MARC HERRON *v.* LINDA DANIELS
(AC 43560)

Bright, C. J., and Prescott and Lavine, Js.

Syllabus

The plaintiff sought to recover the security deposit he had paid to the defendant landlord in connection with a one year lease of a single-family home. A few months after the start of the lease term, the plaintiff purchased his own home and attempted to terminate the lease, offering to vacate the premises and pay the remaining rent due under the agreement. The defendant refused the offer, and the plaintiff agreed to continue to pay rent and to fulfill his other obligations under the lease throughout the remainder of its term, despite vacating the premises. After the leasehold expired, the defendant sent the plaintiff an accounting of the security deposit, indicating that no portion of it would be returned due to unpaid rent and fees due under the lease and expenses incurred to repair alleged damages to the premises, and that the plaintiff owed the defendant additional funds for damages that exceeded the amount of the security deposit. The trial court found in favor of the plaintiff in part on his complaint and on the defendant's counterclaim, and the defendant appealed and the plaintiff cross appealed to this court. *Held*:

1. The trial court did not err when it awarded the plaintiff double damages as a result of the defendant's failure to return a portion of the security deposit: the trial court's determination that certain of the defendant's charges for damages to the premises were pretextual was not erroneous, as the court credited the plaintiff's testimony that he had hired a cleaning service after he vacated the premises and found the defendant's testimony relating to the claimed repair expenses unconvincing; moreover, although the trial court's finding that the charge for the replacement of the furnace filter was pretextual was erroneous, such finding did not undermine its conclusions regarding the disputed charges nor did it impact the judgment rendered; furthermore, the trial court's award of statutory damages equal to double the entire amount of the plaintiff's security deposit was required by the plain language of the applicable statute (§ 47a-21 (d) (2)), even though a portion of the security deposit was properly withheld.
2. The trial court did not err when it concluded that the defendant violated the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.): the trial court's finding that the defendant engaged in unethical behavior that violated the public policy of the applicable statute (§ 47a-21 (d) (2)) by withdrawing portions of the security deposit for her personal use and by assessing certain itemized damages as a pretext to avoid having to return the security deposit following the termination of the

lease was supported by the record; moreover, the defendant's claim that she was not required to place the security deposit into an escrow account because she had fewer than four rental units was unavailing because the applicable statute (§ 47a-21 (k) (2)) provided an affirmative defense only to criminal penalties for the failure to maintain an escrow account, not to similar civil actions; furthermore, the evidence in the record demonstrated that the plaintiff suffered an ascertainable loss as a result of the defendant's withholding of the portion of the security deposit that was legitimately owed to him.

3. The trial court did not abuse its discretion by awarding punitive damages to the plaintiff: the trial court's findings that the defendant did not act in good faith when she assessed pretextual damages to the plaintiff and failed to place the security deposit into an escrow account and that her actions caused substantial injury to the plaintiff were not clearly erroneous and were sufficient to support an award of punitive damages; moreover, the trial court based the award on the defendant's failure to comply with her statutory obligations as a landlord, not on her breach of contract; furthermore, the amount awarded was not excessive in light of the amount in dispute, the defendant's conduct, and the trial court's stated purpose in making the award, which was to provide the defendant with an incentive to comply with security deposit laws and to protect her future tenants.
4. The trial court did not err in holding that the plaintiff was not entitled to a return of the rental payments that he made after vacating the premises: the trial court correctly determined that, pursuant to the applicable statute (§ 47a-11a), the plaintiff did not abandon the premises prior to the end of the lease term, as he explicitly stated that he intended to fulfill his obligations under the lease, he continued to pay rent and landscaping costs for the property throughout the lease term, and he did not return the keys to the premises or request the return of his security deposit until the lease term expired; accordingly, there was no early termination of the lease.
5. The trial court did not err in denying the plaintiff's common-law claim for money had and received: the trial court's determination that the plaintiff was obligated to make monthly rental payments in accordance with the terms of the lease was supported by the record, which demonstrated that the plaintiff signed the lease, indicated that he would continue to abide by its terms, and failed to repudiate the lease during his tenancy; moreover, the record supported the trial court's conclusion that a duty to mitigate damages never arose under § 47a-11a and, accordingly, the plaintiff failed to prove that he had paid his monthly rent by mistake and that he was free from any moral or legal obligation to make the payments.

Argued April 8—officially released October 5, 2021

Procedural History

Action for, inter alia, the return of a security deposit, and for other relief, brought to the Superior Court in the judicial district of Fairfield, Housing Session at Bridgeport, where the defendant filed a counterclaim; thereafter, the matter was tried to the court, *Spader, J.*; judgment for the plaintiff in part on the complaint and for the plaintiff on the counterclaim, from which the defendant appealed and the plaintiff cross appealed to this court. *Affirmed.*

Alan R. Spirer, for the appellant-cross appellee (defendant).

Anthony J. Musto, for the appellee-cross appellant (plaintiff).

Opinion

BRIGHT, C. J. In this landlord-tenant dispute over a security deposit, the defendant landlord, Linda Daniels, appeals from the judgment of the trial court, rendered following a trial to the court, in favor of the plaintiff tenant, Marc Herron. On appeal, the defendant claims that the trial court erred when it (1) awarded the plaintiff double damages pursuant to General Statutes § 47a-21 (d), due to her failure to return to the plaintiff a portion of his security deposit, (2) concluded that the her handling of the plaintiff's security deposit and her failure to return a portion of his security deposit violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and (3) awarded punitive damages to the plaintiff under CUTPA.

The plaintiff cross appeals claiming that the court erred in (1) holding that he was not entitled to a return of certain rental payments because, pursuant to General Statutes § 47a-11a, he did not abandon the premises

prior to June 30, 2017, and (2) denying his common-law claim for money had and received. We affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. On May 6, 2016, the parties entered into a written lease agreement for the period of July 1, 2016 to June 30, 2017, for a monthly rental rate of $6365 plus $435 in monthly common charges for the use and occupancy of a single-family home located at 161 Morning Dew Circle in Fairfield (premises). The plaintiff provided a security deposit to the defendant in the amount of $12,730. A few months later, the plaintiff purchased a home for his family and attempted to negotiate an early termination of the lease by offering to vacate the premises and to pay the balance due under the lease.

The defendant, however, demanded that the plaintiff pay an additional $1500 each month for costs associated with the lease, including utilities, lawn care, and property maintenance. In response, the plaintiff sent an e-mail to the defendant's attorney, stating: "I will just continue the lease as is. I will not be present but will adhere to the conditions of the lease. I will provide the absolute minimal yet compliant services to the home. . . . I will pay monthly rent. I will leave water and electric on and pay those bills. I will keep thermostat at minimal level to ensure no freezing occurs. . . . I will keep the right to have minimal furniture in the home to then use when I choose." The plaintiff continued to provide some maintenance and, except for the final month, continued to meet his monthly rental obligations.

The leasehold expired on June 30, 2017, and the plaintiff timely provided the defendant with a forwarding address so that she could return his security deposit, less the unpaid June, 2017 rent. The defendant responded

with an accounting of the security deposit, indicating that no portion of the security deposit would be returned and that the plaintiff owed the defendant $1834.79. The accounting alleged that the June, 2017 rent ($6365), association fees ($435), and associated late fees ($250) were not paid and included a number of charges, totaling $7516.85, for repairs to remedy alleged damages to the premises.

The plaintiff commenced this civil action in May, 2018, seeking the return of his security deposit. The operative complaint included seven counts: breach of contract; violation of § 47a-21 (d); violation of CUTPA; conversion; civil theft; violation of § 47a-11a; and a common-law claim for money had and received. The plaintiff sought, inter alia, double damages under § 47a-21 (d) (2), and attorney's fees and punitive damages under CUTPA. The defendant denied the plaintiff's claims and filed a counterclaim for amounts due to her for damages exceeding the amount of the security deposit.

On October 21, 2019, following a one day trial to the court and the submission of posttrial briefs, the court issued a memorandum of decision in which it found in favor of the plaintiff on his claims for breach of contract, violation of § 47a-21 (d), violation of CUTPA, and conversion. The court rejected the plaintiff's remaining claims. It also concluded that, of the $12,730 security deposit, only $7429.92 properly was withheld by the defendant. The amount properly withheld included the unpaid June rent and association fees, the corresponding late charges and $379.72 for repairs.[1] The court

[1] The court appears to have made a computational error regarding the amount properly withheld by the defendant. Although it found the total amount of the justified deductions from the security deposit was $7429.92, the actual total of the individual charges the court found to be justified deductions was $7429.72. Additionally, the trial court found that the defendant improperly charged the plaintiff $244.66 for HVAC repairs and $838.18 for plumbing repairs even though the evidence showed that the actual amounts claimed were $244.60 and $836.18, respectively. These errors do not affect our analysis of the parties' claims on appeal because the court

found that the defendant's other claimed repair costs "were not supported by the defendant's testimony or attached evidence . . . ." The court further found that certain charges were "fabricated" by the defendant and found that all of the deductions from the security deposit that were disputed by the plaintiff were "pretextual." The court also found that the defendant had mishandled the plaintiff's security deposit by not keeping it segregated in a separate account, using it for her personal expenses during the term of the lease, and not accounting for accrued interest on the security deposit.

In light of its findings, the court concluded that the defendant had breached the lease agreement by withholding more of the security deposit than that to which she was entitled and concluded that the plaintiff was entitled to damages on his breach of contract claim in the amount of $5300.08 and attorney's fees of 15 percent of the amount of the damages.[2] The court nevertheless declined to award the plaintiff any damages on his breach of contract claim because it was awarding the plaintiff greater damages and attorney's fees on his other claims.

Specifically, on the plaintiff's second count, which alleged a violation of § 47a-21 (d), the court awarded, pursuant to the statute, double damages in the amount of twice the plaintiff's security deposit and interest due thereon for the defendant's wilful failure to return the

did not award the plaintiff damages based on the amount of the improper charges and because the defendant does not challenge on appeal the court's calculation of the improper charges.

[2] The court did not identify the contractual basis for its conclusion that the plaintiff was entitled to attorney's fees on his breach of contract claim. The only attorney's fees provision in the lease agreement provides that the defendant was entitled to collect attorney's fees from the plaintiff if it became necessary for her "to employ an attorney to enforce any of the conditions or covenants [of the lease agreement] . . . ." The defendant does not challenge on appeal the court's authority to award attorney's fees with respect to the plaintiff's breach of contract claim.

portion of the deposit to which the plaintiff was entitled. In particular, the court awarded the plaintiff $12,730, the amount of the security deposit, and $12.73 in accrued interest. The court doubled the damages, increasing the award to $25,460 and $25.46, respectively, pursuant to its conclusion that the defendant had violated § 47a-21 (d).

As to the plaintiff's third count alleging a CUTPA violation, the court held that the defendant's mishandling of the security deposit and her improper withholding of a portion of the security deposit were "inexcusable and indefensible and [left] the court with no choice but to award CUTPA and punitive damages to the plaintiff in this matter." The court concluded that it would not duplicate the damages award that it had rendered on the plaintiff's second count, but it awarded the plaintiff $19,867.13 in punitive damages, $12,625 in attorney's fees, and $811.92 in costs.

As to the plaintiff's fourth count alleging conversion, the court concluded that a conversion had occurred but that any damages that it might award would be duplicative, so it awarded none. As to the plaintiff's fifth count alleging statutory theft, the court concluded that "the defendant [did not have] the requisite specific intent to raise her conduct to a finding of statutory theft toward the plaintiff. She was negligent and careless with the plaintiff's security deposit, but the court does not find that she committed a statutory theft."

As to the plaintiff's sixth count alleging that he was entitled to a return of a portion of the rent he paid after he moved out of the premises because the defendant had failed to use reasonable efforts to rent the premises pursuant to § 47a-11a, the court found that the defendant's duty under the statute never materialized because the plaintiff never abandoned the premises before the end of the lease term. Similarly, because the

plaintiff never abandoned the premises and continued to use it for storage through the end of the lease term, the court concluded that the plaintiff could not succeed on his seventh count alleging the common-law claim of money had and received.

Finally, because it had concluded that the defendant had failed to prove that she properly had kept the entirety of the security deposit, the court rendered judgment for the plaintiff on the defendant's counterclaim.

The defendant appealed and the plaintiff cross appealed.

I

THE DEFENDANT'S APPEAL

A

The defendant's first claim is that the trial court erred in awarding the plaintiff double damages pursuant to § 47a-21 (d). The defendant presents two arguments relating to this claim. First, the defendant argues that the court erroneously determined that certain of her charges for damages to the premises were pretextual. In making this argument, the defendant does not dispute the court's conclusion that she failed to prove that the plaintiff caused the alleged damages to the premises. Instead, she argues that she complied with § 47a-21 (d) by providing the plaintiff with a list of itemized deductions from his security deposit and that her failure to prove that the deductions were justified does not constitute a violation of the statute unless those charges were pretextual. See *Carrillo* v. *Goldberg*, 141 Conn. App. 299, 310–11, 61 A.3d 1164 (2013). She argues that the court's finding that the deductions were pretextual was clearly erroneous.

Second, the defendant argues that, even if the court's finding of pretext was not clearly erroneous, the court

erred by awarding the plaintiff the entire amount of his security deposit and doubling it pursuant to § 47a-21 (d) when the plaintiff conceded that the defendant properly retained more than one half of the security deposit to cover unpaid rent, association fees, late charges, and certain repairs. The defendant argues that the plaintiff's recovery of statutory damages under § 47a-21 (d) should be limited to double the portion of the security deposit that the court determined was improperly withheld by the defendant.

In response, the plaintiff argues that the trial court's finding that almost all of the defendant's charges for damages to the premises were pretextual is not clearly erroneous. He further contends that the court's award of statutory damages equal to double the entire amount of the plaintiff's security deposit is required by the plain language of § 47a-21 (d) (2). We agree with the plaintiff.

"We accord plenary review to the court's legal basis for its damages award." (Internal quotation marks omitted.) *Pedrini* v. *Kiltonic*, 170 Conn. App. 343, 348–49, 154 A.3d 1037, cert. denied, 325 Conn. 903, 155 A.3d 1270 (2017). "The court's calculation under that legal basis is a question of fact, which we review under the clearly erroneous standard. . . . Moreover, to the extent that we must construe the salient provisions of the security deposit statute, our review is plenary." (Citation omitted; internal quotation marks omitted.) *Carroll* v. *Yankwitt*, 203 Conn. App. 449, 465, 250 A.3d 696 (2021).

1

We begin by addressing the defendant's argument that the court erroneously determined that she violated § 47a-21 (d) by providing the plaintiff with an itemized list of deductions from his security deposit that included pretextual charges.

"Section 47a-21 (d) (2) requires, in the circumstance where the landlord does not return the entire security deposit, that the landlord return to the tenant both the 'balance of the security deposit paid . . . after deduction for any damages' caused by the tenant and 'a written statement itemizing the nature and amount of such damages. . . .' If a landlord does not comply with these requirements, the sanction is clear: the landlord 'shall be liable for twice the amount . . . of any security deposit paid . . . .' " (Emphasis omitted.) *Carrillo* v. *Goldberg*, supra, 141 Conn. App. 309–10. A landlord violates the statute when the written statement itemizing deductions from the security deposit includes pretextual or fabricated charges. Id., 310. "The language of the statute allows for landlords to deduct from a tenant's security deposit actual damages, not pretextual damages." Id.

Claims of pretext are questions of fact subject to the clearly erroneous standard of review. See *Carroll* v. *Yankwitt*, supra, 203 Conn. App. 481. "In applying the clearly erroneous standard to the findings of a trial court, we keep constantly in mind that our function is not to decide factual issues de novo. . . . Moreover, [i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence. . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude." (Citation omitted; internal quotation marks omitted.) *White* v. *Latimer Point Condominium Assn., Inc.*, 191 Conn. App. 767, 775–76, 216 A.3d 830 (2019).

