transferred by way of a qualified domestic relations order, $71,035 in her retirement plan, and $2665 in equity in her motor vehicle.[12] The only assets that the plaintiff

[12] The defendant, in his appellate brief, contends that the "plaintiff's total property award was approximately $384,194, of which $308,535 was liquid." The defendant includes in this amount the plaintiff's retirement assets, which he maintains "typically can be transferred into liquid form with a penalty and a tax." Although the trial court found that the defendant "has substantial retirement funds that are not so encumbered that they cannot be accessed," we are not convinced that the retirement assets need be considered "liquid" for purposes of determining whether the plaintiff has "ample liquid assets"

was awarded that were capable of immediate liquidation were the lump sum property settlement of $52,500, $5000 in funds that were held by the caretaker of the Nicaragua property, and $6801 in bank accounts.[13] As the plaintiff maintains, the $25,000 retainer alone amounted to almost 40 percent of her liquid assets. Thus, we cannot conclude that the plaintiff had "ample" liquid funds such that the court abused its discretion in awarding her attorney's fees.

Moreover, the court also specifically found that requiring the plaintiff to pay the $25,000 retainer would undermine the financial awards made in the dissolution judgment, and the defendant has not demonstrated that such finding was unreasonable. See *Grimm* v. *Grimm*, supra, 276 Conn. 395, 398 (holding that trial court reasonably could have determined that $100,000 fee award to plaintiff was necessary to avoid undermining $100,000 lump sum alimony award, despite plaintiff earning more than $100,000 per year, possessing significant retirement accounts, and having been awarded both of parties' Connecticut residences).

Lastly, in addition to the court's finding that not awarding the plaintiff attorney's fees would undermine the other financial orders, the court's decision expressly stated that it had considered the statutory criteria set forth in § 46b-82. See *Leonova* v. *Leonov*, 201 Conn. App. 285, 331, 242 A.3d 713 (2020) ("general reference by the court to those criteria is all that is required"),

with which to pay her attorney's fees. See *Olson* v. *Mohammadu*, 169 Conn. App. 243, 265–66, 149 A.3d 198 (court did not abuse its discretion in awarding plaintiff appellate attorney's fees when it found that plaintiff did not have sufficient liquid assets with which to pay her own legal fees, and trial court was not persuaded that plaintiff's retirement assets constituted sufficient liquid assets to enable plaintiff to pay her own fees), cert. denied, 324 Conn. 903, 151 A.3d 1289 (2016); see also *Misthopoulos* v. *Misthopoulos*, supra, 297 Conn. 386 (categorizing payee's retirement accounts as not liquid).

[13] The plaintiff's financial affidavit listed two checking accounts with values of $1563 and $5228 and a savings account with a value of $10.

cert. denied, 336 Conn. 906, 244 A.3d 146 (2021). The court went further and made specific findings regarding the parties' earning capacities, current income levels, access to retirement funds, assets, and the amount of counsel fees sought as compared to the financial awards the plaintiff received in the dissolution.

Accordingly, we conclude that the court did not abuse its discretion in awarding the plaintiff appellate attorney's fees to defend the present appeal.

V

The defendant's final claim on appeal is that the court's custodial orders are contrary to the best interest of the children in two ways. First, the defendant challenges the court's order permitting the plaintiff to relocate to Massachusetts and designating the plaintiff's residence as primary for purposes of school enrollment.[14] Second, he argues that the 6:15 a.m. transfer time negatively impacts the quality of his time with the parties' children. We disagree that the court abused its discretion in entering its custodial orders.

[14] In his principal brief, the defendant sets forth the factors for consideration to determine the best interest of the child in a *postjudgment* relocation matter, as adopted by our Supreme Court in *Ireland* v. *Ireland*, 246 Conn. 413, 431–32, 717 A.2d 676 (1998). "[Those] factors are: [E]ach parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements. . . . [Another relevant factor is] the negative impact, if any, from continued or exacerbated hostility between the custodial and noncustodial parents, and the effect that the move may have on any extended family relationships." (Internal quotation marks omitted.) *Ford* v. *Ford*, 68 Conn. App. 173, 178, 789 A.2d 1104, cert. denied, 260 Conn. 910, 796 A.2d 556 (2002).

As the defendant's counsel recognized during oral argument before this court, the court is not required to apply the *Ireland* factors in the case of relocation issues arising coincident to the dissolution of marriage. See id., 184.

The following additional facts and procedural history are relevant to this claim. The plaintiff, in her proposed orders, sought an order requiring the parties' children to attend a preschool program in or near Worcester. The defendant, in his proposed orders, requested that "[t]he children's primary residence for school purposes should be the residence of the father." He further requested, in his proposed orders regarding the parties' parenting plan and schedule: "The plaintiff may move to her house . . . in Worcester, MA. Other than that, parties may only move to a location in Connecticut within 20 minutes driving distance from the matrimonial home." He further proposed: "On a nonschool day the relinquishing parent may, for work reasons, drop off the children to the receiving parent at any time between 6 a.m. and 9 a.m., with [seven day] prior notice."

At trial, the court heard evidence regarding the plaintiff's requested relocation to Worcester. The plaintiff testified that, although she was currently renting a home in Tolland, she owns a home in Worcester that she rents to tenants and that she planned to relocate back to the Worcester home. She testified that the Worcester home was about forty minutes driving distance, without rush hour traffic, from the Ashford home.

The plaintiff testified that she had looked into two preschool programs in the Worcester area and explained the schedules and costs of each program. As to the public school system, the plaintiff testified that she preferred the Worcester area school system to that of Ashford, although she acknowledged that the Ashford school system, which she described as average, has good teachers. The defendant testified that both Ashford and Tolland have very good school systems and that the Worcester district where the Worcester home is located is average among the schools in the city of Worcester and is on the lower end of schools in the county of Worcester.

The family services counselor, Sarantopoulos, testified that it was her recommendation that if the plaintiff relocated to Worcester, the children should attend a preschool program in Worcester. She did not do any research regarding the preschool programs or public schools of Worcester or Ashford, as that task would be beyond the scope of her evaluation.

With respect to the transfer time, the plaintiff testified that she was requesting a 6:15 a.m. transfer time because she could not work day shifts with a 9 a.m. transfer time and that time would facilitate the defendant's commute to Boston. She also thought an earlier transfer time worked to the children's benefit, stating: "They're up, they're ready to go, versus a 9 a.m. time period is—toddlers, they're . . . playing. They don't want to be interrupted." Sarantopoulos testified with respect to the earlier transfer time that she would have no issue with it if the parties agreed to that time, while at the same time recognizing that getting the children up at 4:30 or 5 a.m. "would be early if that is not their natural wake-up time . . . ." The plaintiff clarified that she was requesting that the parent beginning their parenting time pick up the children, so that the children would not have to wake up earlier.

The defendant testified that the plaintiff's relocation to Worcester would increase his commuting time. Specifically, he testified that it would increase his commute to Boston by forty minutes.

In its memorandum of decision, the court entered the following parenting schedule: "Week 1: [The defendant] will have the children from Sunday through Wednesday morning at 6:15 a.m. with [the plaintiff] picking up the children at 6:15 a.m. [The plaintiff] will have the children from Wednesday [at] 6:15 a.m. until Monday morning with [the defendant] picking up the children at 6:15 a.m. . . .

"Week 2: [The defendant] will have the children Monday through Wednesday morning with [the plaintiff] picking up the children at 6:15 a.m. [The plaintiff] will have the children from Wednesday at 6:15 a.m. through Friday afternoon with [the defendant] picking up the children at 1:30 p.m. [The defendant] will have the children from Friday through Sunday and the schedule repeats." The court also ordered that the children be enrolled in a preschool program in the Worcester area and that, once the children attained the age to begin kindergarten, both parents shall have input on which Worcester area schools would be the best fit for the children. In the event that the parties were unable to reach agreement as to which school the children should attend, the plaintiff's selection would prevail.

"Our standard of review of a trial court's decision regarding custody, visitation and relocation orders is one of abuse of discretion. . . . [I]n a dissolution proceeding the trial court's decision on the matter of custody is committed to the exercise of its sound discretion and its decision cannot be overridden unless an abuse of that discretion is clear. . . . The controlling principle in a determination respecting custody is that the court shall be guided by the best interests of the child. . . . In determining what is in the best interests of the child, the court is vested with a broad discretion. . . . [T]he authority to exercise the judicial discretion under the circumstances revealed by the finding is not conferred upon this court, but upon the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference. . . .