At trial, the following relevant evidence was presented to the court. In response to the plaintiff's request for the return of his security deposit, the defendant made the following deductions from the security deposit: (1) June, 2017 rent in the amount of $6365, (2)

June, 2017 association fees in the amount of $435, (3) late charges in the amount of $250, (4) fees for cleaning in the amount of $800, (5) irrigation system repair in the amount of $190.45, (6) furnace filter replacement in the amount of $100, (7) landscaping in the amount of $1605.89, (8) lawn maintenance in the amount of $345.64, (9) vacuum hose replacement in the amount of $63.81, (10) replacement of dehumidifier in the amount of $189.27, (11) stair carpeting replacement in the amount of $2800, (12) HVAC pipe replacement in the amount $338.95, (13) HVAC repair in the amount of $244.66, and (14) plumbing repairs in the amount of $838.18. The defendant submitted evidence of invoices she paid relating to the repair, maintenance and cleaning charges.

The parties presented conflicting testimony as to many of the defendant's itemized deductions. The defendant testified that she hired a cleaning service due to the uncleanliness of the premises, that the charge for the furnace filter replacement was a fair and reasonable charge, and that the plaintiff failed to maintain the landscaping of the premises. The defendant also testified that parts of the vacuum hose were missing after the plaintiff vacated the premises and that the carpet needed to be replaced due to an animal urine stain that she initially had noticed in July, 2017, after it was brought to her attention by a painter. The defendant stated that she had not noticed the stain prior to the painter bringing it to her attention despite having paid professional cleaners, who cleaned the premises at some point between April 30 and June 10, 2017. The defendant also testified that she did not take any photographs of the claimed damages.

On the other hand, the plaintiff testified that the condition of the premises was "almost spotless" prior to his departure in October, 2016, because he had hired a cleaner to clean the premises. He also testified that

he hired a landscaping company that regularly maintained the landscaping and the lawn through the spring of 2017. The plaintiff stated that when the defendant contacted him about an issue with the landscaping of the premises, he had the landscaping company ameliorate the issue the following day. He also testified that he did not recall seeing a vacuum hose and that he had a dog but it did not urinate in the premises. The plaintiff stated that he was unaware of any plumbing issues other than the replacement of a gasket and a toilet, which he had replaced on his own accord.

Notably, the plaintiff did not dispute certain charges as justified deductions, including the charges for the June, 2017 rent, the association fees, the late fee, the furnace filter, the irrigation system, and the dehumidifier. In addition, both parties testified that there were HVAC issues predating the plaintiff's tenancy.

The court also had before it undisputed evidence that the defendant did not segregate the plaintiff's security deposit and used it regularly during the term of the lease to pay personal expenses.[3] That evidence showed

[3] General Statutes § 47a-21 (h) provides in relevant part: "(1) Each landlord shall immediately deposit the entire amount of any security deposit received by such landlord from each tenant into one or more escrow accounts established or maintained in a financial institution for the benefit of each tenant. *Each landlord shall maintain each such account as escrow agent and shall not withdraw funds from such account except as provided in subdivision (2) of this subsection.*

"(2) The escrow agent may withdraw funds from an escrow account to: (A) Disburse the amount of any security deposit and accrued interest due to a tenant pursuant to subsection (d) of this section; (B) disburse interest to a tenant pursuant to subsection (i) of this section; (C) make a transfer of the entire amount of certain security deposits pursuant to subdivision (3) of this subsection; (D) retain interest credited to the account in excess of the amount of interest payable to the tenant under subsection (i) of this section; (E) retain all or any part of a security deposit and accrued interest after termination of tenancy equal to the damages suffered by the landlord by reason of the tenant's failure to comply with such tenant's obligations; (F) disburse all or any part of the security deposit to a tenant at any time during tenancy; or (G) transfer such funds to another financial institution or escrow account, provided such funds remain continuously in an escrow account. . . ." (Emphasis added.)

that, during the term of the lease, the account in which the plaintiff's security deposit was supposed to be kept regularly had a balance below $12,730. Furthermore, the defendant testified that the account containing the plaintiff's security deposit also contained security deposits of the tenants of other rental properties she owned, from which the court concluded that "[t]he balance [in the account] should have regularly been much higher."

In its memorandum of decision, the trial court made the following relevant findings of fact. The court found that the June, 2017 rent and association fees, late charges, irrigation system repair, and the replacement of the dehumidifier were legitimate deductions from the security deposit. Thus, the court found that charges amounting to $7429.92 were justified deductions from the plaintiff's security deposit. The court, however, found that the remaining deductions were not proven by a fair preponderance of the evidence as damages incurred during the tenancy and that the deductions were pretextual.

In particular, the court credited the plaintiff's testimony that he had hired a cleaning service when he vacated the premises and found that there was no evidence that the defendant's subsequent cleaning was for conditions beyond ordinary cleaning to re-let the premises. The court did not credit the defendant's evidence with regard to the replacement of the carpet on the stairs, finding that the carpet replacement was "wholly fabricated." Additionally, the court did not credit the defendant's evidence concerning the claimed charges for lawn maintenance, landscaping, HVAC issues, vacuum hose replacement, and plumbing maintenance. Furthermore, the court found that the defendant was "so unconvincing in her testimony that [the

court had] to consider [the remaining charges] pretextual. [The defendant] was only claiming these damages to avoid returning the security deposit." The court determined that the defendant "knowingly included these items in her list because, as her bank statements demonstrate, she was not properly safeguarding her tenants' [security] deposits, and quite frankly, the court believes she had no intention of ever returning the security deposit to the plaintiff."

The defendant argues that the court's finding of pretext was clearly erroneous because she testified that the premises was in "pristine condition" when the plaintiff took possession, the repairs she undertook at the end of the lease term were necessary to restore the premises to that condition, she paid for each repair she charged to the plaintiff and those charges were reasonable and authorized by the lease agreement. Although the defendant acknowledges that the court found her testimony unconvincing, she nonetheless argues that a finding of pretext was unwarranted because the plaintiff bore the burden of proving pretext, and the plaintiff did not meet that burden simply because the court discredited the defendant's testimony. We are not persuaded.

"The sifting and weighing of evidence is peculiarly the function of the trier. [N]othing in our law is more elementary than that the trier is the final judge of the credibility of witnesses and of the weight to be accorded their testimony. . . . The trier is free to accept or reject, in whole or in part, the testimony offered by either party." (Internal quotation marks omitted.) *Rollar Construction & Demolition, Inc.* v. *Granite Rock Associates, LLC*, 94 Conn. App. 125, 132, 891 A.2d 133 (2006). We are not in a position to question the court's credibility finding. "[The trier of fact] is free to juxtapose conflicting versions of events and determine which is more

credible." (Internal quotation marks omitted.) *Benjamin* v. *Norwalk*, 170 Conn. App. 1, 25, 153 A.3d 669 (2016).

As the defendant acknowledges, the court did not credit her testimony regarding the legitimacy of the vast majority of the claimed repair expenses. In fact, the court found her testimony so unconvincing that it led the court to infer that the charges were pretextual. Our review of the record reflects additional support for this conclusion, with one small exception, in the testimony of the plaintiff and the defendant's admitted personal use of the plaintiff's security deposit. The one exception is the $100 furnace filter replacement charge claimed by the defendant. The plaintiff testified that he accepted the furnace filter charge as an item of damage and did not dispute the validity of that charge. Thus, because the record does not contain any conflicting evidence as to whether the charge for the replacement of the furnace filter was pretextual, the trial court's finding that this charge was pretextual is clearly erroneous.

"[W]here . . . some of the facts found [by the trial court] are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous findings to see whether they were harmless, not only in isolation, but also taken as a whole. . . . If, when taken as a whole, they undermine appellate confidence in the court's [fact-finding] process, a new hearing is required." (Internal quotation marks omitted.) *Autry* v. *Hosey*, 200 Conn. App. 795, 801, 239 A.3d 381 (2020).

After carefully reviewing the record, we conclude that the court's erroneous finding regarding the furnace filter does not undermine our confidence in the court's determination that the disputed charges were pretextual because the record contains sufficient evidence to support the court's finding. Removing the $100 charge from the court's calculation of the portion of the

security deposit improperly withheld by the defendant, there was ample evidence to support the rest of the overcharges totaling more than $5000. Furthermore, because the court's damages award was based on its calculation of statutory damages for a failure to return a security deposit in violation of § 47a-21 (d), and not on the actual amount wrongfully withheld, the court's single erroneous finding had no impact on the judgment it rendered. Therefore, we conclude that the court's erroneous finding concerning the furnace filter replacement was harmless, and the court's finding that the disputed charges were pretextual was not clearly erroneous.

2

We next address the defendant's claim that, even if the court's finding that certain items deducted from the plaintiff's security deposit were pretextual was not clearly erroneous, the court erred in awarding double damages based on the full amount of the security deposit instead of basing the award on the portion of the deposit improperly withheld. The plaintiff argues in response that the doubling of the entire security deposit is the precise remedy called for by the plain language of § 47a-21 (d) (2). We agree with the plaintiff.

Resolution of this claim requires us to construe the language of the statute. Consequently, as previously stated, our review is plenary. See *Carroll* v. *Yankwitt*, supra, 203 Conn. App. 465. Furthermore, when construing the language of a statute, "General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be

considered." (Internal quotation marks omitted.) *Maghfour* v. *Waterbury*, Conn. , , A.3d (2021).

Section 47a-21 (d) (2) provides: "Upon termination of a tenancy, any tenant may notify the landlord in writing of such tenant's forwarding address. Not later than thirty days after termination of a tenancy or fifteen days after receiving written notification of such tenant's forwarding address, whichever is later, each landlord other than a rent receiver shall deliver to the tenant or former tenant at such forwarding address either (A) the full amount of the security deposit paid by such tenant plus accrued interest, or (B) the balance of such security deposit and accrued interest after deduction for any damages suffered by such landlord by reason of such tenant's failure to comply with such tenant's obligations, together with a written statement itemizing the nature and amount of such damages. *Any landlord who violates any provision of [§ 47a-21 (d)] shall be liable for twice the amount of any security deposit paid by such tenant, except that, if the only violation is the failure to deliver the accrued interest, such landlord shall be liable for ten dollars or twice the amount of the accrued interest, whichever is greater*." (Emphasis added.)

"By its plain language, § 47a-21 (d) (2) obligates a landlord, within thirty days of the termination of the tenancy [or fifteen days after receiving written notification of such tenant's forwarding address, whichever is later], to deliver to the tenant either (a) the full amount of the security deposit or (b) any remaining balance on that security deposit after deduction for any damages suffered by [the] landlord by reason of [the] tenant's failure to comply with [the] tenant's obligations . . . . When the latter scenario is implicated, § 47a-21 (d) (2) requires the landlord to provide the tenant with a written statement itemizing the nature and amount of such

damages." (Footnote omitted; internal quotation marks omitted.) *Carroll* v. *Yankwitt*, supra, 203 Conn. App. 467.

"[F]or purposes of determining whether to award double damages under [§ 47a-21 (d) (2)] a court need only determine whether a landlord complied with the statutory requirements, and need not determine whether the landlord's reason for withholding the security deposit was justified." (Internal quotation marks omitted.) Id., 470. "We reiterate that the plain language of that statute merely requires a landlord asserting damages stemming from noncompliance with the tenant's obligations to provide the tenant with a written statement itemizing the nature and amount of such damages." (Internal quotation marks omitted.) Id., 471.

Nonetheless, "[t]he language of the statute allows for landlords to deduct from a tenant's security deposit actual damages, not *pretextual* damages." (Emphasis added.) *Carrillo* v. *Goldberg*, supra, 141 Conn. App. 310. A landlord does not satisfy the statutory requirements of § 47a-21 (d) (2) and is subject to double damages when the landlord complies only in form with the requirement prescribed by the statute, while failing to provide the former tenant the balance of the security deposit *legitimately* owed to the former tenant. See id., 310–11 ("While the defendants complied, in form only, with the requirement that a written accounting of damages be sent to the former tenant within the time frame prescribed by § 47a-21 (d) (2) and (4), without also sending the plaintiffs the balance of the security deposit legitimately owed to them, they did not satisfy the statutory requirements. Accordingly, the defendants were subject to the doubling of damages under § 47a-21 (d) (2).").

In the present case, the court found that a portion of the defendant's claimed damages was pretextual.

Thus, the defendant did not comply with the statutory requirements of § 47a-21 (d) (2) because she failed to provide the plaintiff with the balance of his security deposit that was legitimately owed to him. Consequently, because the defendant violated § 47a-21 (d) (2), she was liable for "twice the amount of any security deposit paid by [the plaintiff] . . . ." General Statutes § 47a-21 (d) (2).

The defendant's argument that the statutory damages should be limited to double the portion of the security deposit wrongfully withheld ignores the plain language of the statute. The statute plainly and unambiguously defines the statutory damages as "twice the amount of any *security deposit paid* . . . ." (Emphasis added.) General Statutes § 47a-21 (d) (2). That is precisely what the court awarded the plaintiff on the second count of his complaint. Had the legislature intended the remedy suggested by the defendant, it could have written the statute to accomplish that purpose. It did not. Significantly, however, the legislature did limit the remedy available to a tenant when the landlord's violation of the statute is limited to the failure to deliver to the tenant accrued interest on the security deposit. In such a circumstance, the landlord is liable for only twice the amount of interest or ten dollars, whichever is greater. General Statutes § 47a-21 (d) (2). The fact that the legislature identified a particular circumstance in which the statutory damages would be limited undermines the defendant's argument that it also intended the implicit limitation she suggests.

Furthermore, that the defendant views the application of the statute to the facts of this case to be "manifestly unfair" is irrelevant to our analysis. As this court has previously noted, § 47a-21 (d) (2) "is the punitive damages portion of the security deposit statute." (Internal quotation marks omitted.) *Carroll* v. *Yankwitt*, supra, 203 Conn. App. 466. It is for the legislature—not

this court—to determine what the appropriate statutory penalty is for a landlord who does not fully comply with the statutory obligation to return or account for a tenant's security deposit. It is our duty to apply the plain language of the statute as written, and the language at issue here could not be clearer. Moreover, § 47a-21 (d) (2), like other statutes intended to protect tenants, is a remedial statute and must be "construed liberally in favor of those whom the legislature intended to benefit . . . ." (Citations omitted.) *O'Brien Properties, Inc.* v. *Rodriguez*, 215 Conn. 367, 373, 576 A.2d 469 (1990). Accordingly, we conclude that the court properly awarded the plaintiff twice the amount of the security deposit paid by the plaintiff.

B

Next, the defendant claims that the court erred in concluding that she violated CUTPA by (1) making pretextual deductions from the plaintiff's security deposit and (2) failing to safeguard the plaintiff's security deposit in an escrow account. The defendant argues that her itemization of damages was based on a good faith belief that she had suffered damages as a result of the plaintiff's failure to fulfill his obligation under the lease agreement to maintain the premises. In addition, the defendant argues that she was not required to maintain the security deposit in a separate escrow account, that even if she was, her failure to do so did not constitute a CUTPA violation, and that the plaintiff failed to prove that he suffered an ascertainable loss due to her conduct. We disagree.

"[General Statutes §] 42-110b (a) provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule

by the [F]ederal [T]rade [C]omission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some [common-law], statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. . . . Thus a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy. . . . In order to enforce this prohibition, CUTPA provides a private cause of action to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a [prohibited] method, act or practice . . . .'' (Internal quotation marks omitted.) *Peterson* v. *McAndrew*, 160 Conn. App. 180, 207–208, 125 A.3d 241 (2015).

In its memorandum of decision, the court found that the defendant had ''engaged in unethical, unscrupulous activity in violation of a stated public policy set forth by the Connecticut legislature and caused a substantial injury to the plaintiff.'' The court concluded that the defendant's failure to safeguard the plaintiff's security deposit, her utilization of the security deposit for her own personal purposes, and her claiming of pretextual damages to avoid complying with § 47a-21 (d) (2) constituted a violation of CUTPA. Moreover, the court stated: ''The defendant is a former Realtor and has been

involved in multiple rental relationships on her properties. When asked about whether she currently maintains security deposits in a separate account she answered in the negative. This case was commenced in 2018, after reviewing pleadings and consulting with an attorney on this case, the defendant is still not following Connecticut's security deposit laws (recall, the trial was August 29, 2019). The [trial] court has concerns for [the defendant's] current tenants that their funds may not be secured. This utter indifference to her obligations as a landlord, when taken in context with what the court finds were pretextual damages being assessed to the plaintiff, is inexcusable and indefensible and leaves the court with no choice but to award CUTPA and punitive damages to the plaintiff in this matter. The defendant must be provided with an incentive to comply with security deposit laws and this judgment will hopefully help protect future tenants of the defendant." (Emphasis omitted.)