"The trial court has the opportunity to view the parties [firsthand] and is therefore in the best position

to assess the circumstances surrounding a dissolution action, in which such personal factors as the demeanor and attitude of the parties are so significant. . . . [E]very reasonable presumption should be given in favor of the correctness of [the trial court's] action. . . . We are limited in our review to determining whether the trial court abused its broad discretion to award custody based upon the best interests of the child as reasonably supported by the evidence." (Internal quotation marks omitted.) *Lederle* v. *Spivey*, 113 Conn. App. 177, 185–86, 965 A.2d 621, cert. denied, 291 Conn. 916, 970 A.2d 728 (2009).

"[General Statutes §] 46b-56 (c) directs the court, when making any order regarding the custody, care, education, visitation and support of children, to consider the best interests of the child, and in doing so [the court] may consider, but shall not be limited to, one or more of [sixteen enumerated] factors . . . . The court is not required to assign any weight to any of the factors that it considers."[15] (Internal quotation marks omitted.) Id., 187.

[15] The following factors are set forth in General Statutes § 46b-56 (c): "(1) The temperament and developmental needs of the child; (2) the capacity and the disposition of the parents to understand and meet the needs of the child; (3) any relevant and material information obtained from the child, including the informed preferences of the child; (4) the wishes of the child's parents as to custody; (5) the past and current interaction and relationship of the child with each parent, the child's siblings and any other person who may significantly affect the best interests of the child; (6) the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders; (7) any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents' dispute; (8) the ability of each parent to be actively involved in the life of the child; (9) the child's adjustment to his or her home, school and community environments; (10) the length of time that the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity in such environment, provided the court may consider favorably a parent who voluntarily leaves the child's family home pendente lite in order to alleviate stress in the household; (11) the stability of the child's existing or proposed residences, or both; (12) the mental and physical health

The defendant argues that the plaintiff established no good cause for relocating, while the relocation negatively impacted the defendant's commute and the quality of the children's time with him. He further contends that, "[o]n the days when [he] has the children both before and after school, he will be forced to drive nearly an extra three hours, cutting into either his workday or into his time with the children." He argues that there was no evidence presented that Worcester "is superior culturally, educationally, or in any other way," to Ashford and that there was no compelling reason to designate the Worcester home as the primary residence for school enrollment purposes.

With respect to the defendant's challenge to the court's designation of the plaintiff's Worcester home as primary for school enrollment purposes, the court had before it both parties' testimony regarding their positions on the Ashford and Worcester school systems and Sarantopoulos' recommendation that the children attend a preschool program in Worcester. The defendant essentially requests that we reweigh that evidence in his favor. "[W]e do not retry the facts or evaluate the credibility of witnesses." (Internal quotation marks omitted.) *Brown* v. *Brown*, supra, 148 Conn. App. 20.

As to the defendant's challenge to the transfer times, the court heard evidence that the parties' children wake up early and that an early transfer time would permit the plaintiff to work day shifts. Thus, our review of the

of all individuals involved, except that a disability of a proposed custodial parent or other party, in and of itself, shall not be determinative of custody unless the proposed custodial arrangement is not in the best interests of the child; (13) the child's cultural background; (14) the effect on the child of the actions of an abuser, if any domestic violence has occurred between the parents or between a parent and another individual or the child; (15) whether the child or a sibling of the child has been abused or neglected, as defined respectively in section 46b-120; and (16) whether the party satisfactorily completed participation in a parenting education program established pursuant to section 46b-69b. . . ."

record finds support for the court's order. Moreover, in his proposed orders, the defendant contemplated that "for work reasons," the children could be exchanged "at any time between 6 a.m. and 9 a.m., with [seven] day prior notice." It was not an abuse of discretion to set 6:15 a.m. as the usual transfer time, rather than direct the parents to implement an optional 6:15 a.m. transfer time. Finally, the court stated in its memorandum of decision that it had taken into consideration the statutory criteria and applicable case law and had applied it to the evidence. "[T]he trial court is presumed to have applied the law correctly, and it is the burden of the appellant to show to the contrary." (Internal quotation marks omitted.) *Brown* v. *Brown*, supra, 148 Conn. App. 20.

Accordingly, we conclude that the court did not abuse its broad discretion in formulating its custodial orders.

The judgment is affirmed.

In this opinion the other judges concurred.

JAMES M. MCNAMARA *v.* KRISTINE MCNAMARA
(AC 43391)

Alvord, Alexander and Eveleigh, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court granting her attorney's motion to withdraw his appearance, denying her request for a continuance, and granting the plaintiff's motion for modification. The plaintiff filed a postjudgment motion for modification seeking amendments to the parties' parenting time, communication practices, and medical and educational final decision-making authority. Subsequently, the defendant's counsel, C, filed a motion to withdraw his appearance, in which he represented that communication with the defendant had broken down and that he could not effectively represent her interests. The trial court granted the motion after a hearing. Subsequently, the court denied the defendant's request for a continuance of the hearing on the plaintiff's motion for modification in order to obtain

new counsel. The court granted the plaintiff's motion for modification, and this appeal followed. *Held*:

1. The trial court did not abuse its discretion in granting C's motion to withdraw his appearance: the court correctly determined that the defendant did not object to the motion because, after the trial court stated that it was its understanding that the defendant did not object, the defendant responded only by stating that she did not want to be self-represented, the record revealed that she was afforded ample opportunity to communicate her position, and, although C's motion was granted three days before the hearing on the motion for modification, the motion to withdraw was precipitated by the defendant's refusal to meet with C to prepare for the hearing.
2. The defendant could not prevail on her unpreserved claim that the trial court violated her right to procedural due process in denying her motion for a continuance; the defendant did not meet her burden of proving that the denial of the requested continuance of the hearing on the plaintiff's motion for modification, a postjudgment motion between two parents with joint legal and shared physical custody of their children, was a claim of constitutional magnitude, directly linked to the specific constitutional right she alleged, namely, a parent's constitutional right to make decisions concerning the care, custody and control of his or her child.
3. This court declined to review the defendant's claim that the trial court abused its discretion in denying her motion for a continuance; the defendant failed to brief and analyze adequately how she was harmed by the court's denial of her request, and, result, in the absence of any such analysis, this court was unable to conclude that the denial had any bearing on the outcome of the hearing.
4. The trial court did not abuse its discretion in awarding the plaintiff final decision-making authority on issues concerning the physical and emotional health of the parties' children, treatment decisions, and the selection of therapeutic providers: although the court found that the parties were capable and loving parents, it also found that they communicated poorly with each other and their inability to agree on important issues resulted in the children being denied therapeutic services, and, as a result, a tiebreaker was needed; this court could not conclude, on the basis of the court's findings, that the trial court abused its discretion in concluding that an award of final decision-making authority was necessary and that it was most appropriate for the plaintiff to be given that authority.

(*One judge dissenting*)

Argued April 7—officially released September 28, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the court, *Winslow, J.*, rendered

judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Hon. Heidi G. Winslow*, judge trial referee, granted the motion to withdraw filed by the defendant's counsel; subsequently, the court, *Hon. Heidi G. Winslow*, judge trial referee, denied the defendant's motion for a continuance and granted the plaintiff's motion for modification, and the defendant appealed to this court. *Affirmed.*

Olivia M. Eucalitto, with whom, on the brief, was *Janet A. Battey*, for the appellant (defendant).

Christopher P. Norris, for the appellee (plaintiff).

Opinion

ALVORD, J. In this postdissolution matter, the defendant, Kristine McNamara, appeals from the judgment of the trial court granting her attorney's motion to withdraw his appearance, denying her motion for a continuance, and granting the motion of the plaintiff, James M. McNamara, for modification of certain custody orders. On appeal, the defendant claims that the court (1) abused its discretion in granting her attorney's motion to withdraw, (2) violated her right to procedural due process in denying her motion for a continuance, (3) abused its discretion in denying her motion for a continuance, and (4) abused its discretion in awarding the plaintiff final decision-making authority on issues concerning the health, treatment, and therapeutic providers of the parties' children. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our review of the defendant's claims. The court, *Winslow, J.*, dissolved the parties' eleven year marriage on September 27, 2013. The judgment of dissolution incorporated by reference the parties' separation agreement and parenting plan agreement (parenting plan

agreement), both dated September 26, 2013. The parenting plan agreement provided, inter alia, that the plaintiff had sole legal custody of the parties' two minor children. On January 4, 2016, with the approval of the court, *Eschuk*, *J.*, the parties agreed to amend the parenting plan to provide that the parties would have "joint legal and physical custody of the children." On November 6, 2018, with the approval of the court, *Eschuk*, *J.*, the parenting plan agreement again was modified to provide the defendant with additional parenting time.

On January 11, 2019, the plaintiff filed a motion for modification. On May 15, 2019, the plaintiff filed a second amended motion for modification (operative motion for modification), in which he sought amendments to the parties' parenting time, holiday parenting time, parental communication practices, and medical and educational final decision-making authority. A hearing on the plaintiff's motion for modification was scheduled for August 8 and 9, 2019.

On July 31, 2019, the defendant's counsel, Attorney William Chabb, filed a motion to withdraw his appearance. Attorney Chabb represented that effective communication with the defendant had broken down, the defendant had stated that she did not trust him, and the defendant did not value or follow his reasonable advice or acknowledge the risks of an unfavorable result at trial. As a result, Attorney Chabb represented that he could not effectively or adequately represent the defendant's interests in the matter and that opposing counsel did not object to the granting of the motion. A hearing was set on the motion to withdraw for August 5, 2019, at which the parties appeared before the court, *Hon. Heidi G. Winslow*, judge trial referee. After the hearing, and on that same date, the court granted the motion. The defendant thereafter made an oral request for a continuance in order to obtain new counsel, which the court denied.

On August 6, 2019, the defendant filed a motion for continuance, seeking to have the hearing on the plaintiff's motion for modification continued to September 6, 2019. She asserted, as her reason for requesting a continuance: "I need more time because my lawyer withdrew yesterday. I have no legal professional representation for my hearing." The motion stated that the plaintiff had not consented to the continuance. The court, *Eschuk*, *J.*, denied the motion on the same day it was filed.

The plaintiff's operative motion for modification was heard by the court, *Hon. Heidi G. Winslow*, judge trial referee, on August 8 and 9, 2019. On August 9, 2019, the court made findings on the record and, on August 12, 2019, the court issued a written order, providing, inter alia, that: "The parties shall have joint legal custody of the minor children. The parties shall be equally involved in all major decisions affecting the children. The party with whom the children are staying at the time will have the right to make emergency decisions affecting the children. All other important decisions affecting the health, welfare, education, religious upbringing, guidance, discipline or other aspect of the upbringing of the children shall be made with the participation, involvement and agreement of both parents. Neither party shall be entitled to act unilaterally as to important decisions affecting the children until there has been a bona fide attempt to reach agreement. If, however, the parties are unable to agree on a physical health, emotional health, or therapeutic treatment decision or selection of the providers of such services, the plaintiff shall have the final say. Physical and emotional health care appointments, as well as therapeutic services, shall be scheduled to occur on some of the parenting time of each parent." On August 26, 2019, the defendant filed a motion to reargue the court's August 12, 2019 custody

orders, which was denied. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant's first claim on appeal is that the court abused its discretion in granting Attorney Chabb's motion to withdraw his appearance. Specifically, she argues that it was improper to permit Attorney Chabb to withdraw seventy-two hours before the hearing on the plaintiff's motion for modification was scheduled to begin and that the court's determination that she did not object to Attorney Chabb's withdrawal is contradicted by the transcript. The plaintiff responds that the defendant was clear as to her desire to hire new counsel and she did not object to Attorney Chabb's withdrawal. We conclude that the court did not abuse its discretion in granting the motion to withdraw.

The following additional facts and procedural history are relevant to our resolution of this claim. At the beginning of the August 5, 2019 hearing on Attorney Chabb's motion to withdraw his appearance, the court recessed briefly to give the defendant and Attorney Chabb time to speak with each other. The court then heard argument from Attorney Chabb before turning to the defendant for her position on the motion. The defendant explained: "I feel that [Attorney] Chabb is not informing me and protecting my legal rights by guiding me in the direction that I need to be guided in." The defendant stated that Attorney Chabb had e-mailed her on May 29, 2019, to inform her that she could ask for a deposition of the plaintiff if she wanted to do so. She explained that he had sent her a letter on August 1, 2019, in which he indicated that he had e-mailed her regarding the "use and necessity of a deposition." The defendant stated that Attorney Chabb had falsely said that she was under stress and pressure and that she had virtually no contact with him during July, 2019. She represented that "[I]t's

been all along where I've gone to court and he hasn't reviewed to me what is actually coming up onto to be discussed. And I go into court and, [for] example, the November 6, whatever happened that day, it was the day before that I saw that the opposing side wanted to change something in the parenting plan. But I had met with [Attorney] Chabb the day before and we discussed an entirely different motion. So, I walked into court the next day and I was basically blindsided by a proposal handed to the judge that I didn't even read." The defendant further represented that, on another occasion, Attorney Chabb again had not informed her of the subject matter of an upcoming hearing.

The defendant then explained to the court that she was very busy because of her parenting time with the parties' children. She stated that she had not filed any objection to the plaintiff's request for medical and educational decision-making authority because she had not been told that she was supposed to be filing an objection. She concluded her argument by stating: "[U]nfortunately I can't seem to, for whatever reason, the relationship is—I can't seem to get good counsel. And I'm just looking for a fair and honest . . . process with good legal counsel so that I can put on a case to show the court the good, dedicated mother that I am. Thank you, Your Honor."

After sharing her position, the court followed up by asking the defendant how she responded to Attorney Chabb's May 29, 2019 e-mail regarding the deposition, and whether she let Attorney Chabb know whether she wanted to have the plaintiff deposed. After this line of inquiry, the court stated: "[W]ell, what I think I'm hearing from you is that you're agreeing that your relationship with [Attorney] Chabb has broken down." The defendant responded: "I—you know, I spent $30,000 and I—if there's some way that we can work it out. My problem is that if I go to try and get another lawyer,

you know—I've called and sort of inquired, you know, it would be a $30,000 retainer. So I, you know, I've tried to—to—." The court then interjected: "And really short notice since your hearing is later this week."

The court then inquired of the defendant regarding her willingness to share with Attorney Chabb certain e-mails. The defendant stated: "[I]f [the plaintiff's] entire motion is gonna be heard on the 8th and 9th, he has not asked, sat down with me, and asked me for any e-mails to discuss anything. And so he's telling me now, the other day, that in three to four hours he can prepare me for this hearing but he's spent no time and he's asked for no e-mails of what it is that could support my case against these false allegations that the other side is making." The court and the defendant then engaged in a colloquy regarding whether the defendant should have provided certain e-mails to Attorney Chabb, with the defendant explaining, inter alia, that she wanted to sit down with Attorney Chabb and go through each of the plaintiff's allegations and discuss what types of e-mails would be most responsive to the plaintiff's allegations.

The following colloquy then occurred:

"The Court: I see why [Attorney] Chabb is asking to be released and you're not objecting to his being released.

"[The Defendant]: Well—

"The Court: You get the e-mails together that you need and come and put on your hearing on Thursday. I mean, you either have [Attorney] Chabb representing you Thursday and Friday or you don't.

"[The Defendant]: But I don't want to be—

"The Court: And it sounds as though your relationship has broken down and that you haven't given him the

documents that you feel are necessary for—for the motion to be heard. You know—

"[The Defendant]: But I don't want—

"The Court: —I don't know what you expect him to do when he hasn't been given anything from you.

"[The Defendant]: But I don't want—I don't want to represent myself. I would like some time to find counsel that I can find counsel that can help me.

"The Court: This case has been scheduled for three months, two and a half, at this point.

"[The Defendant]: And—and—

"The Court: And, you know, at this point you're either ready to proceed with [Attorney] Chabb or you're not."