"It is well settled that whether a defendant's acts constitute . . . deceptive or unfair trade practices under CUTPA, is a question of fact for the trier, to which, on appellate review, we accord our customary deference." (Internal quotation marks omitted.) *Carroll* v. *Yankwitt*, supra, 203 Conn. App. 472.

In the present case, the evidence in the record supports the court's determination that the defendant engaged in unethical and unscrupulous activity that clearly offended the public policy of the security deposit statute. In particular, the evidence supports the court's findings that the defendant utilized the plaintiff's security deposit for her personal use and assessed certain itemized damages as pretext to avoid complying with § 47a-21 (d) (2). As to the defendant's personal use of the security deposit, the defendant testified that she did not believe that she could use the funds from the account containing the security deposit for her personal

use, but she also testified, and the evidence presented to the court showed, that she used funds from the account to pay her mortgage and that she transferred funds from the account to her personal account.

The defendant argues that the court should not have relied on such evidence to find a CUTPA violation because she was not required to maintain the security deposit in a segregated escrow account and her failure to do so does not constitute a CUTPA violation. We are not persuaded.

"Whether a defendant is subject to CUTPA and its applicability . . . are questions of law. . . . [If] a question of law is presented, review of the trial court's ruling is plenary, and this court must determine whether the trial court's conclusions are legally and logically correct, and whether they find support in the facts appearing in the record." (Citation omitted; internal quotation marks omitted.) Id.

Section 47a-21 (h) (1) requires that "[e]ach landlord shall immediately deposit the entire amount of any security deposit received by such landlord from each tenant into one or more escrow accounts established or maintained in a financial institution for the benefit of each tenant. Each landlord shall maintain each such account as escrow agent and shall not withdraw funds from such account except as provided in subdivision (2) of this subsection." Subdivision (2) does not permit a landlord to withdraw funds from a security deposit escrow fund to pay the landlord's personal expenses.

The defendant argues that § 47a-21 (h) (1) did not apply to her during the lease term because she had fewer than four rental units at the time. In making this argument, the defendant relies on § 47a-21 (k) (2), which provides in relevant part: "Any person who knowingly and wilfully violates the provisions of subsection (h) of this section . . . shall be subject to a fine of not

more than five hundred dollars or imprisonment of not more than thirty days or both for each offense. It shall be an affirmative defense under the provisions of this subdivision that at the time of the offense, such person leased residential real property to fewer than four tenants who paid a security deposit." That statute though provides an affirmative defense only to the *criminal penalties* set forth in subsection (k) (2) if, at the time of the offense, the defendant leased residential real property to fewer than four tenants who paid a security deposit. General Statutes § 47a-21 (k) (2). In the present *civil* case, however, the defendant was not subject to a fine or imprisonment. Moreover, § 47a-21 (*l*) provides in relevant part that "[n]othing in this section shall be construed as a limitation upon . . . the right of any tenant to bring a civil action permitted by the general statutes or at common law." Accordingly, assuming that the defendant had fewer than four tenants during the lease term, § 47a-21 (k) (2) does not relieve her of her obligations under § 47a-21 (h).[4]

We also are unpersuaded by the defendant's argument that a violation of § 47a-21 (h) is not a CUTPA violation. In support of this argument the defendant relies on this court's decision in *Tarka* v. *Filipovic*, 45 Conn. App. 46, 694 A.2d 824, cert. denied, 242 Conn. 903, 697 A.2d 363 (1997). Such reliance is misplaced. In *Tarka*, this court affirmed the trial court's acceptance of the finding of the attorney referee that the defendants' failure to place the plaintiff's security deposit in an interest bearing account did not rise to the level of a CUTPA violation. Id., 55–56. In doing so, this court noted that whether a practice violates CUTPA is a question of fact. Id., 55. The court also noted that "[t]he

[4] Because the defendant's reliance on § 47a-21 (k) (2) is misplaced, we need not address the defendant's claim that the court's finding that the defendant owned four rental properties was clearly erroneous.

attorney referee determined that [the defendants'] conduct arose out of the defendants' ignorance of their obligations." Id.

In the present case, the court specifically found that the defendant's conduct rose to the level of a CUTPA violation. Furthermore, the court in this case did not conclude that the defendant's violation of her obligations with respect to the plaintiff's security deposit was the result of ignorance. To the contrary, the court concluded that the defendant, who "is a former Realtor and has been involved in multiple rental relationships on her properties," showed "utter indifference to her obligations as a landlord . . . ." The court further noted that the defendant's violations of § 47a-21 with respect to other tenants continued up to and through the trial. Consequently, the factual findings in this case are markedly different than those presented in *Tarka*. Just as this court did not disturb the trial court's factual finding in *Tarka* regarding whether the defendants' conduct rose to the level of a CUTPA violation; *Tarka* v. *Filipovic*, supra, 45 Conn. App. 56; we will not disturb the trial court's finding in the present case. We cannot say that the court erred in concluding that the manner in which the defendant handled the defendant's security deposit constituted a CUTPA violation.

Moreover, as discussed in part I A 1 of this opinion, the evidence in the record supports the trial court's determination that certain itemized damages assessed by the defendant were pretextual. The defendant does not argue that pretextual charges cannot form the basis of a CUTPA violation. Instead, she repeats her argument that the disputed charges were not pretextual and that this case is nothing more than a contract dispute between the parties over the reasonableness of the repairs the defendant made and for which she charged the plaintiff. Given our conclusion in part I A 1 of this opinion, the defendant's argument is without merit.

We also disagree with the defendant's contention that the plaintiff failed to prove that he suffered an ascertainable loss. The issue of whether the plaintiff suffered an ascertainable loss as a result of the defendant's CUTPA violation is a question of fact, which we review under the clearly erroneous standard. See *Cohen* v. *Meyers*, 175 Conn. App. 519, 554, 167 A.3d 1157, cert. denied, 327 Conn. 973, 174 A.3d 194 (2017).

"The ascertainable loss requirement [of General Statutes § 42-110g] is a threshold barrier which limits the class of persons who may bring a CUTPA action seeking either actual damages or equitable relief. . . . Thus, to be entitled to any relief under CUTPA, a plaintiff must first prove that he has suffered an ascertainable loss due to a CUTPA violation. . . . CUTPA, however, is not limited to providing redress only for consumers who can put a precise dollars and cents figure on their loss . . . as the ascertainable loss provision do[es] not require a plaintiff to prove a specific amount of actual damages in order to make out a prima facie case. . . . Rather . . . [d]amage . . . is only a species of loss . . . hence [t]he term loss necessarily encompasses a broader meaning than the term damage. . . . Accordingly . . . for purposes of § 42-110g, an ascertainable loss is a deprivation, detriment [or] injury that is capable of being discovered, observed or established. . . . [A] loss is ascertainable if it is measurable even though the precise amount of the loss is not known. . . . Under CUTPA, there is no need to allege or prove the amount of the actual loss. . . .

"Of course, a plaintiff still must marshal some evidence of ascertainable loss in support of her CUTPA allegations, and a failure to do so is indeed fatal to a CUTPA claim . . . .

"A plaintiff also must prove that the ascertainable loss was caused by, or a result of, the prohibited act.

General Statutes § 42-110g (a) . . . . When plaintiffs seek money damages, the [as a result of] language . . . in § 42-110g (a) requires a showing that the prohibited act was the proximate cause of a harm to the plaintiff. . . . [P]roximate cause is [a]n actual cause that is a substantial factor in the resulting harm . . . . The question to be asked in ascertaining whether proximate cause exists is whether the harm which occurred was of the same general nature as the foreseeable risk created by the defendant's act." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Kelly* v. *Kurtz*, 193 Conn. App. 507, 535–36, 219 A.3d 948 (2019).

In the present case, the evidence in the record supports the court's finding that the defendant assessed pretextual damages to the plaintiff. This evidence also demonstrates that the plaintiff suffered an ascertainable loss as a result of the withholding of the portion of the security deposit that was legitimately owed to him. See *Freeman* v. *A Better Way Wholesale Autos, Inc.*, 174 Conn. App. 649, 667, 166 A.3d 857 ("Whenever a consumer has received something other than what [the consumer] bargained for, [the consumer] has suffered a loss of money or property. That loss is ascertainable if it is measurable even though the precise amount of the loss is not known." (Internal quotation marks omitted.)), cert. denied, 327 Conn. 927, 171 A.3d 60 (2017); see also *Larobina* v. *Home Depot, USA, Inc.*, 76 Conn. App. 586, 597, 821 A.2d 283 (2003) (concluding that trial court improperly concluded that plaintiff failed to prove ascertainable loss because "plaintiff did receive something other than that for which he had bargained; he bargained to have carpeting installed at a price of $7.37 per square yard, but he got nothing").

Consequently, we conclude that the trial court properly found that the defendant violated CUTPA.

C

The defendant's final claim is that the trial court abused its discretion in awarding punitive damages in the amount of $19,867.13. The defendant argues that her conduct did not warrant an award of punitive damages. We disagree.

We begin our analysis with the standard of review. "Awarding punitive damages and attorney's fees under CUTPA is discretionary; General Statutes § 42-110g (a) and (d)[5] . . . 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. . . . In order to award punitive or exemplary damages, evidence must reveal a reckless indifference to the rights of others or an intentional and wanton violation of those rights. . . . In fact, the flavor of the basic requirement to justify an award of punitive damages is described in terms of wanton and malicious injury, evil motive and violence." (Footnote added; footnote omitted; internal quotation marks omitted.) *Ulbrich* v. *Groth*, 310 Conn. 375, 446, 78 A.3d 76 (2013).

"We note also that the CUTPA statutes do not provide a method for determining punitive damages . . . ." (Internal quotation marks omitted.) *Carrillo* v. *Goldberg*, supra, 141 Conn. App. 313. Additionally, "[u]nlike punitive damages under Connecticut common law, punitive damages under CUTPA are focused on deterrence, rather than mere compensation." *Bridgeport Harbour Place I, LLC* v. *Ganim*, 131 Conn. App. 99, 140, 30 A.3d 703, cert. granted, 303 Conn. 904, 31 A.3d 1179 (2011) (appeal withdrawn January 27, 2012), and

[5] General Statutes § 42-110g provides in relevant part: "(a) . . . The court may, in its discretion, award punitive damages . . . .

"(d) 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. . . ."

cert. granted, 303 Conn. 905, 31 A.3d 1180 (2011) (appeal withdrawn January 26, 2012).[6]

In the present case, the trial court awarded punitive damages on the basis of the "defendant's indifference to the law when engaged in this transaction" and "her continued inexcusable failure to segregate her current security deposits from her personal accounts after the commencement of this action, when at the latest she should have learned what the law is." (Emphasis omitted.) The court then awarded punitive damages in the amount of $19,867.13, as determined by the amount of the security deposit of $12,730 and pretextual charges of $7137.13. As stated previously in this opinion, the court also provided the following basis for its award of punitive damages under CUTPA: "The [trial] court has concerns for her current tenants that their funds may not be secured. This utter indifference to her obligations as a landlord, when taken in context with what the court [found] were pretextual damages being assessed to the plaintiff, is inexcusable and indefensible and leaves the court with no choice but to award CUTPA and punitive damages to the plaintiff in this matter." Additionally, the court stated that the defendant "must be provided with an incentive to comply with security deposit laws and this judgment will hopefully help protect future tenants of the defendant."

In her principal brief, the defendant advances several arguments in support of her claim that the trial court erred in awarding punitive damages. The defendant argues that her actions constituted a good faith claim as defined under § 47a-21 (j) (2), and argues further that the plaintiff did not suffer an ascertainable loss as a result of her actions. Additionally, the defendant

[6] Under Connecticut common law, punitive damages are limited to litigation costs. See *Bifolck* v. *Philip Morris, Inc.*, 324 Conn. 402, 447–48, 152 A.3d 1183 (2016).

contends that her actions did not involve a reckless indifference to the plaintiff's rights or an intentional and wanton violation of the plaintiff's rights. Also, the defendant argues that punitive damages are ordinarily not recoverable for breach of contract. Last, the defendant argues that the calculation of the punitive damages was excessive. We address each argument in turn.

First, the defendant argues that her actions constituted a good faith claim as defined under § 47a-21 (j) (2). Section 47a-21 (j) is titled "Investigation of complaints by commissioner. Order. Jurisdiction. Regulations," and provides the procedural parameters in which the banking commissioner may receive, investigate, and remedy complaints regarding any alleged violations of subsections (b), (d), (h), or (i) of § 47a-21.[7] Section 47a-21 (j) (2) provides: "The commissioner shall not have jurisdiction over (A) the failure of a landlord to pay interest to a tenant annually under subsection (i) of this section, or (B) the refusal or other failure of the landlord to return all or part of the security deposit if such failure results from the landlord's good faith claim that such landlord has suffered damages as a result of a tenant's failure to comply with such tenant's obligations, regardless of whether the existence or amount of the alleged damages is disputed by the tenant. For purposes of this section, 'good faith claim' means a claim for actual damages suffered by the landlord for which written notification of such damages has been provided to the tenant in accordance with the

[7] General Statutes § 47a-21 (j) (1) provides: "Except as provided in subdivision (2) of this subsection, the commissioner may receive and investigate complaints regarding any alleged violation of subsections (b), (d), (h) or (i) of this section. For the purposes of such investigation, any person who is or was a landlord shall be subject to the provisions of section 36a-17. If the commissioner determines that any landlord has violated any provision of this section over which the commissioner has jurisdiction, the commissioner may, in accordance with section 36a-52, order such person to cease and desist from such practices and to comply with the provisions of this section."

provisions of subdivision (2) of subsection (d) of this section."

The defendant, here, fails to explain how this statutory provision is applicable to her claim that the trial court erred in awarding punitive damages. The jurisdictional parameters of the banking commissioner are not at issue in the present case. Furthermore, the court concluded that the defendant's claims were not made in good faith when it found that certain itemized damages assessed by the defendant were fabricated and pretextual and that her handling of the security deposits of the plaintiff and other tenants showed an utter indifference to her obligations as a landlord. See *Cianci* v. *Originalwerks, LLC*, 126 Conn. App. 18, 22, 16 A.3d 705 ("[w]e will not disturb the court's finding unless it is clearly erroneous"), cert. denied, 301 Conn. 901, 17 A.3d 1043 (2011).

Second, the defendant argues that the plaintiff did not suffer an ascertainable loss as a result of the defendant's actions. As stated in part I B of this opinion, the plaintiff suffered an ascertainable loss due to the defendant's withholding of the plaintiff's security deposit that she legitimately owed to him.

Third, the defendant argues that none of her actions involved a reckless indifference to the plaintiff's rights or an intentional and wanton violation of the plaintiff's rights warranting an award of punitive damages. We disagree.

Here, the court found, and the record supports, that the defendant failed to comply with § 47a-21 (d) and assessed pretextual damages to the plaintiff. Moreover, the evidence showed that she violated § 47a-21 (h). In particular, the defendant testified that she did not believe that she was allowed to use the security deposit for personal purposes, yet the evidence demonstrated that she did so. Consequently, the court found that the

defendant's actions were "inexcusable and indefensible" and constituted "unethical, unscrupulous activity in violation of a stated public policy set forth by the Connecticut legislature and caused a substantial injury to the plaintiff." These findings are not clearly erroneous and are sufficient to support an award of punitive damages. See *Votto* v. *American Car Rental, Inc.*, 273 Conn. 478, 486, 871 A.2d 981 (2005) ("[t]he trial court's findings that the defendant's conduct was 'reprehensible,' that its conduct of 'bilking' its customers was not isolated and that this initial conduct of making unauthorized charges was 'exacerbated' by the defendant's use of the phony business card constitute evidence of reckless indifference to and intentional and wanton violation of the plaintiff's rights").

The defendant's fourth argument is that punitive damages are ordinarily not recoverable for breach of contract. The punitive damages award in this case, however, was not based on a simple breach of contract finding but, rather, was based on a CUTPA violation for unscrupulous conduct. The court clearly based its award of punitive damages on the defendant's actions in failing to comply with her statutory obligations as a landlord.