The defendant then stated that she and Attorney Chabb had not had any contact for the month of July, 2019. Attorney Chabb responded: "For the record . . . [the defendant] is right. I had not contacted her for three weeks. Largely because my policy is to wait for preparation as close to a hearing as possible in order, number one, to save money, number two, i[n] case there's amended motions or anything else that comes along. However, prior to May 29th and that e-mail about the deposition as I forwarded per [the defendant's] instructions, formal objections drafted to the allegations made by [the plaintiff's counsel] in the normal course. I also drafted motions for modifications per [the defendant's] directions. I sent them to her, I looked for her direction as to actually filing them. [The defendant] stated to me that she had answers to all the allegations for [the plaintiff's counsel's] motion and I never received them. So, there comes a point where I can't obviously command, I can only try to persuade my clients. And I tried to persuade her to deal with these issues and deal with them in a timely fashion, I heard

nothing. So, at one point, you just have to stop. I've done everything she directed me to do, she's been successful in terms of her parenting and an additional time in November, the last time we were in court. So, the problem becomes is . . . not that I take [the defendant's] criticisms personally, I don't, but professional[ly] I have to decide whether I can actually work with her when her attitude is somewhat in opposition depending on the day. So when she called me last week and asked me about preparation I did say, and I invited her to come to my office last Wednesday or Thursday to sit down, I have a complete file, I have what I believe would be some objections, might have merit, but she proceeded to simply not take me up on my offer and kind of personally harangue me. Again, it's not personal but professionally how can I recover from that? So, how can I sit down now with [the defendant] and pretend it all didn't happen and now deal with all the documents she's had, no deposition and it is her option, it's always the client's options, as to whether they want to spend any money on any legal procedures. So unfortunately, I don't believe that I can represent [the defendant]. I think too much water under the bridge in this relationship.

"The Court: I'll hear from you again, Ms. McNamara. [Attorney] Chabb has said that you were invited to his office last week. Do you recall something of that sort?

"[The Defendant]: Over the phone he told me that on Thursday and Friday that the only things are gonna be discussed are [the plaintiff's] issue wanting sole medical and educational decision making.

"The Court: Did he invite you to his office—

"[The Defendant]: He—

"The Court:—to sit down and talk?

"[The Defendant]: He did. He—

"The Court: And—and—

"[The Defendant]:—over the phone he—Yeah.

"The Court: And what was your response to that?

"[The Defendant]: That . . . last minute to go there and sit down and talk to him when he never even told me what type of e-mails or anything that I would prepare. He said I can see you either tomorrow or the next day and I'll prepare you in three to four hours. But I said, I don't want you to prepare me when . . . you haven't even told me what to bring or we haven't even discussed. How can, it's not that I don't want him to, it's that how could we possibly prepare effectively in three to four hours for just sole medical and educational decision making as if those are just the only issues when we have had no contact and we've not sat down for him to guide me on what it is that I could bring that would be most worthy for a hearing.

"The Court: So you declined to sit down with him?

"[The Defendant]: I said to him how can we prepare, you know, in three to four hours and that be it when we haven't—

"The Court: So, did you decline to sit down with him last week?

"[The Defendant]: Ah—no. I would like—I'm still willing to sit down and prepare effectively.

"The Court: So why did you not go when he suggested that you go and sit down with him last week?

"[The Defendant]: Well, I was—I was with my kids that day so I couldn't go that day. And it wasn't kind of like, I couldn't go that day. . . . It was so last minute. It wasn't even something that was scheduled in advance, like this is when we're gonna sit down. There was no, it wasn't even that there was an appointment

scheduled to say, okay, in two weeks I want, since we've had this discussion, we're gonna have another sit down where we're gonna discuss in three to four hours everything that I told you to bring. So then we're gonna sit down at this time . . . and really go prepare properly with what I've asked you to bring. It's almost like there's nothing and then . . . we had a conversation and he said come and in three to four hours, tomorrow or the next day, I'm gonna prepare you with nothing. And we—I mean, pretty much the whole month of . . . July, we—there's been no contact. There's been no professional guidance and I just feel that that's detrimental to my interests for . . . having a fair trial, a fair hearing for medical and educational decision making when I'm the one that—that makes very good decisions medically and educationally for my children. So, I'm going—If I don't have good counsel helping me advance my interests to me that's, I don't—

"The Court: Well, it seems to me that there's a definite rift between [the defendant] and [Attorney] Chabb. Ms. McNamara, I don't really understand your reasoning that says I needed to sit down with him but I couldn't make myself available on either of the days that he suggested last week for several hours. And it doesn't make sense to me and I think that [Attorney] Chabb has the same difficulty with a hearing coming up shortly for you to not make yourself available to sit down with him is a problem. So, I'm going to grant his motion releasing him from further representation in this matter. You just made it very clear that you have no confidence in his ability to represent you.

"[The Defendant]: I don't want to be self-represented though."

We first set forth our standard of review. "Decisions regarding the withdrawal of counsel are evaluated under an abuse of discretion standard." *Tolman* v.

Banach, 82 Conn. App. 263, 265, 843 A.2d 650 (2004); see also *State* v. *Fernandez*, 254 Conn. 637, 647, 758 A.2d 842 (2000), cert. denied, 532 U.S. 913, 121 S. Ct. 1247, 149 L. Ed. 2d 153 (2001).

The defendant first contends that the court incorrectly concluded that she did not object to Attorney Chabb's motion to withdraw. Our review of the transcript reveals that the court asked the defendant whether she wanted to be heard on Attorney Chabb's motion to withdraw. The defendant responded in detail by chronicling the ways in which she perceived her counsel to have failed to inform her, to protect her rights, and to guide her. Specifically, she stated that he had failed to inform her of the substance of prior court hearings, miscommunicated with her as to the importance of a deposition, and said false things about her stress level. She did not include in her remarks any statement that she objected to the motion or that she wanted Attorney Chabb to continue to represent her. At the conclusion of the defendant's remarks, the court followed up with questions for the defendant. Following that colloquy, the court stated that it was its understanding that the defendant was not objecting to her counsel being permitted to withdraw, to which the defendant responded that she did not want to be self-represented. It was not until the discussion turned to whether the defendant had failed to accept her counsel's invitation to meet to prepare for the upcoming hearing that the defendant stated that she was still willing to meet with Attorney Chabb. Moreover, after the court stated that it was granting Attorney Chabb's motion, the defendant responded only by stating that she did not want to be self-represented. On the basis of this record, we conclude that the court did not incorrectly determine that the defendant did not object to Attorney Chabb's motion to withdraw.

Although the defendant points to instances in which she contends the court "cut her off" when she tried to clarify whether she was objecting to Attorney Chabb's motion to withdraw, the record reveals that she was afforded ample opportunity to communicate her position on the motion. The colloquies cited by the defendant as evidencing the court's "cut[ting] her off" occurred after both the defendant's full opportunity to state her position and the additional colloquy between the court and the defendant, in which the defendant provided indirect responses to the court's question as to why she had declined to meet with her counsel.

The defendant's second argument is that the time frame of the court's granting of her counsel's motion to withdraw, seventy-two hours before the hearing on the plaintiff's motion for modification was scheduled to begin, further reflects an abuse of discretion. Although Attorney Chabb's motion to withdraw was granted three days before the hearing on the motion for modification, the motion to withdraw, which had been filed on July 31, 2019, was precipitated, at least in part, by the defendant's refusal to accept Attorney Chabb's invitation that they meet to prepare for the hearing. Moreover, the defendant, prior to the hearing on Attorney Chabb's motion to withdraw, had consulted with another attorney and was told she would have to provide a $30,000 retainer. Accordingly, we conclude that the court did not abuse its discretion in granting Attorney Chabb's motion to withdraw his appearance.

II

The defendant's second claim on appeal is that the court violated her right to procedural due process when it denied her motion for a continuance. We disagree.

The following additional procedural history is relevant to this claim. After the court orally granted Attorney Chabb's motion to withdraw his appearance, the

defendant requested that the hearing on the plaintiff's motion for modification be continued to allow her time to find new counsel. The following colloquy occurred:

"[The Defendant]: I don't want to be self-represented though. I'd like a month then to—

"The Court: That's your option.

"[The Defendant]:—find counsel.

"The Court: You may go and seek counsel or you may come up and represent yourself in two—three days, I guess it is.

"[The Defendant]: So I—

"The Court: See you on the eighth.

"[Attorney Chabb]: Thank[s], Your Honor.

"[The Defendant]: So I need to find, so I need to find counsel for the case—

"The Court: Or represent yourself, whichever.

"[The Defendant]:—on Friday or—for that. So, it can't be—it can't be—

"The Court: It's the eighth, not Friday.

"[The Defendant]: So it can't be continued so I can find legal counsel?

"The Court: No. This matter's been pending since May.

"[The Defendant]: Okay.

"The Court: You will show up and have your hearing on Thursday and Friday.

"[The Defendant]: Thank you."

The following day, August 6, 2019, the defendant filed a motion for a continuance, in which she represented:

"I need more time because my lawyer withdrew yesterday. I have no legal professional representation for my hearing." She requested that the hearing be continued to September 6, 2019. The defendant indicated on the motion that the plaintiff did not consent to the request for continuance. The court, *Eschuk*, *J.*, denied the motion.

On appeal, the defendant argues that the court's denial of her motion for a continuance deprived her of due process, and she seeks review of her claim under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), because her claim was not presented to the trial court as constitutional in nature. Assuming the first prong of *Golding* is met, we turn to whether, under the facts of this case, the defendant has met her burden of proving that the denial of the requested continuance is a claim of constitutional magnitude. See, e.g., *Foster* v. *Foster*, 84 Conn. App. 311, 316–17, 853 A.2d 588 (2004). "In general, a claim that a court improperly denied a motion for a continuance is not a constitutional claim, but rather one that rests in the discretion of the trial court. . . . If the denial of the continuance is directly linked, however, to a constitutional right, then due process rights are implicated, and the claim is of constitutional magnitude." (Citation omitted.) Id., 317.

We are not persuaded that the defendant has satisfied her burden of demonstrating that the denial of the requested continuance is directly linked to the specific constitutional right she alleges, namely, a parent's constitutional right to make decisions concerning the care, custody and control of his or her child. The defendant relies on *In re Shaquanna M.*, 61 Conn. App. 592, 767 A.2d 155 (2001), and *Foster* v. *Foster*, supra, 84 Conn. App. 311, both of which are distinguishable from the present case.

In re Shaquanna M., supra, 61 Conn. App. 605–608, involved a denial of a continuance in a proceeding to terminate parental rights. This court determined that the respondent's due process rights were violated when the court denied her a continuance to obtain new counsel for her children after the individual who had been serving as their attorney and guardian ad litem had died. Id., 593–94, 608. Because the proceeding to terminate parental rights implicated the respondent's constitutional right to maintain a relationship with her children, this court reviewed the trial court's denial of the continuance pursuant to a procedural due process standard, rather than the general abuse of discretion standard. Id., 604–605. *Foster* v. *Foster*, supra, 84 Conn. App. 313–14, involved motions filed by the paternal grandparents to modify custody or, in the alternative, to enforce their visitation rights. On appeal, the plaintiff claimed that the court violated her right to procedural due process when it denied her motion for a continuance. Id., 315. This court determined that, "because the hearing involved a request by grandparents for visitation, the plaintiff's motion for a continuance was sufficiently linked to a constitutional right to accord *Golding* review to the court's denial of her motion for a continuance." Id., 318. This court, citing *Roth* v. *Weston*, 259 Conn. 202, 229, 789 A.2d 431 (2002), stated that our Supreme Court has held that a motion by a grandparent or a third party for visitation affects a parent's fundamental right to make decisions regarding her child's care, control, education, health, religion, and association. *Foster* v. *Foster*, supra, 317–18.

The present case does not involve the irrevocable severance of a parent's rights; see, e.g., *In re Shaquanna M.*, supra, 61 Conn. App. 605; or the "forced intervention by a third party seeking visitation . . . ." (Internal quotation marks omitted.) *Foster* v. *Foster*, supra, 84 Conn. App. 318. Rather, the motion filed by the plaintiff sought

modifications both to parenting time and holiday parenting time, modifications to the method and frequency of communications between the parents, and an order that the plaintiff be awarded final decision-making authority with respect to the medical, dental, orthodontic, and educational needs of the parties' children. The defendant has provided this court with no authority that the denial of her requested continuance of the postjudgment hearing between two parents who have joint legal and shared physical custody of their children, is directly linked to her constitutionally protected interest in the care, custody, and control of her children.

Consequently, we conclude that the defendant has failed to satisfy the second prong of *Golding*, in that she has not met her burden of proving that the denial of the requested continuance is a claim of constitutional magnitude.

III

The defendant's third claim on appeal is that the court abused its discretion in denying her motion for a continuance. We decline to review this claim.

"The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. . . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. . . . [I]f the reasons given for the continuance do not support any interference with [a] specific constitutional right, the [reviewing] court's analysis will revolve around whether the trial court abused its discretion. . . .

"Decisions to grant or to deny continuances are very often matters involving judicial economy, docket man-

agement or courtroom proceedings and, therefore, are particularly within the province of a trial court. . . . Whether to grant or to deny such motions clearly involves discretion, and a reviewing court should not disturb those decisions, unless there has been an abuse of that discretion, absent a showing that a specific constitutional right would be infringed. . . .

"Our Supreme Court has articulated a number of factors that appropriately may enter into an appellate court's review of a trial court's exercise of its discretion in denying a motion for a continuance. Although resistant to precise cataloguing, such factors revolve around the circumstances before the trial court at the time it rendered its decision, including: the timeliness of the request for continuance; the likely length of the delay; the age and complexity of the case; the granting of other continuances in the past; the impact of delay on the litigants, witnesses, opposing counsel and the court; the perceived legitimacy of the reasons proffered in support of the request; [and] the defendant's personal responsibility for the timing of the request . . . ." (Citations omitted; internal quotation marks omitted.) *Watrous* v. *Watrous*, 108 Conn. App. 813, 827–28, 949 A.2d 557 (2008); see also, e.g., *State* v. *Rivera*, 268 Conn. 351, 379, 844 A.2d 191 (2004).

"In the event that the trial court acted unreasonably in denying a continuance, the reviewing court must also engage in harmless error analysis." (Internal quotation marks omitted.) *Boccanfuso* v. *Daghoghi*, 193 Conn. App. 137, 169, 219 A.3d 400 (2019), aff'd, 337 Conn. 228, 253 A.3d 1 (2020); see also *Mensah* v. *Mensah*, 167 Conn. App. 219, 223, 143 A.3d 622, cert. denied, 323 Conn. 923, 150 A.3d 1151 (2016). "[I]n order to establish reversible error in nonconstitutional claims, the [appellant] must prove both an abuse of discretion and harm . . . ." (Internal quotation marks omitted.) *Cunniffe* v. *Cunniffe*, 141 Conn. App. 227, 235, 60 A.3d 1051, cert. denied,

308 Conn. 934, 66 A.3d 497 (2013); see also *State* v. *Coney*, 266 Conn. 787, 803, 835 A.2d 977 (2003) (declining to decide whether court's denial of request for continuance was improper when defendant failed to sufficiently demonstrate harm flowing from denial); *Boccanfuso* v. *Daghoghi*, supra, 170 (concluding that, even if court abused its discretion in refusing to grant continuance in order to present witness' testimony, appellant failed to demonstrate harm as consequence of denial of motion).

In the present case, the defendant failed to brief adequately how she was harmed by the court's denial of her request for a continuance. Notably, her appellate brief does not recognize or discuss her burden in this regard. As a result of the defendant's failure to brief the issue of harm, the plaintiff did not have the opportunity in his appellate brief to respond to any harm analysis. "Our practice requires an appellant to raise claims of error in his original brief . . . so that the issue as framed by him can be fully responded to by the appellee in its brief, and so that [the appellate court] can have the full benefit of that written argument." (Internal quotation marks omitted.) *State* v. *Jose G.*, 290 Conn. 331, 341 n.8, 963 A.2d 42 (2009); see, e.g., *Scalora* v. *Scalora*, 189 Conn. App. 703, 722 n.20, 209 A.3d 1 (2019); see also, e.g., *State* v. *Toro*, 172 Conn. App. 810, 815, 162 A.3d 63 (declining to review claim when appellant presented harmful error analysis for first time in reply brief), cert. denied, 327 Conn. 905, 170 A.3d 2 (2017).[1] In the absence of any analysis concerning how the defendant was harmed by the denial of the continuance, we are unable to conclude that the denial had any bearing on the outcome of the hearing.