Finally, the defendant argues that the trial court's award of punitive damages was excessive. The defendant contends that the award of punitive damages is excessive "by any objective determination." We note that, "[w]hile the CUTPA statutes do not provide a method for determining punitive damages, courts generally award punitive damages in amounts equal to actual damages or multiples of the actual damages." (Internal quotation marks omitted.) *Bridgeport Harbour Place I, LLC* v. *Ganim*, supra, 131 Conn. App. 139–40.

In the present case, the trial court determined the award of punitive damages by adding together the

amount of the security deposit and the pretextual charges, resulting in CUTPA punitive damages of $19,867.13. This amount was approximately one and one-half times the security deposit paid by the plaintiff and less than the statutory damages the court awarded pursuant to § 47a-21 (d) (2). The stated purpose of the court's punitive damages award was to deter the defendant from continuing to flout her obligations under the security deposit statute by providing the defendant "with an incentive to comply with security deposit laws . . . ." Furthermore, the court stated that "this judgment will hopefully help protect future tenants of the defendant." Accordingly, given the actual amounts in dispute, the defendant's conduct, both as to the plaintiff and her other tenants, and the stated purpose of the court's punitive damages award, we conclude that the trial court's award of punitive damages was not excessive. See *Ulbrich* v. *Groth*, supra, 310 Conn. 456 ("[a]lthough the trial court's punitive damages award in the present case undoubtedly was a large one, especially in light of the large size of the compensatory damages award, we cannot conclude that the award constituted a manifest abuse of discretion or that an injustice was done"); see also *Votto* v. *American Car Rental, Inc.*, supra, 273 Conn. 486 (trial court's awarding of punitive damages equal to three times amount of unauthorized charges to plaintiff's credit card was not abuse of discretion).

In sum, on review of the record, we conclude that the trial court did not abuse its discretion in awarding punitive damages to the plaintiff. The court based its determination on evidence that showed that the defendant failed to properly safeguard the plaintiff's security deposit and then attempted to avoid returning the security deposit to the plaintiff by fabricating pretextual charges. Furthermore, the court clearly articulated that the purpose of the punitive damages award was to deter

the defendant from continuing her improper use of her tenants' security deposits and to protect future tenants from the defendant improperly managing their security deposits. See *Bridgeport Harbour Place I, LLC* v. *Ganim*, supra, 131 Conn. App. 140 ("[u]nlike punitive damages under Connecticut common law, punitive damages under CUTPA are focused on deterrence, rather than mere compensation").

II

THE PLAINTIFF'S CROSS APPEAL

In his cross appeal, the plaintiff claims that the trial court erred in holding that he was not entitled, pursuant to § 47a-11a, to a return of rent payments he made after vacating the premises. Additionally, the plaintiff claims that the court erred in denying his common-law claim for money had and received. We disagree with both claims.

A

The plaintiff first claims that the court erred by not awarding him damages for rent he paid after he moved out of the premises and the defendant had the opportunity to re-let the premises. Specifically, the plaintiff argued before the trial court that the defendant should be required to return to the plaintiff all rents she received after February, 2017, because the lease was terminated by operation of law due to the defendant's violation of § 47a-11a.

Section 47a-11a provides: "(a) If the tenant abandons the dwelling unit, the landlord shall make reasonable efforts to rent it at a fair rental in mitigation of damages.

"(b) If the landlord fails to use reasonable efforts to rent the dwelling unit at a fair rental, the rental agreement is deemed to be terminated by the landlord as of the date the landlord has notice of the abandonment."

The plaintiff argued that the defendant admitted at trial that the plaintiff abandoned the premises during the winter of 2016 through 2017 and testified further that she was present in April, 2017, when a moving truck removed the remainder of the plaintiff's personal property from the premises. Consequently, he argued that, by operation of law, the lease agreement was terminated by March, 2017, and the defendant had no right to any rent from that point forward.

The court rejected the plaintiff's claim on the basis of its factual findings that "[t]he parties attempted to negotiate an early exit for the plaintiff but when the negotiations failed [the plaintiff] indicated he would fulfill his obligations under the lease and he left items (albeit very few items) in storage at the premises until at least the end of April, 2017." The court further found that the plaintiff "did not hand over the keys to the premises and he continued to pay rent . . . ."

On appeal, the plaintiff does not challenge the court's factual findings. Instead, he argues that, "[a]ccepting all of the facts found by the trial court, the plaintiff contends that the payments were made without the plaintiff's obligation to pay or the defendant's right to receive them." He describes the issue as a matter of law subject to plenary review. Thus, we understand the plaintiff's claim to be that the court improperly construed § 47a-11a by concluding that his conduct did not constitute "abandonment" under the statute.

"The interpretation of a statute, as well as its applicability to a given set of facts and circumstances, involves a question of law and our review, therefore, is plenary." (Internal quotation marks omitted.) *Russell* v. *Russell*, 91 Conn. App. 619, 629, 882 A.2d 98, cert. denied, 276 Conn. 924, 888 A.2d 92 (2005), and cert. denied, 276 Conn. 925, 888 A.2d 92 (2005). We begin with the text

of the statute and its relationship to other statutes. See General Statutes § 1-2z.

Section 47a-11a does not provide a statutory definition of the terms "abandons" or "abandonment"; however, a statutory definition is provided for "abandonment" in General Statutes § 47a-11b. Thus, we look to § 47a-11b for guidance in our interpretation of the terms "abandons" and "abandonment" in § 47a-11a. See *Cagiva North America, Inc.* v. *Schenk*, 239 Conn. 1, 12, 680 A.2d 964 (1996) ("[w]hen construing a statute, we may look for guidance to other statutes relating to the same general subject matter, as the legislature is presumed to have created a consistent body of law"); *BayBank Connecticut, N.A.* v. *Thumlert*, 222 Conn. 784, 790, 610 A.2d 658 (1992) ("[s]tatutes are to be interpreted with regard to other relevant statutes because the legislature is presumed to have created a consistent body of law" (internal quotation marks omitted)).

Section 47a-11b provides in relevant part: "(a) For the purposes of this section, 'abandonment' means the occupants have vacated the premises without notice to the landlord and do not intend to return, which intention may be evidenced by the removal by the occupants or their agent of substantially all of their possessions and personal effects from the premises and either (1) nonpayment of rent for more than two months or (2) an express statement by the occupants that they do not intend to occupy the premises after a specified date. . . ." Thus, in accordance with the statutory definition of abandonment in § 47a-11b, we construe the terms abandons and abandonment in § 47a-11a as meaning that the tenant has vacated the premises without notice to the landlord and does not intend to return. As ascertained from the text of § 47a-11b, this intention may be evidenced by the removal of substantially all of the tenant's possessions and personal effects from the premises and either (1) nonpayment of rent for more

than two months or (2) an express statement by the tenant that he does not intend to occupy the premises after a specified date.

Applying this definition, we conclude that the court correctly determined that the plaintiff did not abandon the premises before the end of the lease term. The plaintiff did not vacate the premises without notice to the defendant. To the contrary, he tried to negotiate an early termination of the lease agreement. When those negotiations failed, he expressly stated his intention to fulfill his obligations under the lease, which is the opposite of abandoning the premises. In an e-mail to the defendant's attorney, the plaintiff stated: "I will just continue the lease as is. I will not be present but will adhere to the conditions of the lease. I will provide the absolute minimal yet compliant services to the home. . . . I will pay monthly rent. I will leave water and electric on and pay those bills. I will keep thermostat at minimal level to ensure no freezing occurs. . . . I will keep the right to have minimal furniture in the home to then use when I choose." Consistent with his e-mail, there was never a period of more than two months when the plaintiff did not pay rent. In fact, as previously discussed in this opinion, the plaintiff testified that, in addition to rent, he continued to pay for landscaping on the property through the end of the lease term. Finally, the plaintiff did not turn over the keys to the premises and request the return of his security deposit until the end of the lease term. Given these facts, none of which the plaintiff challenges on appeal, we agree with the court that the plaintiff never abandoned the premises and did not trigger an early termination of the lease agreement under § 47a-11a.

B

Last, the plaintiff claims that the court improperly held that he failed to prove his common-law claim for

money had and received. The plaintiff contends that he is entitled to recover rent in the amount of $6365 and common charges in the amount of $435 that were paid for each month from March through June, 2017.

"To prevail on a claim for money had and received, a plaintiff must prove both the lack of authority to authorize the payment and that it is inequitable for the recipient to retain it. . . . Because a cause of action for money had and received requires proof of two prongs, this court may affirm the judgment of the trial court on proof that the payment was authorized or that its retention by the defendant is equitable under all of the circumstances." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Stratford* v. *Winterbottom*, 151 Conn. App. 60, 77–78, 95 A.3d 538, cert. denied, 314 Conn. 911, 100 A.3d 403 (2014).

"Our Supreme Court has stated that when money is paid by one on the basis of a mistake as to his rights and duties and the recipient has no right in good conscience to retain the money, an action of indebitatus assumpsit may be maintained to recover the money, regardless of whether the mistake was one of fact or of law. . . . The action of indebitatus assumpsit for the recovery of money had and received and for money paid . . . is an action of the common law, but, to a great extent, an equitable action, adopted for the enforcement of many equitable, as well as legal rights. . . . Stated another way, [t]he action for money had and received is an equitable action to recover back money paid by mistake where the payor is free from any moral or legal obligation to make the payment and the payee in good conscience has no right to retain it. Is the plaintiff in this action, as between it and the defendant, in equity and good conscience entitled to the money? If it is, then it is entitled to recover. The real ground of recovery is the equitable right of the plaintiff to the money. . . .

"[E]quitable remedies are not bound by formula but are molded to the needs of justice. . . . The court's determinations of whether a particular failure to pay was unjust and whether the defendant was benefited are essentially factual findings . . . that are subject only to a limited scope of review on appeal. . . . Those findings must stand, therefore, unless they are clearly erroneous or involve an abuse of discretion. . . .

"We will reverse a trial court's exercise of its equitable powers only if it appears that the trial court's decision is unreasonable or creates an injustice. . . . [E]quitable power must be exercised equitably . . . [but] [t]he determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Citations omitted; internal quotation marks omitted.) *Stratford* v. *Wilson*, 151 Conn. App. 39, 46–48, 94 A.3d 644, cert. denied, 314 Conn. 911, 100 A.3d 403 (2014).

In its memorandum of decision, the trial court found that the plaintiff failed to prove that he provided payments to the defendant under the mistaken belief that he had an obligation to do so. The court found that the plaintiff signed the lease agreement, continued to use the premises for storage until April, 2017, and failed to repudiate the lease agreement at any point during the tenancy. Thus, the court concluded that the plaintiff failed to prove his common-law claim of money had and received.

On appeal, the plaintiff argues that the court's conclusion was improper because the plaintiff presented evidence showing that he stated in writing to the defendant's attorney that he would no longer be present at the premises after October, 2016. Also, the plaintiff argues that the defendant testified to the following: the plaintiff had abandoned the premises in the winter of 2016–2017, the defendant was physically present at the premises when the remainder of the plaintiff's property was removed from the premises, and she did not attempt to re-let the premises prior to July, 2017. We are not persuaded.

The court's determination that the plaintiff was obligated to make the monthly rental payments in accordance with the terms of the lease agreement is supported by the record demonstrating that the plaintiff signed the lease agreement, communicated to the defendant's attorney that he would abide by the terms of the lease, and failed to repudiate the lease agreement at any point during the tenancy. Furthermore, as we also concluded in part II A of this opinion, there was ample evidence to support the court's conclusion that a duty to mitigate damages pursuant to § 47a-11a never materialized and, thus, the plaintiff failed to prove that he had paid his monthly rent by mistake and that he was free from any moral or legal obligation to make the rental payments. Therefore, having reviewed the record, we conclude that the trial court reasonably concluded that the plaintiff failed to prove his claim of money had and received.

The judgment is affirmed.

In this opinion the other judges concurred.

WATSON REAL ESTATE, LLC *v.* WOODLAND RIDGE, LLC, ET AL.
(AC 43006)

Cradle, Alexander and DiPentima, Js.

Syllabus

The plaintiff sought to recover damages from the defendants for, inter alia, breach of contract. The parties entered into an escrow agreement in conjunction with the purchase of a lot in a residential subdivision owned by the defendant W Co. The escrow agreement provided that, in the event of a dispute, all costs of litigation, including attorney's fees, shall be paid to the prevailing party. During trial, the parties agreed that the issue of attorney's fees should be reserved until after a decision on the merits of the complaint had been rendered. The trial court rendered judgment in favor of W Co., from which the plaintiff appealed to this court, which affirmed the trial court's judgment. While that appeal was pending, the trial court denied W Co.'s motion for attorney's fees. Following this court's release of its decision on the plaintiff's appeal, W Co. moved for judgment on its pending counterclaim seeking attorney's fees. The court denied W Co.'s motion for judgment and its motion for reargument and reconsideration, and W Co. appealed to this court. *Held* that the trial court failed to exercise its discretion with respect to W Co.'s claim for attorney's fees: the trial court summarily denied W Co.'s motion for attorney's fees and its motion for judgment on its counterclaim without explanation; in the court's subsequent articulation, it explained that it denied the motion for judgment because it had denied the motion for attorney's fees nearly two years earlier and W Co. had not filed an appeal, and the court's circular explanation for its denials of W Co.'s motions demonstrated that it failed to exercise its discretion; moreover, the parties' contract provided for attorney's fees for the prevailing party, and the court had a duty to exercise its discretion to determine whether W Co. had proven its claim for attorney's fees and whether those fees were reasonable, and, at no point, did the court indicate that it had considered the merits of the defendant's W Co.'s request; furthermore, W Co. properly moved for judgment on its pending counterclaim and timely appealed from the court's denial of that motion, and the lack of an appeal from the court's denial of W Co.'s motion for attorney's fees could not serve as the sole basis for not awarding attorney's fees.

Argued January 6—officially released October 5, 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 Hartford, where the named defendant filed a counterclaim; thereafter, the matter was tried to the court, *Dubay, J.*; judgment in part for the named defendant, from which the plaintiff appealed to this court, *Alvord*, *Moll* and *Bear*, *Js.*, which affirmed the trial court's judgment; subsequently, the court, *Dubay, J.*, denied the named defendant's motion for attorney's fees; thereafter, the court denied the named defendant's motion for judgment on its counterclaim and its motion to reargue and for reconsideration, and the named defendant appealed to this court. *Reversed*; *further proceedings*.

Mario R. Borelli, for the appellant (named defendant).

Jeffrey J. Mirman, for the appellee (plaintiff).

Opinion

ALEXANDER, J. The present appeal originated from an escrow agreement entered into by the parties in conjunction with the purchase of a lot in a residential subdivision. In *Watson Real Estate, LLC* v. *Woodland Ridge, LLC*, 187 Conn. App. 282, 284–85, 202 A.3d 1033 (2019), this court affirmed the judgment of the trial court rendered in favor of the defendant Woodland Ridge, LLC.[1] Specifically, we rejected the claims of the plaintiff, Watson Real Estate, LLC, that the trial court (1) improperly failed to find that a meeting of minds existed between the parties as to the specifications of the common driveway that the defendant was required to install under the escrow agreement, (2) improperly failed to find that the defendant had breached the escrow agreement by not reimbursing the plaintiff for

[1] The plaintiff also named Daniel Zak, Peter J. Alter, and Leonard Bourbeau as defendants, but these individuals did not participate in the trial court proceedings or the previous appeal. *Watson Real Estate, LLC* v. *Woodland Ridge, LLC*, supra, 187 Conn. App. 284 n.1. We, therefore, refer to Woodland Ridge, LLC, as the defendant.

costs incurred for work that the defendant was required to complete and (3) abused its discretion in denying the plaintiff's request to amend its complaint to add a claim for unjust enrichment. Id.

Both prior to and following the plaintiff's appeal, the defendant sought attorney's fees pursuant to a prevailing party clause contained in the parties' agreement. The trial court denied the defendant's attempts to recover attorney's fees, and this appeal followed.

In this appeal, the defendant claims that (1) the trial court improperly denied its claim for attorney's fees, pursuant to a prevailing party clause in the parties' escrow agreement, and (2) it was entitled to appellate attorney's fees. We conclude that the court failed to exercise its discretion with respect to the defendant's request for attorney's fees. Accordingly, we reverse the judgment of the trial court and remand the case for further proceedings.