It is well established that "[w]e are not required to review claims that are inadequately briefed. . . . We

[1] The defendant did not file a reply brief.

consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where the parties cite no law and provide no analysis of their claims, we do not review such claims." (Internal quotation marks omitted.) *State* v. *Holmes*, 176 Conn. App. 156, 185, 169 A.3d 264 (2017), aff'd, 334 Conn. 202, 221 A.3d 407 (2019). In the context of the failure of a party adequately to brief how a challenged evidentiary ruling was harmful, this court, on multiple occasions, has declined to review a claim of error related to such ruling. See, e.g., *State* v. *Lyons*, 203 Conn. App. 551, 569, 248 A.3d 727 (2021) (declining to consider whether court's admission of challenged testimony was abuse of its discretion when appellant failed to brief how it was harmed by court's evidentiary ruling); *State* v. *Toro*, supra, 172 Conn. App. 818 (declining to address claim when defendant failed to address issue of harm adequately in principal brief). As with an evidentiary claim, the claim of the defendant in the present case is nonconstitutional in nature, and, therefore, the defendant bears the burden of demonstrating both an abuse of the trial court's discretion and resulting harm. See, e.g., *Cunniffe* v. *Cunniffe*, supra, 141 Conn. App. 235. In light of the defendant's failure to brief and analyze how she was harmed by the court's denial of her request for a continuance, we, accordingly, decline to consider whether the court's ruling was an abuse of discretion.[2]

[2] Although we decline to respond to the dissent on a point by point basis, we are compelled to note the following. The dissent, despite acknowledging that the defendant has the burden of demonstrating harm, fails to identify any meaningful analysis of harm contained in the defendant's appellate brief. Instead, it points to the defendant's "statement of facts" section of her brief, in which she states that she was not familiar with the rules of evidence, and that she did not enter any exhibits into evidence or call any witnesses other than herself to testify during her case-in-chief. The only other reference that the dissent identifies in the defendant's appellate brief as demonstrating an analysis of harm is the defendant's statement in the "conclusion and statement of relief requested" portion of her brief, in which she stated that

IV

The defendant's final claim on appeal is that the court abused its discretion in modifying custody orders. Specifically, the defendant claims that the court erred in awarding the plaintiff final decision-making authority. We disagree.

The following additional facts and procedural history are relevant to the defendant's claim. In the plaintiff's May 16, 2019 motion, the plaintiff sought amendments to the parties' parenting time, holiday parenting time, parental communication practices, and medical and educational final decision-making authority. Regarding final decision-making authority, the plaintiff represented that "[t]he parties' minor children have specific and significant educational and medical needs and the defendant has wilfully failed and refused to provide her consent for the plaintiff to pursue various medical and/or educational needs of the minor children, which have been recommended by health care and educational providers and experts." He alleged that the defendant's refusal to provide consent to the plaintiff to pursue

she "stood to lose the ability to make important medical and educational decisions" for her children if the court granted the plaintiff's motion.

In the absence of any briefing or analysis of harm, the dissent identifies three ways in which the defendant may have been harmed by the court's ruling. First, the dissent goes beyond the defendant's recitation of the facts that she did not introduce any exhibits or call any additional witnesses, to add that she also did not raise any objections. Second, the dissent states that "given that the trial judge questioned the defendant extensively during the hearing, an attorney surely would have raised an objection on her behalf." The defendant does not make this argument in her brief. Third, the dissent states that harm is demonstrated by the fact that the court granted the plaintiff's motion for modification. It is unclear how the dissent, in the absence of any analysis regarding harm, could conclude that the denial of the continuance had any bearing on the outcome of the plaintiff's motion. See, e.g., *State* v. *Coyne*, 118 Conn. App. 818, 824, 985 A.2d 1091 (2010) ("[a]bsent any analysis regarding harm, we cannot conclude that the admission of the subject evidence had any bearing on the trial's outcome"). In sum, we do not agree with the dissent's approach of deciding the case on the basis of speculative arguments that the defendant never made.

the recommendations of health care and educational providers was "contrary to the well-being of the minor children."

The plaintiff further represented that the defendant had "made unilateral health care and/or educational decisions regarding the minor children and [had] withheld pertinent information from the plaintiff, which is contrary to the parties' joint legal and physical custody and the minor children's best interests." The plaintiff acknowledged that it was in the children's best interests that "the parties continue to have joint legal and physical custody . . . ." He maintained, however, that on the basis of the defendant's unilateral decision making, withholding of information from the plaintiff, and unreasonably withholding of consent for the plaintiff to pursue recommendations of health care and education providers, he should be granted "sole, exclusive, final decision-making abilities with respect to the medical, dental, orthodontic, and educational needs of the minor children . . . ."

The court held a two day hearing on the plaintiff's motion on August 8 and 9, 2019. Both parties testified along with Cynthia Twiss, the interim director of special services for public schools in Easton and Redding, and the court heard closing remarks. At the conclusion of the hearing, the court made findings on the record. The court first found that "both parents are capable and loving parents of their children" and stated that it had no concerns about the well-being of the children when they are with either parent. The court found that the parties communicate poorly with each other. Specifically, it found that the plaintiff "tends to put forward comprehensive scheduling plans for the future and [the defendant], for whatever reason, seems reluctant to commit in writing, by e-mail or text, to specific plans and this creates problems with scheduling and timing. So, she has not always made timely responses to

requests that have been made by [the plaintiff], and that has to do with a number of issues, schedules, activities, summer plans, therapist suggestions."

The court found: "It's not really a question of whether the parties have good things to contribute, because I think both do as far as the—what's best for the boys. Both parties spend a lot of time with the boys. Both parties are very acutely aware of their needs. There are . . . two good heads to bring to bear here with regard to parenting decisions. Both are attuned to the boys' needs. Both have valid proposals to make and good ideas as to what might be best for the boys. So, that kind of joint communication is going to have to be improved, but it is important that both parties have input into the decision making with regard to what is best for the boys, as—particularly with regard to such areas as medical care, therapeutic care and education.

"Nevertheless, at this point services are being denied to the boys because of the inability of the parties to reach mutual agreement on important issues. They have already had disagreements with regard to the choice of medical doctor for the boys. They've already had disagreements regarding what and when a therapist should be applied for in-home services. There are disagreements looming at this point with regard to schooling for the boys and there's already been disagreement with regard to the educational plan the school put forward for [the parties' younger child] in particular . . . requiring that there actually be a formal hearing at which the questions arose whether . . . the school plan should be followed or not. The parties disagreed with regard to that issue. There's been a . . . more recent disagreement regarding the extended school year that [the parties' older child] had. A disagreement in 2018, again in 2019, resolved only by basically its being implemented by [the plaintiff] over the lukewarm, perhaps, but otherwise objection of [the defendant].

"So, these are all very important issues that cannot remain in limbo going into the future. Somehow, there has to be a . . . tiebreaker and a way to resolve it, and I recognize that. I am compelled to follow the best interests of the children as I apply those to the facts that have been presented, applying the statutory criteria, of course. But, I do find that the best interests of the boys do require some changes at this point because of the fact that there are some serious problems with getting decisions made and I will be making some changes."

On August 12, 2019, the court issued its order on the plaintiff's motion for modification. With respect to custody, the court issued the following order: "The parties shall have joint legal custody of the minor children. The parties shall be equally involved in all major decisions affecting the children. The party with whom the children are staying at the time will have the right to make emergency decisions affecting the children. All other important decisions affecting the health, welfare, education, religious upbringing, guidance, discipline or other aspect of the upbringing of the children shall be made with the participation, involvement and agreement of both parents. Neither party shall be entitled to act unilaterally as to important decisions affecting the children until there has been a bona fide attempt to reach agreement. If, however, the parties are unable to agree on a physical health, emotional health, or therapeutic treatment decision or selection of the providers of such services, the plaintiff shall have the final say. Physical and emotional health care appointments, as well as therapeutic services, shall be scheduled to occur on some of the parenting time of each parent."

"Our standard of review of a trial court's decision regarding custody, visitation and relocation orders is one of abuse of discretion. . . . [I]n a dissolution proceeding the trial court's decision on the matter of custody is committed to the exercise of its sound discretion

and its decision cannot be overridden unless an abuse of that discretion is clear. . . . The controlling principle in a determination respecting custody is that the court shall be guided by the best interests of the child. . . . In determining what is in the best interests of the child, the court is vested with a broad discretion. . . . [T]he authority to exercise the judicial discretion under the circumstances revealed by the finding is not conferred upon this court, but upon the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference." (Internal quotation marks omitted.) *Baker-Grenier* v. *Grenier*, 147 Conn. App. 516, 519, 83 A.3d 698 (2014).

The defendant's sole contention with respect to the custody orders is that the court's favorable findings as to the defendant's decision-making abilities are inconsistent with the court's order providing the plaintiff with final decision-making authority with respect to the children's physical health, emotional health, or therapeutic treatment decisions or selection of the providers of such services. We disagree with the defendant.

The defendant emphasizes the court's findings that she is "very acutely aware" of the children's needs, that she has a "good [head] to bring to bear . . . with regard to parenting decisions," and that she has "valid proposals to make and good ideas as to what might be best for the boys." The court made these findings applicable to both parents.