This court previously set forth the relevant facts and procedural history underlying the defendant's claim for attorney's fees. "The defendant was the owner and developer of a four lot residential subdivision located on the westerly side of Woodland Street in Glastonbury. The subdivision consists of two front lots abutting Woodland Street (lots 1 and 2) and two rear lots abutting the western boundaries of the front lots (lots 3 and 4). A common driveway providing ingress and egress to the subdivision runs west from Woodland Street past the entrances to lots 1 and 2 and terminates at the entrances to the rear lots.

"In May, 2006, H. Kirk Watson, a member of the plaintiff, entered into an agreement with the defendant for the purchase of lot 1. At the time of the execution of the purchase agreement, the common driveway had been paved only from Woodland Street to a point 118 feet before the entrance to lot 1; the remainder of the

driveway, including the portion passing along the entrance to lot 1, remained unpaved. Consequently, Watson, in his capacity as a member of the plaintiff, entered into an agreement with the defendant and Attorney Peter J. Alter to create an escrow fund from a portion of the defendant's proceeds from the sale of lot 1 to assure the defendant's completion of the common driveway and certain other improvements and construction that remained to be completed (escrow agreement). Under the escrow agreement, the defendant was to deposit with the escrow agent, Alter, the sum of $51,000, which represented a fair estimate of the cost of completion of the [w]ork.

"The particular items that remained to be completed were set forth in a punch list that was attached to the escrow agreement as exhibit A. Pursuant to exhibit A, the defendant was required to complete the common driveway to the point at which it becomes an individual driveway for each approved lot, but the defendant was not to put the final course of bituminous pavement on the common driveway until construction of all four houses [was] complete (as indicated by the issuance of a certificate of occupancy), or five (5) years from the date of [the escrow agreement], whichever shall first occur. The stated rationale for this delay was to avoid damage to the final pavement as may be caused by heavy construction vehicles using the driveway during home construction. As Watson later testified at trial, at the time he executed the escrow agreement, he believed that this language required the defendant to initially extend the existing layer of pavement along the remainder of the driveway and, then, at the appropriate time, install a second layer of pavement over the entire length of the driveway. Per exhibit A, the defendant was also required to install a common electric power service from which each lot could secure individual service.

"Because the parties recognized that the work needed to be completed before the plaintiff could secure a building permit and a certificate of occupancy, the escrow agreement provided for a procedure by which the plaintiff could contract with a third party to complete the work and seek reimbursement from Alter out of the escrow funds if the defendant failed to complete the work in a timely manner. Pursuant to this procedure, the plaintiff was to give written notice to the defendant that the plaintiff's construction project required that the work be completed within a reasonable time. If the defendant subsequently failed to complete the work within thirty days, the plaintiff was then authorized to contract for the completion of the work, and, upon [submission] of an invoice or contract for performance from a [third-party] contractor, [Alter] shall advance the funds from the escrow agreement to satisfy the invoice or contract provisions.

"Upon the closing of the transaction, Watson took title to the property in the name of the plaintiff and began developing the property. Between the time of closing and the completion of the plaintiff's house, no additional paving of the common driveway was done. Watson was told by the town, however, that in order to obtain a certificate of occupancy, the paved portion of the common driveway needed to be extended to the entrance of the plaintiff's property. Consequently, in 2008, Watson contracted with a third party to pave this portion of the common driveway at a cost of $4914, which Watson paid. The remainder of the driveway, however, remained a dirt road. Watson also paid $530.70 to Megson & Heagle Civil Engineers & Land Surveyors, LLC (Megson & Heagle), to satisfy an unpaid bill incurred by Daniel Zak, an agent for the defendant, in connection with the preparation of a Connecticut Light and Power Company easement map (easement map) for the common driveway.

"Between 2008 and 2011, no additional paving was done on any portion of the common driveway. In September, 2011, Zak notified Alter that the defendant intended to complete all of the remaining work required under the escrow agreement. The defendant, thereafter, engaged R & J Paving, LLC (R & J Paving), to pave the final portion of the common driveway, from the entrance of the plaintiff's property to the entrances to lots 3 and 4. *The defendant did not, however, have a second, final layer of pavement installed, which Watson believed was required under the escrow agreement.* Upon receipt from Zak of the paving invoice, Alter released $9000 to R & J Paving and divided the remainder of the escrow funds between Zak and Leonard Bourbeau, a member of the defendant. The plaintiff was never reimbursed for the costs it expended in extending the common driveway to the entrance to its property and settling the invoice for the easement map. The plaintiff, however, had not submitted invoices for these expenditures to Alter as required under the escrow agreement.

"The plaintiff commenced the present action in March, 2013. In count two of the operative, revised complaint—the only count at issue in this appeal—the plaintiff alleged, inter alia, that the defendant breached the escrow agreement by improperly seeking the release of escrow funds. The plaintiff further alleged that, as a result, it sustained damages, including the costs to complete the work that the defendant had failed to perform. The matter was tried to the court on September 20 and 22, 2016.

"At trial, the plaintiff appeared to abandon its claim that the defendant improperly sought the release of the escrow funds. *The plaintiff, instead, proceeded under a theory that the defendant breached the escrow agreement by failing to install a second, final layer of pavement over the common driveway. The principal issue*

at trial was whether the defendant's obligation under the agreement to install a final course of bituminous pavement was intended to require the defendant to apply two layers of pavement. On this issue the parties presented contradictory evidence.

* * *

"In its memorandum of decision issued on January 10, 2017, *the court . . . determined that it could not find that there was a meeting of the minds as to the specifics of the common driveway and concluded that the plaintiff had failed to sustain its burden of proving its breach of contract claim.* The court, therefore, rendered judgment in favor of the defendant on count two of the plaintiff's revised complaint." (Footnotes omitted; emphasis altered; internal quotation marks omitted.) Id., 285–92.

In the prior appeal filed by the plaintiff, we first considered whether the trial court improperly found that a meeting of the minds between the parties had not occurred with respect to the number of layers of pavement to be applied to the common driveway. Id., 294. We rejected this claim. Id., 296–97. Next, we declined to review the plaintiff's claim that the defendant had breached the escrow agreement by not reimbursing the plaintiff for costs it had incurred on the basis that this claim had not been alleged in the operative complaint or asserted at trial. Id., 297–98. Finally, we concluded that the court had not abused its discretion in denying the plaintiff's request for leave to amend its revised complaint to add a claim of unjust enrichment. Id., 299–300.

With this summary in mind, we now turn to the facts relating to the defendant's claim for attorney's fees. In its revised complaint, the operative pleading, the plaintiff set forth nine counts against the various defendants. In its amended answer, dated November 23, 2015,

the defendant set forth the following counterclaim: "The escrow agreement, exhibit A to the plaintiff's revised complaint, provides, in pertinent part, that in the event of a dispute between this defendant and the plaintiff, 'all costs of litigation, including reasonable [attorney's] fees, shall be paid to the prevailing party by the [nonprevailing] party.' Wherefore, the defendant . . . in the event that it is the prevailing [party] in this action, seeks its costs of litigation and reasonable attorney's fees." During trial, the parties represented to the court their agreement that the issue of attorney's fees should be reserved until after a decision on the merits of the complaint had been rendered.

On January 10, 2017, the court issued its memorandum of decision. At the outset, the court observed that only count two of the revised complaint, alleging breach of contract, remained pending against the defendant. With respect to this count, the plaintiff had alleged that the defendant breached the escrow agreement and its obligation to fully and completely pave the driveway pursuant to specifications set forth in the purchase agreement. The court found that the plaintiff failed to meet its burden with respect to its claim of a breach of the escrow agreement and the specifics of the driveway set forth in the purchase agreement. The court further explained that there was no "meeting of the minds as to the specifics of the common driveway." The court then rendered judgment in favor of the defendant as to count two of the revised complaint.

On May 9, 2017, the defendant filed a motion for attorney's fees and an affidavit of attorney's fees and costs totaling $38,807.88. One week later, the plaintiff appealed from the judgment rendered in favor of the defendant on count two of the revised complaint. On May 19, 2017, the plaintiff filed an opposition to the motion for attorney's fees. The plaintiff argued that the court had not rendered a judgment on the defendant's

counterclaim seeking attorney's fees and, in the alternative, it should deny any such fees in the exercise of its discretion. On June 28, 2017, the court issued an order denying the motion for attorney's fees.

This court released its decision on the plaintiff's appeal on January 22, 2019. *Watson Real Estate, LLC* v. *Woodland Ridge, LLC*, supra, 187 Conn. App. 282. On February 25, 2019, the defendant moved for judgment on its counterclaim seeking attorney's fees. The defendant also filed an updated affidavit for attorney's fees and costs that included work done for the appeal for a total claim of $45,857.88. On April 18, 2019, the plaintiff filed an opposition to the motion for judgment. It iterated some of its prior arguments as to why attorney's fees should not be awarded and added a claim that the prior denial constituted "the law of the case." The court denied both the defendant's motion for judgment on its counterclaim and its subsequent motion for reargument and reconsideration.

The defendant filed the present appeal on June 3, 2019. Nine days later, the defendant moved for an articulation of the trial court's 2019 denials of its motions for judgment on its counterclaim and for reargument and reconsideration. On July 11, 2019, the court granted the defendant's motion and stated: "[The motions for judgment and for reargument/reconsideration] were denied out of hand as the court had ruled on the defendant's request for attorney's fees nearly two years earlier. . . . [The] [m]atter went to judgment on January 17, 2018. The appeal period expired twenty-one days thereafter."

On July 19, 2019, the defendant moved for further articulation, requesting that the trial court explain why it was not entitled to attorney's fees incurred as a result of the plaintiff's appeal. On September 24, 2019, the court granted the defendant's motion and noted that,

although the 2019 affidavit of attorney's fees included appellate work, "[n]either [the 2019 motion for judgment nor the motion to reargue/for reconsideration] contain anything in the body of either filing that would give the trial court even a hint of a request for attorney's fees in connection with a successful defense of the appeal. The first time the court [was] made explicitly aware of the request [was] in this request for further articulation." This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendant claims that the court improperly denied its request for trial and appellate attorney's fees. Specifically, it contends that such an award was authorized by the prevailing party clause contained in the parties' escrow agreement, it was the prevailing party, and, therefore, the court improperly denied its request for attorney's fees. We conclude that the court improperly failed to exercise its discretion with respect to the defendant's claim for attorney's fees.

We begin with the relevant legal principles and our standard of review. This court has noted that, as a general matter, Connecticut follows the American rule[2] with regard to attorney's fees. See *Mangiante* v. *Niemiec*, 98 Conn. App. 567, 570, 910 A.2d 235 (2006). "[U]nder the American rule, [a party] ordinarily cannot recover attorney's fees for breach of contract in the absence of an express provision allowing recovery . . . ." (Footnote omitted; internal quotation marks omitted.) *Winakor* v. *Savalle*, 198 Conn. App. 792, 810–11, 234 A.3d 1122, cert. granted, 335 Conn. 958, 239 A.3d 319 (2020); see also *Total Recycling Services of*

[2] "The general rule of law known as the American rule is that attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception." (Internal quotation marks omitted.) *Aurora Loan Services, LLC* v. *Hirsch*, 170 Conn. App. 439, 453 n.9, 154 A.3d 1009 (2017).

Connecticut, Inc. v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 326–27, 63 A.3d 896 (2013); *Neiditz* v. *Housing Authority*, 42 Conn. App. 409, 413, 679 A.2d 987 (1996).

"[W]here a contract provides for the payment of attorney's fees . . . those fees are recoverable solely as a contract right. . . . Therefore, the language of the [contract] governs the award of fees . . . . Such attorney's fees incurred language has been interpreted by our Supreme Court . . . as permitting recovery so long as that bill is not unreasonable upon its face and has not been shown to be unreasonable by countervailing evidence or by the exercise of the [court's] own expert judgment." (Internal quotation marks omitted.) *Florian* v. *Lenge*, 91 Conn. App. 268, 283, 880 A.2d 985 (2005); see also *Atlantic Mortgage & Investment Corp.* v. *Stephenson*, 86 Conn. App. 126, 134, 860 A.2d 751 (2004).

In reviewing a claim that attorney's fees are contractually authorized, "we apply the well established principle that [a] contract must be construed to effectuate the intent of the parties, which is determined from [its] language . . . interpreted in the light of the situation of the parties and the circumstances connected with the transaction." (Internal quotation marks omitted.) *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, supra, 308 Conn. 327. The intent of the parties is a question of law subject to plenary review when the contract is unambiguous within its four corners. *FCM Group, Inc.* v. *Miller*, 300 Conn. 774, 811, 17 A.3d 40 (2011).

In the present case, the parties' escrow agreement provided that, in the event of a dispute, "all costs of litigation, *including reasonable* [*attorney's*] *fees, shall be paid to the prevailing party by the* [*nonprevailing*] *party*." (Emphasis added.) The parties do not dispute

that the escrow agreement authorized payment of attorney's fees to the prevailing party. The question that remains, therefore, is whether the court properly denied the defendant's request for attorney's fees.

"An award of attorney's fees is not a matter of right. Whether any award is to be made and the amount thereof lie within the discretion of the trial court, which is in the best position to evaluate the particular circumstances of a case. . . . A court has few duties of a more delicate nature than that of fixing counsel fees. The issue grows even more delicate on appeal; we may not alter an award of attorney's fees unless the trial court has clearly abused its discretion, for the trial court is in the best position to evaluate the circumstances of each case. . . . Because the trial court is in the best position to evaluate the circumstances of each case, we will not substitute our opinion concerning counsel fees or alter an award of attorney's fees unless the trial court has clearly abused its discretion." (Internal quotation marks omitted.) *Francini* v. *Riggione*, 193 Conn. App. 321, 329–30, 219 A.3d 452 (2019); *WiFiLand, LLP* v. *Hudson*, 153 Conn. App. 87, 101–102, 100 A.3d 450 (2014).

"If a contractual provision allows for reasonable attorney's fees, [t]here are several general factors which may properly be considered in determining the amount to be allowed as reasonable compensation to an attorney. These factors are summarized in [rule 1.5 (a) of the Rules of Professional Conduct]. . . . [T]he commentary to rule 1.5 provides that the factors specified in the rule . . . are not exclusive and not all may be relevant given a particular instance." (Citation omitted; internal quotation marks omitted.) *Francini* v. *Riggione*, supra, 193 Conn. App. 330–31. "These factors include: the time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal service properly; the fee customarily

charged in the locality for similar legal services; the amount involved and the results obtained; the time limitations imposed by the client; the experience, reputation and ability of the lawyer or lawyers performing the services, and whether the fee is fixed or contingent." *WiFiLand, LLP* v. *Hudson*, supra, 153 Conn. App. 103. Additionally, a court may rely on its own general knowledge of what occurred during the proceedings to provide evidence in support of an award of attorney's fees. *Francini* v. *Riggione*, supra, 331.

Under the facts and circumstances of the present case, we conclude that the court did not exercise its discretion in ruling on the defendant's request for attorney's fees. "While it is normally true that [appellate courts] will refrain from interfering with a trial court's exercise of discretion . . . this presupposes that the trial court did in fact *exercise* its discretion. [D]iscretion imports something more than leeway in decision-making. . . . It means a legal discretion, to be *exercised* in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (Emphasis in original; internal quotation marks omitted.) *Higgins* v. *Karp*, 243 Conn. 495, 504, 706 A.2d 1 (1998); see also *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 609, 181 A.3d 550 (2018) (when trial court properly is called on to exercise its discretion, its failure to do so is error); *State* v. *Lee*, 229 Conn. 60, 73–74, 640 A.2d 553 (1994) (same).

Following the judgment rendered in favor of the defendant with respect to the plaintiff's breach of contract claim, the defendant moved for an award of attorney's fees in the amount of $38,807.88 on May 9, 2017. At that time, no judgment had been rendered on the defendant's counterclaim seeking attorney's fees. The court denied the defendant's motion without explanation on June 28, 2017. Thus, the defendant's counterclaim seeking attorney's fees remained pending until February, 2019.

After the resolution of the plaintiff's appeal, the defendant moved for judgment on its counterclaim seeking attorney's fees on February 25, 2019. The defendant updated its request to $45,857.88, to include work done for the appeal. The court, again, simply denied the defendant's motion for judgment on the counterclaim without explanation on April 23, 2019. It similarly denied the defendant's motion for reargument and reconsideration. In response to the defendant's motion for articulation, the court subsequently explained that it had denied the motion for judgment on the counterclaim and the motion for reargument and reconsideration "out of hand" due to the fact that it had denied the 2017 motion for attorney's fees nearly two years earlier and the defendant had not filed an appeal.