Significantly, the court expressly found that, although the parties were both capable and loving parents, they communicated poorly with each other and their inability to agree on important issues resulted in the children being denied therapeutic services. Specifically, the

court heard evidence that the children had not received in-home therapy for approximately one year due to the parties' inability to agree on a provider. The court additionally referenced disagreements with respect to the children's pediatrician. The court heard evidence that the defendant unilaterally terminated the children's relationship with their pediatrician. Further, the court referenced the defendant's disagreement with the school's educational plan for the parties' younger child, and her objection to the continued participation of the parties' older child in an extended school year program. The court found that there were "serious problems with getting decisions made" and that a "tiebreaker" was needed. On the basis of these findings, we cannot conclude that the court abused its discretion in determining that an award of final decision-making authority was necessary and that it was most appropriate that the plaintiff be given final decision-making authority.[3]

The judgment is affirmed.

In this opinion ALEXANDER, J., concurred.

EVELEIGH, J., dissenting. I respectfully dissent. I disagree with the majority's conclusion that the defendant, Kristine McNamara, failed to brief adequately how she was harmed by the trial court's denial of her request for a continuance.[1] Under the circumstances here, and

[3] The defendant maintains that "[t]o allow the plaintiff to ultimately make the final decisions concerning the children is, in effect, sole custody . . . ." We conclude that this argument lacks merit. As this court has previously held, "[f]inal [decision-making] authority in one parent is distinct from sole legal custody." *Lopes* v. *Ferrari*, 188 Conn. App. 387, 397, 204 A.3d 1254 (2019); see also *Desai* v. *Desai*, 119 Conn. App. 224, 230, 987 A.2d 362 (2010) (rejecting argument that grant of ultimate decision-making authority to one parent is in effect order of sole custody).

[1] Because I am dissenting from the majority's failure to consider whether the trial court abused its discretion in denying the defendant's request for a continuance and because, in my view, the trial court's decision was an abuse of discretion and the judgment of the trial court should be reversed on that ground, I make no comment on the other claims addressed by the majority.

after considering the relevant factors, I would conclude that the defendant sufficiently addressed the issue of harm in her brief and that the denial of the defendant's request for a continuance constituted an abuse of discretion. Therefore, I would reverse the judgment of the trial court and remand the case for a new hearing on the second amended motion for a modification of the parties' parenting plan filed by the plaintiff, James M. McNamara.

The majority opinion sets forth in detail the factual and procedural history of this case. Accordingly, a full recitation of those facts is not needed here. I, however, briefly set forth some of the factual and procedural history of the case that is relevant to my analysis. The parties' marriage was dissolved on September 27, 2013, and a parenting plan dated September 26, 2013, was incorporated into that judgment. On January 4, 2016, the parties agreed to an amendment to and modification of the parenting plan. Subsequently, on February 5, 2018, the plaintiff filed a motion for modification. With respect to that motion, the parties entered into a stipulation on April 23, 2018, whereby they agreed to mediation of the parenting issues raised in the motion. Thereafter, on November 6, 2018, the plaintiff requested orders regarding his February 5, 2018 motion for modification, and the court entered orders in accordance with that request.

On January 11, 2019, the plaintiff filed another postjudgment motion for modification, in which he sought modification of the parties' parenting plan with respect to the following issues: (1) the defendant's constant harassing and distracting, nonemergency communications directed to the plaintiff, which he claimed were not respectful as required by the January 4, 2016 amendment to the parenting plan, (2) a Christmas and New Year holiday schedule for the minor children, as the previous parenting plan and modifications did not set

forth specific parenting time concerning the Christmas and New Year's holidays, and (3) the defendant's refusal to provide consent for the plaintiff to pursue various medical and/or educational needs of the minor children, which was contrary to the well-being of the children and necessitated the plaintiff having final decision-making authority concerning the children's medical and educational needs.

On January 11, 2019, the plaintiff also filed a motion for contempt related to the defendant's failure to execute documentation for the transfer of her interest in the plaintiff's business. The trial court file also contains an amended motion for modification dated February 5, 2019, in which the plaintiff sought a modification on the basis of the same three grounds alleged in his January 11, 2019 motion for modification but included new allegations concerning actions taken by the plaintiff after the filing of the January 11, 2019 motion through February 2, 2019. The court, *Pavia, J.*, ordered a hearing to be held on March 11, 2019, with respect to the plaintiff's amended motion for modification, as well as for a number of other motions filed by the plaintiff, including an amended motion for contempt, a motion dated February 5, 2019, for this matter to be transferred to the family relations office for a custody study, and a motion to appoint a guardian ad litem for the minor children. It is not clear from the record why a hearing on the plaintiff's various motions did not take place on March 11, 2019.

On May 16, 2019, the plaintiff filed a second amended motion for modification, in which he sought a modification of the parenting plan for the same reasons as alleged in his January 11 and February 5, 2019 motions for modification, and he sought therapy for the parties' minor children, whose behavior had become volatile and physical. On May 16, 2019, the plaintiff also filed

a motion to appoint a guardian ad litem for the defendant and a motion seeking to have the defendant undergo a psychological examination. On July 31, 2019, notice was issued to the defendant of a motion to withdraw filed by her counsel, Attorney William Chabb, which set a hearing date on the motion to withdraw for August 5, 2019, on which date the court, *Hon. Heidi G. Winslow*, judge trial referee, granted the motion. The defendant had made an oral request for a continuance at the hearing on August 5, 2019, which was denied by Judge Winslow at the hearing. The next day, August 6, 2019, the defendant filed a written motion for a continuance, which was denied by the court, *Eschuk*, *J.*, the same day.[2] A hearing was held on the plaintiff's pending May 16, 2019 second amended motion for modification on August 8 and 9, 2019, at which the defendant appeared in a self-represented capacity. The court rendered judgment granting the plaintiff's second amended motion for modification on August 12, 2019, and this appeal followed.

Next, I set forth the law and standard of review applicable to the defendant's claim that it was an abuse of discretion for the trial court to deny her motion for a continuance to obtain counsel after the court had granted her counsel's motion to withdraw just three days prior to a scheduled hearing on a pending motion for modification filed by the plaintiff. As the majority correctly notes, "[t]he determination of whether to grant a request for a continuance is within the discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion. . . . To prove an abuse of discretion, an appellant must show that the trial court's denial of a request for a continuance was arbitrary. . . . There are no mechanical tests for deciding

[2] Judge Eschuk denied the defendant's written motion for a continuance without stating the reasons for her decision. This dissent concerns Judge Winslow's decision denying the plaintiff's oral request for a continuance at the August 5, 2019 hearing.

when a denial of a continuance is . . . arbitrary . . . . The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." (Internal quotation marks omitted.) *State* v. *Rivera*, 268 Conn. 351, 378, 844 A.2d 191 (2004). "An abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." *In re Shaquanna M.*, 61 Conn. App. 592, 603, 767 A.2d 155 (2001).

In *State* v. *Rivera*, supra, 268 Conn. 379, our Supreme Court articulated the "factors that appropriately may enter into an appellate court's review of a trial court's exercise of its discretion in denying a motion for a continuance. Although resistant to precise cataloguing, such factors revolve around the circumstances before the trial court at the time it rendered its decision, including: the timeliness of the request for continuance; the likely length of the delay; the age and complexity of the case; the granting of other continuances in the past; the impact of delay on the litigants, witnesses, opposing counsel and the court; the perceived legitimacy of the reasons proffered in support of the request; [and] the defendant's personal responsibility for the timing of the request . . . ." (Internal quotation marks omitted.)

"In the event that the trial court acted unreasonably in denying a continuance, the reviewing court must also engage in harmless error analysis." (Internal quotation marks omitted.) *State* v. *Williams*, 108 Conn. App. 556, 560, 948 A.2d 1085 (2008). Where, as here, the claim involved is nonconstitutional in nature, "to establish reversible error . . . the defendant must prove both an abuse of discretion and harm . . . ." (Internal quotation marks omitted.) Id., 561.

The majority does not reach the merits of the defendant's claim on appeal that the trial court abused its

discretion in denying her request for a continuance on the basis of its determination that the defendant failed to brief the issue of harm adequately. I respectfully disagree. Although the defendant has not designated a separate section of her brief to address harm, I believe she did address the harm that resulted from the court's decision when she discussed in her brief what she stood to lose if the court granted the defendant's motion, namely, "the ability to make important medical and educational decisions for her special needs children . . . ." The defendant also addressed the issue of harm resulting from her self-representation when she stated in her brief: "The defendant, a nonlawyer who was unfamiliar with the rules of evidence, did not enter one exhibit into evidence. . . . Nor did she call one witness other than herself to testify during her case-in-chief." Accordingly, I would conclude that the defendant is entitled to a review of the merits of her claim in this appeal.