The court's circular explanation for its repeated denials of the defendant's efforts to obtain an award of attorney's fees demonstrates that it failed to exercise its discretion in conformity with the spirit of the law. The parties' contract specifically provided for attorney's fees for the prevailing party. See generally *A & A Mason, LLC* v. *Montagno Construction, Inc.*, 49 Conn. Supp. 405, 407, 889 A.2d 278 (2005) (it is elementary that, when authorized, fees and costs are ordinarily awarded to prevailing party). Furthermore, the defendant was a prevailing party following the judgment rendered in its favor with respect to the plaintiff's breach of contract action. "Our Supreme Court has stated: [P]revailing party has been defined as [a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded . . . ." (Internal quotation marks omitted.) *Giedrimiene* v. *Emmanuel*, 135 Conn. App. 27, 34–35, 40 A.3d 815, cert. denied, 305 Conn. 912, 45 A.3d 97 (2012); see also *Peterson* v. *McAndrew*, 160 Conn. App. 180, 210–11, 125 A.3d 241 (2015).

The trial court had a duty to exercise its discretion to determine whether the defendant had proven its claim

seeking attorney's fees and whether those fees were reasonable. Here, the court simply denied the defendant's 2017 motion for attorney's fees and the 2019 motion of judgment on its counterclaim without any explanation, and later issued an articulation concluding that the defendant's motions for judgment and for reargument and reconsideration were untimely. At no point, however, did the court provide any indication that it had considered the merits of the requests for attorney's fees, despite the contractual language and the defendant's status as a prevailing party.[3]

We also disagree with the trial court's assessment that the defendant was required, under these facts and circumstances, to file an appeal in 2017, following the denial of its motion for attorney's fees. Our Supreme Court has held that a judgment rendered on the merits is final for the purposes of filing an appeal, even though the recoverability or amount of attorney's fees has not yet been determined. See *Paranteau* v. *DeVita*, 208 Conn. 515, 523, 544 A.2d 634 (1998); see also *Hylton* v. *Gunter*, 313 Conn. 472, 487, 97 A.3d 970 (2014). Our Supreme Court further recognized that this rule may lead to "piecemeal appeals for judgments on the merits and awards of attorney's fees." (Internal quotation marks omitted.) *Paranteau* v. *DeVita*, supra, 524. Thus, a separate question exists as to the timeliness of an appeal from an award of attorney's fees, a collateral and independent claim, as compared with a judgment rendered on the merits of the underlying action. See *Benvenuto* v. *Mahajan*, 245 Conn. 495, 500, 715 A.2d 743

[3] We conclude, therefore, that the plaintiff's contentions in its appellate brief that the court declined to award the defendant attorney's fees on the basis that it was unjustly enriched, or that the defendant failed to present sufficient evidence of the amount of reasonable attorney's fees, constitute nothing more than speculation, which, as we repeatedly have noted, has no place in appellate review. See, e.g., *Village Mortgage Co.* v. *Veneziano*, 203 Conn. App. 154, 171, 247 A.3d 588 (2021); *Bisson* v. *Wal-Mart Stores, Inc.*, 184 Conn. App. 619, 640, 195 A.3d 707 (2018).

(1998); see also *Neiditz* v. *Housing Authority*, supra, 42 Conn. App. 411–12 (request for attorney's fees is not motion to open, set aside, alter, or modify judgment but, rather, raises legal issues collateral to main cause of action). This court recently explained that, once the trial court determines the amount of attorney's fees, that determination "will be a separately appealable final judgment as to the reasonableness of the fees awarded." *Iino* v. *Spalter*, 192 Conn. App. 421, 457, 218 A.3d 152 (2019); see also *Paraneau* v. *DeVita*, supra, 524 n.11.

In the present case, the defendant filed a counterclaim seeking attorney's fees.[4] In its January 10, 2017 memorandum of decision, the court did not address or render judgment with respect to this counterclaim. Following the resolution of the plaintiff's appeal on the merits of its action against the defendant, on February 25, 2019, the defendant moved for judgment on its counterclaim. On April 23, 2019, the court denied the defendant's motion for judgment on the counterclaim. The defendant filed the present appeal from the April 23, 2019 denial of its motion for judgment on the counterclaim and from the May 28, 2019 denial of its motion for reargument and reconsideration.

Under the unique facts of the present case, in which the trial court did not address the defendant's counterclaim seeking attorney's fees pursuant to a prevailing party clause in the parties' contract, and in which the

[4] We note that the plaintiff never challenged the propriety of asserting a counterclaim to obtain attorney's fees through either a motion to strike, a motion to dismiss or a motion for summary judgment. See Practice Book §§ 10-30,10-39, and 17-49. We therefore expressly decline to consider whether the use of such a pleading is proper for the purpose of recovering attorney's fees. Furthermore, the plaintiff failed to file a motion to dismiss the defendant's appeal as untimely. See, e.g., *Meribear Productions, Inc.* v. *Frank*, 193 Conn. App. 598, 604–605, 219 A.3d 973 (2019) (although Appellate Court ordinarily dismisses late appeals that are subject of timely motion to dismiss, twenty day time limit for filing appeal is not subject matter jurisdictional).

plaintiff failed to challenge the propriety of such a pleading or properly challenge the timeliness of the present appeal, we conclude that the defendant was not foreclosed from challenging the denial of its claim for attorney's fees. The defendant properly moved for judgment on its pending counterclaim for attorney's fees in 2019 and timely appealed from the trial court's denial of that motion. Simply stated, we are not persuaded that the defendant was required to file an appeal following the 2017 denial of the motion for attorney's fees, given its unresolved counterclaim. The defendant timely appealed from the 2019 denial of its motion for judgment on the counterclaim, and the lack of an appeal in 2017 cannot serve as the sole basis for not awarding attorney's fees.

Finally, we briefly address the plaintiff's contention that the trial court had determined that no enforceable contract existed between the parties, and, therefore, there was no agreement regarding an award of attorney's fees to the prevailing party. We disagree with the premise of this argument. As we stated in our prior decision, "the [trial] court determined that it could not find that there was a meeting of the minds *as to the specifics of the common driveway* . . . ." (Emphasis added; internal quotation marks omitted.) *Watson Real Estate, LLC* v. *Woodland Ridge, LLC*, supra, 187 Conn. App. 292. This finding regarding the lack of a meeting of the minds applied only to the specifics of the work to be completed regarding the common driveway and not to the escrow agreement itself, which contained the prevailing party clause.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

OCWEN LOAN SERVICING, LLC *v.* SANDRA A. SHELDON ET AL. (AC 43704)

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

Syllabus

The plaintiff, O Co., sought to foreclose a mortgage on certain real property owned by the defendants, S and J. S and J originally signed a promissory note to G Co., secured by a mortgage on the property, and further agreed to participate in a "bisaver program," through which they made a payment to G Co. every two weeks via a direct withdrawal by G Co. from S's checking account. G Co. ceased withdrawing payments in 2008, and reported S and J, who had neither requested nor authorized the cessation, as delinquent to several credit reporting agencies, which severely damaged S and J's credit. S and J thereafter reached an oral agreement with G Co., pursuant to which G Co. agreed to "restore" their credit. G Co. did not restore their credit, S and J ceased to make additional payments, and G Co. resumed reporting S and J as delinquent to the credit agencies. Subsequently, G Co. assigned the note to O Co. S and J asserted several special defenses to the foreclosure action, including unclean hands. Thereafter, P Co. was substituted as the plaintiff. The trial court concluded that S and J had satisfied their burden of proof on their special defense of unclean hands and rendered judgment in their favor, finding that they had equitable title to the property. On P Co.'s appeal to this court, *held*:

1. The trial court's finding that G Co. did not restore S and J's credit was not clearly erroneous: the court credited J's testimony that G Co. never sent letters to the credit reporting agencies in order to correct its error and restore S and J's credit, which supported the finding that G Co. did not restore their credit, and the court was not required to credit evidence submitted by P Co., including three letters that P Co. claimed demonstrated that G Co. had restored S and J's credit; moreover, this court declined to review P Co.'s unpreserved claim that the court relied on J's testimony in contravention of the best evidence rule, as P Co. did not object to J's testimony that G Co. and O Co. failed to restore S and J's credit, and J's testimony that G Co. did not send letters to the credit reporting agencies was based on his firsthand observations.
2. The trial court properly balanced the equities in concluding that P Co.'s legal title to the property was unenforceable after finding for S and J on their special defense of unclean hands.

   a. The trial court properly applied the doctrine of unclean hands: the court concluded that G Co.'s failure to take payments from S and J and to restore S and J's credit after erroneously reporting them to be in default caused their credit to be destroyed; moreover, the court's findings

that G Co.'s conduct was wilful and that S and J came to the court with clean hands were not clearly erroneous, as G Co. voluntarily reported S and J's nonpayment, caused by G Co.'s failure to withdraw payments, to the credit reporting agencies, and the court credited J's testimony that G Co. failed to send letters to restore S and J's credit; furthermore, the court's finding that S and J's economic downfall was caused by G Co. was not clearly erroneous, as evidence presented linked S and J's economic difficulties to G Co.'s actions in failing to restore their credit, including J's testimony that G Co. had not attempted to restore S and J's credit but, instead, had continued to report nonpayment to the credit reporting agencies for more than ten years, and P Co.'s argument that the ruination of S and J's credit was unconnected to G Co.'s error in failing to withdraw the payments was based on the incorrect premise that G Co. had acted to restore S and J's credit.

b. The trial court did not abuse its discretion in determining that a reasonable balancing of the equities weighed in favor of S and J's equitable title to the property: the court considered all relevant factors and found that S and J's economic downfall was a greater inequity than their failure to make a payment on the note in more than ten years; moreover, the remedy ordered by the court did not eliminate S and J's obligations under the note or hold that P Co. may not pursue its legal remedy to enforce the note, but merely held that P Co. was not entitled to the equitable remedy of foreclosure.

Argued February 10—officially released October 5, 2021

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendants, and for other relief, brought to the Superior Court in the judicial district of Windham, where PHH Mortgage Corporation was substituted as the plaintiff; thereafter, the case was tried to the court, *Hon. Leeland J. Cole-Chu*, judge trial referee; judgment for the defendants, from which the substitute plaintiff appealed to this court. *Affirmed.*

Jordan W. Schur, for the appellant (substitute plaintiff).

Opinion

ALEXANDER, J. In this foreclosure action, the substitute plaintiff, PHH Mortgage Corporation, appeals from the judgment of the trial court rendered in favor of the

defendants, Sandra A. Sheldon and James J. Sheldon. On appeal, the substitute plaintiff claims that, in concluding that the defendants prevailed on their special defense of unclean hands, the court (1) made a clearly erroneous factual finding that a predecessor of the substitute plaintiff failed to "restore" the defendants' credit following its own error, and (2) improperly determined that the balancing of the equities prevented foreclosure. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant. On September 24, 2007, the defendants signed a promissory note in which they promised to pay $182,000, plus interest, to GMAC Mortgage, LLC (GMAC). The note was secured by a mortgage to Mortgage Electronic Registration Systems, Inc. (MERS),[1] as nominee for GMAC. Part of the property that is the subject of the mortgage and this foreclosure action is located in Killingly (Killingly property). The other portion of the property is located in Foster, Rhode Island. Only a foreclosure on the Killingly property was sought in the present case.

Shortly after the note was executed, the defendants accepted GMAC's offer of a " 'bisaver program' " wherein payments would be made on the loan every two weeks by direct withdrawal from Sandra Sheldon's checking account. In or about August, 2008, for reasons that remain unexplained, GMAC ceased withdrawing

[1] "MERS does not originate, lend, service, or invest in home mortgage loans. Instead, MERS acts as the nominal mortgagee for the loans owned by its members. The MERS system is designed to allow its members, which include originators, lenders, servicers, and investors, to assign home mortgage loans without having to record each transfer in the local land recording offices where the real estate securing the mortgage is located." (Internal quotation marks omitted.) *Chase Home Finance, LLC* v. *Fequiere*, 119 Conn. App. 570, 572 n.2, 989 A.2d 606, cert. denied, 295 Conn. 922, 991 A.2d 564 (2010).

the biweekly payments as the defendants had authorized it to do. The substitute plaintiff and GMAC admitted that the nonpayment of the loan was GMAC's fault. The court determined that there was no evidence that, had GMAC continued to withdraw the authorized biweekly payments, there would have been any interruption in the defendants' payments. Although the missed payments were a result of GMAC's failure to withdraw those payments, GMAC, nevertheless, reported the absence of the payments to several credit reporting agencies. The court found that, as a result, the defendants' credit was "damaged quickly" and eventually was "destroyed." Soon after GMAC stopped withdrawing the payments and began reporting the resultant missed payments as a default on the part of the defendants, James Sheldon's credit cards were cancelled. Because James Sheldon needed at least one open credit card account for travel related expenses in order to fulfill the duties of his employment in multistate construction management, he could not continue such work, and his income dropped dramatically.

The defendants filed complaints with the Rhode Island Department of Business Regulation, Division of Banking (department) in 2008 and 2009. An officer with the department told GMAC that it " 'screwed up and you gotta fix it.' " Bryan Duggan, a GMAC representative, acknowledged GMAC's error in failing to withdraw the loan payments, but GMAC continued to send regular reports to credit reporting agencies that the defendants were in default. On July 14, 2009, an oral agreement was reached between the defendants and GMAC, wherein the defendants agreed to bring the loan current and make three additional regular monthly payments, and GMAC agreed to restore the defendants' credit. The defendants satisfied the October, 2008 through July, 2009 loan payments in July, 2009, and made three additional mortgage payments, with the last one being in

December, 2009. James Sheldon testified that, because the defendants did not believe that GMAC had performed its obligation to restore their credit, they made no additional mortgage payments thereafter. As a result of the defendants' refusal to make additional mortgage payments, GMAC resumed reporting to credit agencies by early 2010, that the defendants were delinquent in their mortgage payments.

On August 20, 2010, GMAC assigned the mortgage to Ocwen Loan Services, LLC (Ocwen). Although James Sheldon explained the situation to Ocwen, it refused to do anything to restore the defendants' credit or to take into account the effect that GMAC's errors had on the defendants' credit and income. Ocwen continued to send reports of the defendants' nonpayment of the mortgage to credit reporting agencies. At least one credit reporting agency reported the defendants as having no credit rating at all, which fact prevented them from obtaining a Veterans Administration refinancing loan.

In 2017, Ocwen commenced this foreclosure action against the defendants.[2] In its amended complaint, Ocwen alleged that the defendants had defaulted on their mortgage payment due on November 1, 2009, and every month thereafter. Ocwen alleged that, as a result, it had elected to accelerate the balance due on the note and to foreclose on the mortgage on the Killingly property. The defendants, who were self-represented throughout the proceedings in the trial court, filed an

[2] The record reflects that at or around the time that the mortgage was assigned to Ocwen, it also was "referred to foreclosure." Nevertheless, the foreclosure action that is the subject of this appeal was not instituted until September, 2017. James Sheldon testified that this delay caused the defendants additional harm and that he made several requests that if Ocwen was going to foreclose on the property it do so quickly so that the matter could be resolved and the defendants' credit standing could be restored in a timely fashion. The court, in its memorandum of decision, stated that it found James Sheldon's testimony "credible and, in essence, accepts it."

answer and asserted special defenses, including unclean hands.[3] Ocwen assigned the note and mortgage to the substitute plaintiff and filed a motion to substitute PHH Mortgage Corporation as the plaintiff, which was granted by the court.[4]

Following trial, the court issued a memorandum of decision on October 18, 2019, in which it concluded that the defendants had satisfied their burden of proof of their special defense of unclean hands. The court credited James Sheldon's testimony. It determined that the defendants' original default was GMAC's fault due to its failure to take biweekly mortgage payments and that GMAC reported, without justification, these nonpayments to credit reporting agencies as the defendants' fault. The court further found that GMAC failed to restore the defendants' credit, thereby causing the defendants' credit to be destroyed, and rendering James Sheldon unable to continue his career in multistate construction management.

In balancing the equities, the court found for the defendants on the issue of liability and concluded that the substitute plaintiff's legal title to the property was unenforceable. It found that the defendants had equitable

[3] Although the substitute plaintiff makes a passing reference in its appellate brief to the defendants' unclean hands defense being "unstated," it does not challenge the court's construction of the defendants' narrative special defenses as including a claim that the plaintiff acted with unclean hands. Furthermore, to the extent that the substitute plaintiff's passing reference to the defense being unstated could be construed as an argument that the court should not have considered such a defense because it was not specifically pleaded by the defendants, we note that "in light of the court's inherent equitable powers in a foreclosure action . . . [a trial court may properly] consider the equitable doctrine of unclean hands without it being specifically pleaded." *McKeever* v. *Fiore*, 78 Conn. App. 783, 789, 829 A.2d 846 (2003).

[4] The substitute plaintiff took the note subject to all defenses that could be asserted by the defendants, including equitable defenses. See *Bank of America, N.A.* v. *Aubut*, 167 Conn. App. 347, 371, 143 A.3d 638 (2016).

title subject to legal title being quieted in them by agreement or by a separate action. This appeal followed.[5] Following the filing of the present appeal, the substitute plaintiff filed a motion for articulation, which the trial court granted. Additional facts will be set forth as necessary.

Because the substitute plaintiff's claims on appeal center on the unclean hands doctrine, we note at the outset the following relevant legal principles. "Our jurisprudence has recognized that those seeking equitable redress in our courts must come with clean hands. The doctrine of unclean hands expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue. . . . For a complainant to show that he is entitled to the benefit of equity he must establish that he comes into court with clean hands. . . . The clean hands doctrine is applied not for the protection of the parties but for the protection of the court. . . . It is applied . . . for the advancement of right and justice. . . . The party seeking to invoke the clean hands doctrine to bar equitable relief must show that his opponent engaged in wilful misconduct with regard to the matter in litigation. . . . The trial court enjoys broad discretion in determining whether the promotion of public policy and the preservation of the courts' integrity dictate that the clean hands doctrine be invoked." (Internal quotation marks omitted.) *Monetary Funding Group, Inc.* v. *Pluchino*, 87 Conn. App. 401, 407, 867 A.2d 841 (2005).

I

The substitute plaintiff first claims that the court's finding that GMAC did not restore the defendants' credit

[5] The defendants failed to file an appellee's brief as ordered by this court. This court, therefore, ordered the appeal to be considered on the basis of the substitute plaintiff's brief and the record, as defined by Practice Book § 60-4.

is clearly erroneous. It argues that the defendants "presented no credible evidence that [the] credit reporting was *not* corrected as agreed." (Emphasis in original.) We are not persuaded.

"[W]hen reviewing findings of fact, we defer to the trial court's determination unless it is 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. . . . Under the clearly erroneous standard of review, a finding of fact must stand if, on the basis of the evidence before the court and the reasonable inferences to be drawn from that evidence, a trier of fact reasonably could have found as it did." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Lorson*, 183 Conn. App. 200, 210, 192 A.3d 439, cert. granted, 330 Conn. 920, 193 A.3d 1214 (2018).

The substitute plaintiff challenges the court's decision to credit James Sheldon's testimony that GMAC did not restore his credit. Specifically, it argues that James Sheldon did not testify as to what GMAC failed to do to restore his credit, but testified only that GMAC failed to fix his credit "to my satisfaction and my wife's satisfaction." James Sheldon did not, as the substitute plaintiff contends, testify that GMAC failed to restore his credit only because it did not fix his credit to his undefined "satisfaction." His testimony was that GMAC did not restore his credit at all because it did not send letters to credit reporting agencies in order to correct its mistake and restore the defendants' credit. He testified that he brought the loan current and made the additional loan payments as requested by GMAC, but that GMAC "never followed through."[6] James Sheldon

[6] The court noted that, despite the arguable lack of consideration for the verbal agreement, it was GMAC's responsibility to restore the defendants' credit whether or not the defendants resumed payments.

testified that GMAC did not send letters to the credit reporting agencies, questioning, "[W]hy would they not do this? It corrects everything. And really maybe eight, fifty cent stamps is all it's gonna cost 'em, that's all. GMAC didn't do it . . . ." He further stated that, "when Ocwen had the chance, they didn't feel like generating eight letters either . . . ." James Sheldon argued that, as of July 31, 2009, he never again heard from the executive officers at GMAC despite that "[i]t's probably eight letters, three credit bureaus and five creditors, and they just walked away."[7] The court, as was within its province to do, credited the testimony of James Sheldon that GMAC did not restore his credit. See *Gianetti* v. *Norwalk Hospital*, 304 Conn. 754, 772–73, 43 A.3d 567 (2012) (it is within province of trier of fact to weigh evidence presented and determine credibility).

The substitute plaintiff contends that James Sheldon's two credit denial letters from 2019, which were admitted as full exhibits at trial, had no bearing on the status of the defendants' credit in 2009, but rather related to the defendants' failure to make any payments in the following eight years. Regardless of whether these credit denial letters relate to GMAC's failure to restore the defendants' credit, James Sheldon's testimony supports the court's finding that GMAC did not restore the defendants' credit. See, e.g., *Wells Fargo Bank, N.A.* v. *Lorson*, supra, 183 Conn. App. 210 (finding of fact is clearly erroneous when there is *no* evidence in record to support it).

The substitute plaintiff argues that the court's factual finding, in reliance on James Sheldon's testimony, was clearly erroneous because the uncontroverted documentary evidence proved that GMAC met its obligation

[7] Because James Sheldon made these statements when he was not under oath during the testimony of the plaintiff's sole witness, the court interpreted his statements as clarifying his position to the court.

to restore the defendants' credit rating. In particular, the substitute plaintiff relies on three letters that it claims show that GMAC had restored the defendants' credit in accordance with the verbal agreement. The first letter, which was dated July 27, 2009, and which was addressed to the defendants from Duggan, stated that GMAC "sent an *amendment* to the four credit reporting agencies for the [September, 2008] through [the June, 2009] payments. These payments will reflect as paid within the month due. The credit report will reflect no late payments since the loan origination in [September, 2007]." (Emphasis added.) The letter further stated that the defendants "may use this letter for verification, should you need to provide a potential credit grantor with proof that this correction is in [progress]." A second letter, dated July 31, 2009, sent from Duggan to the defendants, stated that the $13,544.06 that was received on July 23, 2009, was applied to the October, 2008 through July, 2009 payments and that "the credit has been *amended* to reflect no late payments on the account. A letter will be sent under separate cover to be used for potential creditors." (Emphasis added.) In a third letter, dated March 13, 2012, to the department, Duggan stated that GMAC had "received complaints filed with your office by the [defendants] in 2008 and 2009," and that "[i]n [July, 2009], [the defendants] remitted funds to satisfy the [October, 2008] through [July, 2009] payments. . . . A recent review of the information reported by the credit bureaus reflects no late payments on the account prior to August 1, 2009, which was the agreement reached . . . ."

The substitute plaintiff contends that the July 27, 2009 letter informs the defendants that credit reporting amendments were sent to the credit reporting agencies and that the credit reporting would be corrected to show the loan as paid from September, 2008 through July, 2009. The substitute plaintiff contends that the

July 31, 2009 letter confirms the removal of the negative credit reporting for the defendants and that the March 12, 2012 letter further demonstrates that the defendants' credit was restored upon receipt of the defendants' three payments. It further argues that the department must have agreed that GMAC met its obligation to the defendants because it took no further action on the defendants' complaint.

The court was not convinced that the letters to which the substitute plaintiff directs our attention demonstrated that GMAC had restored the defendants' credit. It determined that, in the letters, GMAC only "claimed to send correcting credit reports to credit reporting agencies, but all that the evidence shows it actually did is to place the burden of fixing their credit on the defendants: it gave the defendants a letter acknowledging its error and saying the defendants could use it to try to restore their credit." The court stated that, "[a]part from submitting GMAC correspondence using the word 'amendment' instead of 'correction,' the [substitute] plaintiff offered no direct evidence of any such 'amendment.' . . ." In its articulation, the court stated, "[T]he evidence showed that GMAC claimed that it sent 'corrective credit reporting' . . . not that it actually did so." [8] It was within the province of the court not to credit the letters and the testimony of the substitute plaintiff's witness as having established that GMAC had restored the defendants' credit and instead to credit the testimony of James Sheldon that GMAC and its successors in interest never restored the defendants' credit rating.

[8] The substitute plaintiff argues its sole witness, Peter Killinger, an analyst in its foreclosure department, testified, in reference to the July 31, 2009 letter, that GMAC restored James Sheldon's credit because "[w]ell, it says here that they did." Although the court did not specifically mention this portion of Killinger's testimony, it implicitly rejected Killinger's interpretation that the letter established this correction and instead credited James Sheldon's testimony that GMAC did not restore the defendants' credit.

The substitute plaintiff argues that, in accordance with the best evidence rule, the defendants should have produced credit reports to refute the letters it presented, which demonstrated that the defendants' credit had been restored. It contends that in light of the defendants' failure to do so, the court should have concluded that GMAC had restored the defendants' credit. The substitute plaintiff misunderstands the best evidence rule. The rule does not prevent the court from relying on evidence that has been admitted before it. Instead, it is a ground on which a party may rely to object to the admission of evidence because other evidence is preferable. See *State* v. *Carter*, 151 Conn. App. 527, 537–38, 95 A.3d 1201 (2014), appeal dismissed, 320 Conn. 564, 132 A.3d 729 (2016). Significantly, the substitute plaintiff did not object to James Sheldon's testimony that GMAC and Ocwen failed to restore the defendants' credit rating. Thus, its claim that the court should not have relied on this evidence because it was not the best evidence of whether GMAC performed its obligation to restore the defendants' credit rating was not properly preserved and, therefore, is unreviewable. See, e.g., *State* v. *Warren*, 83 Conn. App. 446, 451, 850 A.2d 1086 (unpreserved evidentiary claims are not reviewable on appeal), cert. denied, 271 Conn. 907, 859 A.2d 567 (2004). In any event, we note that the rule, nevertheless, is inapplicable. "[T]he best evidence rule requires a party to produce an original writing, if it is available, when the terms of that writing are material and must be proved." (Emphasis omitted; internal quotation marks omitted.) *Cadle Co.* v. *Errato*, 71 Conn. App. 447, 452, 802 A.2d 887, cert. denied, 262 Conn. 918, 812 A.2d 861 (2002); see also E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 10.1.2, p. 697 ("The Best Evidence Rule is a rule of preference, not one of exclusion. Thus, it prefers proof by the original document but will accept oral evidence if necessary.").

The disputed issue regarding whether GMAC restored the defendants' credit was not something that was reduced to a writing. Rather, James Sheldon's statements that GMAC did not send letters to his credit agencies is based on his firsthand observations. "Where one testifies to what he has seen or heard, such testimony is primary evidence regardless of whether such facts are reduced to writing." (Internal quotation marks omitted.) *Coelm* v. *Imperato*, 23 Conn. App. 146, 150, 579 A.2d 573, cert. denied, 216 Conn. 823, 581 A.2d 1054 (1990).

We also reject the argument of the substitute plaintiff that the department concluded that GMAC had met its obligation to fix the defendants' credit rating. The absence of evidence before the court regarding the outcome of the defendants' complaint that was filed with the department does not indicate whether or how it resolved the complaint. Although the court could have drawn the inference the plaintiff advocates for on appeal, it was not required to do so. James Sheldon, whose testimony the court credited, explained that he followed the advice of the department and entered into an agreement with GMAC but that GMAC never followed through in sending the letters to restore his credit.

We will not second-guess the court's decision to credit James Sheldon's testimony or its decision not to credit GMAC's representation in the letters of what steps it purportedly took to restore the defendants' credit. See *Gianetti* v. *Norwalk Hospital*, supra, 304 Conn. 772–73 (appellate court must defer to fact finder's assessment of credibility). For the foregoing reasons, we conclude that the court's finding that GMAC did not restore the defendants' credit is not clearly erroneous.

II

The substitute plaintiff next claims that the court improperly balanced the equities in concluding that its

legal title was unenforceable after finding for the defendants on their special defense of unclean hands. We are not persuaded.

A

This claim contains various subarguments in which the substitute plaintiff challenges the court's underlying factual findings and legal application of the unclean hands doctrine. Our standard of review is as follows. "[A]pplication of the doctrine of unclean hands rests within the sound discretion of the trial court. . . . The exercise of [such] equitable authority . . . is subject only to limited review on appeal. . . . The only issue on appeal is whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of [the trial court's] action. . . . Whether the trial court properly interpreted the doctrine of unclean hands, however, is a legal question distinct from the trial court's discretionary decision whether to apply it. . . . [T]he question of whether the clean hands doctrine may be applied to the facts found by the court is a question of law. . . . We must therefore engage in a plenary review to determine whether the court's conclusions were legally and logically correct and whether they are supported by the facts appearing in the record." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Monetary Funding Group, Inc.* v. *Pluchino*, supra, 87 Conn. App. 406.

1

The substitute plaintiff contends that the court improperly determined that it engaged in misconduct despite the defendants "hav[ing] not shown fraud or other inequitable or illegal conduct on the part of [the] plaintiff . . . ." It contends, citing *LaSalle National Bank* v. *Freshfield Meadows, LLC*, 69 Conn. App. 824,

798 A.2d 445 (2002) (*LaSalle*), that "[s]ituations where the plaintiff refused to accept payments postcommencement of foreclosure [were] not deemed unclean hands by this [c]ourt."

In *LaSalle*, this court concluded that the unclean hands doctrine was not applicable where the plaintiff bank did not accept payments, which had been made by the defendant after indebtedness was accelerated due to the defendant's default, because it was not required to do so pursuant to the note or mortgage. *LaSalle National Bank* v. *Freshfield Meadows, LLC*, supra, 69 Conn. App. 835–36. Those facts are markedly different from the facts in the present case, wherein it was GMAC's failure to withdraw the authorized payments from Sandra Sheldon's bank account and where GMAC, prior to default, ruined the defendants' credit as a result. There is no rigid formula for what constitutes misconduct, rather, to constitute misconduct it must be "of such a character as to be condemned and pronounced wrongful by honest and fair-minded people . . . ." (Internal quotation marks omitted.) *Thompson* v. *Orcutt*, 257 Conn. 301, 310, 777 A.2d 670 (2001). In our exercise of plenary review, we determine that the court properly applied the doctrine of unclean hands to the facts of the present case when it determined that GMAC failed to take loan payments from the defendants and failed to restore the defendants' credit after it erroneously reported the defendants' to be in default, thereby causing the defendants' credit to be destroyed.

2

The substitute plaintiff next argues that the court's finding that its conduct was wilful was clearly erroneous. We disagree.

"Whether a party's conduct is wilful is a question of fact. . . . The term has many and varied definitions, with the applicable definition often turn[ing] on the

specific facts of the case and the context in which it is used. . . . As we previously have observed . . . wilful has been defined [as] voluntary; knowingly; deliberate . . . [i]ntending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary . . . or with indifference to the natural consequences. . . . Wilful misconduct has also been defined as intentional conduct that is deemed highly unreasonable or indicative of bad faith.'' (Citations omitted; internal quotation marks omitted.) *Cathedral Green, Inc.* v. *Hughes*, 174 Conn. App. 608, 622–23, 166 A.3d 873 (2017).

We conclude that the court's finding was not clearly erroneous. Wilfulness reasonably can be inferred from GMAC's voluntary act of reporting to credit reporting agencies the nonpayment of the mortgage that was caused by GMAC's own failure to withdraw the mortgage payments from Sandra Sheldon's checking account and its subsequent failure to restore the defendants' credit. See *19 Perry Street, LLC* v. *Unionville Water Co.*, 294 Conn. 611, 623, 987 A.2d 1009 (2010) (intent may be inferred from conduct and circumstances).

3

The substitute plaintiff next argues that the court's finding that the defendants came to the court with clean hands is clearly erroneous. Specifically, it contends that the defendants' actions indicate that they came to the court with unclean hands because they ''unilaterally demand[ed]'' GMAC to satisfy the verbal agreement to their own undefined '' 'satisfaction' '' standard and failed to make any loan payments for more than a decade. It contends that it is clear that the defendants came to the court with unclean hands because they ''made a complaint to the [department], and nothing happened. It is clear that the [department] found that

the complaint had no merit . . . .'' We are not persuaded.