After thoroughly reviewing the record and carefully considering the factors set forth in *Rivera*, I believe that they weigh in favor of granting the continuance and, thus, that the court's failure to grant the defendant's request for a continuance constituted an abuse of discretion under the circumstances of this case.

With respect to the first factor—the timeliness of the request for a continuance—the record demonstrates that the defendant made her oral request for a continuance immediately after the court granted Attorney Chabb's motion to withdraw and the defendant realized that she would not be represented by counsel at the upcoming hearing on the plaintiff's motion for modification, which was set to take place three days later. The request, therefore, was timely. As for the second factor concerning the length of the delay, the defendant stated to the court at the August 5, 2019 hearing that she

needed one month to find counsel, which was a relatively short period of time and was not unreasonable.

Moreover, as to the age and complexity of the case, the plaintiff's second amended motion for modification had been pending for two and one-half months at the time that the defendant's attorney sought to withdraw and the court denied the defendant's request for a continuance. That was not a lengthy period of time, and there is nothing in the record to suggest that any kind of emergency existed such that an immediate decision on the plaintiff's motion for modification was necessary. Although the plaintiff's May 16, 2019 motion did raise, in substance, the same claims as those raised in his January 11, 2019 motion for modification as well as his February 5, 2019 amended motion for modification, a hearing had been scheduled on that amended motion for modification for March 11, 2019. However, that hearing did not occur, and, thus, the plaintiff filed his second amended motion for modification shortly thereafter in May, 2019. Nothing in the record suggests that the failure of that hearing to take place in March, 2019, was attributable to the defendant. The trial court even recognized this matter as pending for two and one-half months since May, 2019, not since January, 2019. Moreover, I would not weigh the delay in having the issues resolved, even if construed as being seven months, against the defendant, especially when, since the filing of the plaintiff's January 11, 2019 motion for modification, the plaintiff had filed numerous other motions that had to be addressed by the court, including a motion for contempt, an amended motion for modification, an amended motion for contempt, a motion for this matter to be transferred to the family relations office for a custody study, a motion to appoint a guardian ad litem for the minor children, a second amended motion for modification, a motion to appoint a guardian ad litem

for the defendant, and a motion seeking to have the defendant undergo a psychological examination.

The fourth factor clearly weighs in favor of the defendant, as she had not previously requested a continuance prior to the hearing on August 5, 2019, when she orally requested one. After considering the fifth factor—the impact of delay on the litigants, witnesses, opposing counsel and the court—I would also conclude that this favors the defendant. At the August 5, 2019 hearing, the plaintiff never objected to the defendant's request for a continuance, nor did he make any claim that he would have been prejudiced if the court granted the defendant's request for a one month continuance. See, e.g., *Robelle-Pyke* v. *Robelle-Pyke*, 81 Conn. App. 817, 824, 841 A.2d 1213 (2004) (trial court abused its discretion in denying request for continuance when there was nothing in record to reflect that prejudice would have occurred if continuance had been granted). Moreover, the plaintiff even recognizes in his appellate brief that there is nothing in the record to indicate the impact of a delay on the court or the plaintiff.

Furthermore, with respect to the sixth factor, the plaintiff had a legitimate reason for making her request for a continuance—she wanted time to find an attorney so that she would not be self-represented at the upcoming hearing on the plaintiff's second amended motion for a modification of the parties' parenting plan. It is clear from the transcript of the proceeding on August 5, 2019, that the plaintiff expressed to the court multiple times that she did not want to proceed as a self-represented party. Given the importance of the matters involved in the upcoming hearing—the decision-making authority concerning the health care and educational needs of the parties' minor children—I cannot think of a more legitimate reason for seeking a continuance.

The final factor set forth in *Rivera* concerns the defendant's personal responsibility for the timing of the

request. First, although the court stated at the hearing on August 5, 2019, its belief that the defendant was not objecting to Attorney Chabb's withdrawal, the defendant countered by making it clear to the court that she did not want to represent herself. She also asked the court "if there's some way that [they could] work it out," and stated that she was "still willing to sit down and prepare effectively." Clearly, the defendant did not consent to Attorney Chabb's withdrawal. She explained to the court that she was not able to meet with Attorney Chabb the previous week because it was a last minute request and she was with her children that day, and that her primary concern with Attorney Chabb was his lack of preparation. Attorney Chabb even acknowledged that he had not contacted the defendant for weeks and that he usually waits to prepare until right before a hearing.

The timing of the defendant's request for a continuance was prompted by the trial court's decision to grant Attorney Chabb's motion to withdraw, even though the court was aware that a hearing was scheduled for three days later. The court recognized the "really short notice" it was giving the defendant, and yet, despite the defendant's statements that she was still willing to work with Attorney Chabb, the court granted the motion to withdraw. This is not a situation in which the defendant had sufficient time before the upcoming scheduled hearing to obtain new counsel; see, e.g., *Foster* v. *Foster*, 84 Conn. App. 311, 321, 853 A.2d 588 (2004) (denial of continuance was not improper when plaintiff had ample time to obtain counsel before scheduled hearing date); she had only three days.

Finally, I also think it is important to consider the concept of fairness in this matter. The defendant simply wanted an attorney to represent her at the upcoming hearing on the plaintiff's motion for modification, the court acknowledged the very short notice it was giving

the defendant to find another attorney before the commencement of that hearing, and, as noted previously, the plaintiff never objected to the defendant's request for a continuance. I acknowledge that appellate courts "afford great deference to a court's ruling on a motion for a continuance"; *State* v. *Williams*, supra, 108 Conn. App. 565; and I recognize the importance of docket management. Under the circumstances of this case, however, I believe that the court's denial was unreasonable and arbitrary. See, e.g., id. Accordingly, I would conclude that it was an abuse of discretion for the court to deny the defendant's request for a continuance to seek new counsel, especially when the court's decision to allow her attorney to withdraw, with a hearing pending in three days, was the very reason that she needed the continuance. The court here had an1 alternative, as it could have denied Attorney Chabb's motion to withdraw. Doing so would have obviated the need for the continuance, especially given that this was not a case in which a grievance had been filed or money was owed, and the defendant was still willing to work with Attorney Chabb. Once the court granted the motion to withdraw, however, it should have afforded the defendant a reasonable continuance to give her the opportunity to obtain new counsel.

Moreover, I would conclude that the defendant was harmed by the court's decision denying her request for a continuance. Even though the court commended the defendant on her performance in representing herself during the proceedings on the plaintiff's motion for modification, her self-representation was not without its consequences. During the hearing on the plaintiff's second amended motion for modification on August 8 and 9, 2019, the defendant never introduced any exhibits, called any witnesses other than herself, or raised any objections. The failure of the court to allow the defendant a reasonable continuance to obtain counsel

prevented the defendant from mounting a meaningful challenge to the plaintiff's motion for modification. See generally *State* v. *Jackson*, 334 Conn. 793, 816, 821, 224 A.3d 886 (2020) (trial court abused its discretion in failing to afford defendant reasonable continuance to obtain his own expert to counter late disclosure of expert by state, which deprived defendant of meaningful opportunity to challenge state's expert); see also *Ramos* v. *Ramos*, 80 Conn. App. 276, 284–85, 835 A.2d 62 (2003) (trial court abused its discretion in denying motion for continuance to address late disclosure of plaintiff's health condition, and court's decision was harmful when defendant was denied opportunity to investigate impact of plaintiff's health condition on determination of plaintiff's damages), cert. denied, 267 Conn. 913, 840 A.2d 1175 (2004). Moreover, given that the trial judge questioned the defendant extensively during the hearing, an attorney surely would have raised an objection on her behalf. The harm to the defendant is further demonstrated by the fact that the court granted the plaintiff's motion for modification, which resulted in the plaintiff being awarded final decision-making authority concerning educational and heath care issues of the minor children. The court's ruling on the request for a continuance denied the defendant the opportunity to mount an effective defense to the plaintiff's motion, on which the court ruled in the plaintiff's favor. "A reasonable continuance almost undoubtedly would have rectified the prejudice." *State* v. *Jackson*, supra, 815.

Accordingly, I respectfully dissent.