As we have detailed in part I of this opinion, James Sheldon testified that GMAC did not restore his credit because GMAC declined to send correction letters to credit reporting agencies and that the absence of evidence regarding the outcome of the defendants' complaint against GMAC with the department does not indicate that their claim against GMAC was without merit. We conclude that the substitute plaintiff has not demonstrated that the court's finding that the defendants came to the court with clean hands was clearly erroneous.

4

The substitute plaintiff next argues that the court erred in finding that the defendants' economic downfall was caused by GMAC's actions. It contends that the defendants' loan was current as of November, 2009, that the defendants' credit was restored as of July, 2009, and, therefore, that the defendants' failure to obtain new credit cards after July, 2009, and the defendants' economic difficulties from 2009 through 2020, was outside the control of the substitute plaintiff. We are not persuaded.

The court found that, ''[q]uickly after those negative credit reports began, and because of them—that is, because GMAC stopped taking the defendants' payments and started reporting as their default what was GMAC's fault—all [of] [James] Sheldon's credit cards were cancelled.'' The court determined that there was no evidence contradicting James Sheldon's testimony that, after GMAC stopped taking the automatic biweekly payments, it reported, without justification, the resulting nonpayments to credit reporting agencies as defaults, and that those reports ''eviscerated the defendants' credit and caused [James] Sheldon to be

unable to continue his career in multistate construction management."

There was evidence linking the defendants' economic difficulties to the actions of GMAC in failing to restore the defendants' credit. James Sheldon testified that GMAC failed to restore his credit by not sending letters of correction to the credit reporting agencies. He further testified that he followed the advice of an agent with the department, who had advised him, "[D]o not make another payment until such time as you've straightened this out." He explained that he tried to contact GMAC and, later, Ocwen to resolve the situation, but that it was "impossible" because "they never made any effort to reach a resolution" and that they "didn't wanna talk," but said they would "pass it up the chain," and no one would discuss the matter because information concerning this issue was not in the file. He testified that "the most important thing that we do was to get our credit restored. GMAC was responsible for the destruction of that." He stated that, even during the time frame wherein GMAC was "investigating the mortgage, GMAC kept sending that little note to the credit bureau saying [he was] not paying his mortgage. I needed that off the books. They agreed to do it . . . if I brought the account up to date, gave them three extra payments to cover the period of time that it would take . . . for the credit bureaus to actually get the paperwork entered into the system. I agreed to that." He further testified that his credit rating was destroyed and that "[n]owhere did anybody think that . . . for ten years, they would continue to report . . . no, he didn't make his mortgage payment this month."

The substitute plaintiff's argument that the ruination of the defendants' credit is unconnected to GMAC's actions in failing to take the biweekly payments under the bisaver program is based on the incorrect premise that GMAC had *restored* the defendants' credit as of

July, 2009. As the court found, GMAC did not restore the defendants' credit. It reasonably can be inferred from James Sheldon's testimony that GMAC's failure to restore the defendants' credit led to and caused the defendants' financial ruin. The court determined that "the degree of the defendants' financial ruin caused by GMAC long before this action began has increased over the life of this action by the length of time the defendants have suffered the effects of GMAC's unjustified and unremedied ruin of their credit [and] their financial reputation . . . ." The court further reasoned that it regarded Duggan's July 27, 2009 letter, in which he stated that GMAC sent an "amendment" to credit reporting agencies for the September, 2008 through June, 2009 payments, as an admission "of the foreseeable damage to the defendants' credit: any credit reporting company, or actual or prospective creditor relying on such company's report on the defendants, would dismiss the defendants' credit on seeing a report of ten months [of] failure to pay their mortgage." The court drew reasonable inferences from the evidence in this regard. In light of the foregoing, we conclude that the court's finding that GMAC's act in reporting its own failure to take the authorized biweekly payments GMAC as defaults caused the defendants' financial ruin was not clearly erroneous.

B

The substitute plaintiff's final claim is that the court did not properly balance the equities when it "wiped out [the substitute plaintiff's] lien based on oral testimony that lacked documentary proof to show that the credit was not corrected or documentary evidence that [the substitute plaintiff] somehow caused [the defendants'] 2019 credit denials. The flimsy evidence offered by [the] [d]efendants does not equal or justify wiping out a consensual lien and giving the [d]efendants a free

house. None of the above factors appear[s] to have been considered by the [c]ourt." We disagree.

"This court will reverse a trial court's exercise of its equitable powers only if it appears that the trial court's decision is unreasonable or creates an injustice. . . . [E]quitable power must be exercised equitably . . . [but] [t]he determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court." (Internal quotation marks omitted.) *Thompson* v. *Orcutt*, 70 Conn. App. 427, 435, 800 A.2d 530, cert. denied, 261 Conn. 917, 806 A.2d 1058 (2002). "How a court balances the equities is discretionary but if, in balancing those equities, a trial court draws conclusions of law, our review is plenary." (Internal quotation marks omitted.) *New Breed Logistics, Inc.* v. *CT INDY NH TT, LLC*, 129 Conn. App. 563, 571, 19 A.3d 1275 (2011).

As we have previously explained in this opinion, the court's findings that GMAC did not restore the defendants' credit and that GMAC's misconduct led to the defendant's economic difficulties were not clearly erroneous. See parts I and II A of this opinion. The substitute plaintiff cannot prevail on its argument that the court improperly balanced the equities because it credited James Sheldon's testimony, which the substitute plaintiff argues is "flimsy." It was in the court's province to do so. See *Gianetti* v. *Norwalk Hospital*, supra, 304 Conn. 772–73.

The substitute plaintiff, nevertheless, contends that, even if the court properly credited James Sheldon's testimony, it "was not entitled to wipe clear a $308,380.43 loan obligation . . . ."[9] The court, however, is permitted, in the exercise of its discretion, to

[9] The court noted that the amount of the debt was in dispute and that it was not necessary to find the amount of the debt because that issue was not actually litigated at trial. We note that the original promissory note was for $182,000.

withhold the remedy of foreclosure based on equitable considerations and principles. See *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 671, 212 A.3d 226 (2019). "[E]quitable remedies are not bound by formula but are molded to the needs of justice." (Internal quotation marks omitted.) *McKeever* v. *Fiore*, 78 Conn. App. 783, 788, 829 A.2d 846 (2003). "[T]he trial court enjoys broad discretion in considering whether to grant a mortgagee the remedy of foreclosure for the default of a mortgage loan." *ARS Investors II 2012-1 HVB, LLC* v. *Crystal, LLC*, 324 Conn. 680, 685, 154 A.3d 518 (2017).

We find no merit in the substitute plaintiff's claim that the court failed to consider multiple factors in its favor, such as the defendants not having paid the mortgage in more than a decade. The court's articulation makes clear that it considered all relevant factors and rejected the substitute plaintiff's argument that the balancing of the equities weighed in its favor. The court stated in its articulation that, "[i]mplicitly, the [substitute] plaintiff claims that the court, its findings of fact notwithstanding, should have concluded that the defendants not making a mortgage payment in more than ten years is the greater inequity than the [substitute] plaintiff's predecessor destroying the defendants' credit, in turn destroying [James] Sheldon's career and earning capacity and the defendants' ability to pay the mortgage. Implicitly, the [substitute] plaintiff argues that, given the facts found by the court, the defendants should lose more than they, due to GMAC's and [the] successor mortgagor Ocwen's conduct in credit reporting, have already lost: they should lose their home, too. The court rejected that analysis of the equities of the present case."

In its memorandum of decision, the court reasoned that "the defendants have suffered the effects of GMAC's unjustified and unremedied ruin of their credit, their financial reputation; and by the length of time they

have endured the burden and stress of this foreclosure action, which the court finds, to the extent retrospective prognostications may be considered in equity, would have been unnecessary had GMAC, in whose shoes the plaintiff and its principal stand, promptly repaired the damages it unjustifiably caused to the defendants' credit." (Footnote omitted.)

Finally, we note that the remedy ordered by the court does not "wipe clear" the defendants' obligation under the note. The court did not hold that the substitute plaintiff may not pursue its legal remedy to enforce the note. Instead, it held that the plaintiff is not entitled to the equitable remedy of foreclosure. See *JP Morgan Chase Bank, N.A.* v. *Winthrop Properties, LLC*, 312 Conn. 662, 674, 94 A.3d 622 (2014) ("[u]nlike the equitable nature and aims of foreclosure, a claim on the note at law is grounded in contract, and is enforceable as between the parties to that contract—the debtor and the creditor, as well as persons who succeed to those obligations or rights by transfer or assignment").

On the basis of the court's factual findings of inequitable misconduct by GMAC and its successor, Ocwen, we conclude that the court properly acted within its discretion when it determined that a reasonable balancing of the equities weighed in favor of the defendants.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* SHAWN G.*
(AC 42617)

Bright, C. J., and Elgo and Moll, Js.

Syllabus

Convicted, after a jury trial, of the crimes of possession of narcotics with intent to sell by a person who is not drug-dependent, criminal possession of a revolver and risk of injury to a child, and, after a plea of guilty, of being a persistent serious felony offender, the defendant appealed to this court, claiming that the evidence was insufficient to sustain his conviction and that the trial court improperly declined to issue a capias he requested. The police had executed a search warrant on the defendant's apartment, where he lived with his wife and minor stepchildren. During their search of the apartment, the police found, inter alia, a loaded revolver and cash in a storage container, crack cocaine in a dresser drawer, used drug baggies that tested positive for cocaine residue and a digital scale. Two cell phones also were found during a search of the defendant's person. The defendant told the police that the revolver was his and that he had bought it to protect his family. *Held*:

1. The evidence was sufficient to support the defendant's conviction of the weapon and drug charges, but his conviction of risk of injury to a child could not stand:

a. The evidence was sufficient to establish that the defendant had dominion and control over and constructively possessed the revolver, as his ownership of the revolver was the ultimate manifestation of dominion and control; the defendant's admission to the police that he purchased the revolver to protect his family supported the conclusion that he intended to exercise dominion and control over it by using it for that purpose, and, notwithstanding his contention that he was not in exclusive possession of the apartment and that the state never proved that he resided there at the time of the search, there was abundant evidence from which the jury could conclude that the defendant lived there, including the concession by his counsel that he spent time there with his wife and family, and, that the revolver was found in the bedroom he shared with his wife, reinforced the evidence of his ownership of and intention to maintain dominion and control over the revolver.

b. The defendant's claim that the state failed to prove that he constructively possessed the narcotics found in his bedroom was unavailing, the confluence of incriminating statements and circumstances having

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

supported the inference that he was in a position of control over the narcotics and, thus, constructively possessed them: the jury had evidence before it that guns frequently are used by drug dealers to protect themselves and their cash and narcotics, the presence of the loaded revolver in the bedroom was relevant in determining whether the defendant intended to exercise dominion and control over the narcotics, the cash found in the same storage container as the revolver was in denominations that were significant to the purchase of narcotics, and digital scales are commonly used to ensure that narcotics are accurately measured for packaging and distribution; moreover, as the bedroom is an intimate area of the home, the jury reasonably could have concluded that access to it would ordinarily be limited to the defendant and his wife, and the cumulative effect of the most incriminating statements and circumstances relating to the conduct of someone involved in the sale of narcotics implicated the defendant, rather than his wife.

c. The mere presence of a firearm hidden in a storage container in the defendant's bedroom did not constitute a situation under the risk of injury statute (§ 53-21 (a) (1)) in which a child was likely to be injured, and the state conceded that it failed to present sufficient evidence with respect to that charge; accordingly the judgment was reversed with respect to that conviction.

2. The defendant failed to demonstrate that the trial court violated his sixth amendment right to compulsory process when it declined to issue a capias for a police officer who failed to appear at trial in response to a subpoena and denied the defendant's request for a continuance:

a. Although the trial court mistakenly believed it could not issue the capias in the absence of in-hand service of the subpoena on the officer, who was in Florida at the time of trial, it properly considered the interwoven nature of the defendant's requests for the capias and a continuance before it denied the request for a continuance, which the defendant did not challenge on appeal, as the court had before it uncontroverted evidence that the officer had been out of state at all relevant times and would remain so for another two weeks, the defendant already had been granted continuances to procure witnesses, his request was untimely, the length of the requested continuance was too long, the proffered testimony would be cumulative of evidence already before the jury, and the denial of the continuance would not impair his ability to defend himself.

b. Any violation of the defendant's sixth amendment right to compulsory process stemming from the trial court's refusal to issue a capias to procure the police officer's presence was harmless beyond a reasonable doubt, as defense counsel conceded that the officer's testimony might have been cumulative of evidence that was already before the jury, the impact of the testimony would have been inconsequential, as the defendant never proffered that it would undermine the evidence against him, and, given that the officer had discovered the narcotics in the bedroom and heard the defendant confess that the gun was his, the

testimony likely would have been adverse to the defense, for which the defendant never articulated to the court a reason to believe otherwise.

Argued December 2, 2020—officially released October 5, 2021

Procedural History

Two part substitute information charging the defendant, in the first part, with the crimes of possession of narcotics with intent to sell by a person who is not drug-dependent, criminal possession of a revolver and risk of injury to a child, and, in the second part, with being a persistent serious felony offender, brought to the Superior Court in the judicial district of Middlesex, where the first part of the information was tried to the jury before *Suarez, J.*; verdict of guilty; thereafter, the defendant was presented to the court on a plea of guilty to the second part of the information; judgment of guilty in accordance with the verdict and plea, from which the defendant appealed to this court. *Reversed in part; judgment directed.*

Pamela S. Nagy, assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Michael A. Gailor*, state's attorney, and *Russell C. Zentner*, senior assistant state's attorney, for the appellee (state).

Opinion

ELGO, J. The defendant, Shawn G., appeals from the judgment of conviction, rendered after a jury trial, of one count of possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes (Rev. to 2017) § 21a-278 (b),[1] one count of criminal possession of a revolver in violation of General Statutes § 53a-217c (a) (1), and one count of risk

[1] We note that the legislature amended § 21a-278 since the events at issue. See Public Acts 2017, No. 17-17, § 2. For convenience, all references to § 21a-278 in this opinion are to the 2017 revision of the statute.

of injury to a child in violation of General Statutes § 53-21 (a) (1). On appeal, the defendant claims that (1) the evidence adduced at trial was insufficient to sustain his conviction of each of the three counts, and (2) the trial court violated his sixth amendment right to compulsory process by declining to issue a capias that he requested. We affirm in part and reverse in part the judgment of the trial court.

At trial, the jury was presented with evidence of the following facts. The defendant lived in the first floor apartment of a two-story, multifamily house at 215 Pearl Street in Middletown (apartment). He shared the apartment with his wife and his two stepchildren—a sixteen year old boy and a twelve year old girl. On May 31, 2017, officers from the Middletown Police Department executed a search warrant on the defendant's apartment. When they arrived at the apartment, they observed the defendant and another male standing in the street. The police then went to the apartment, where the defendant's wife answered the door. The defendant's stepchildren were in the apartment at that time. During the search of the apartment, the officers found, among other things, crack cocaine and a revolver.

The defendant subsequently was arrested and charged with the aforementioned offenses. A trial followed, at the conclusion of which the jury found the defendant guilty of all counts. The defendant thereafter pleaded guilty to being a persistent serious felony offender in violation of General Statutes § 53a-40 (c). On October 3, 2018, the court sentenced the defendant to a total effective term of twenty years of incarceration, execution suspended after twelve years, plus five years of probation.[2] This appeal followed.

[2] For the possession with intent to sell conviction, the court sentenced the defendant to twenty years of incarceration, execution suspended after twelve years, plus five years of probation. The court also sentenced the defendant to concurrent ten year terms of incarceration on the criminal possession of a revolver and risk of injury to a child counts.

I

The defendant claims that the evidence adduced at trial was insufficient to establish his guilt for each of the three offenses of which he was convicted. The state concedes that the evidence is insufficient to support his conviction of risk of injury to a child but contends that the evidence was sufficient to support his conviction of criminal possession of a revolver and possession of narcotics with intent to sell by a person who is not drug-dependent. We agree with the state.

As this court has observed, "[a] defendant who asserts an insufficiency of evidence claim bears an arduous burden." *State* v. *Hopkins*, 62 Conn. App. 665, 669–70, 772 A.2d 657 (2001). "In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . .

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

ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Capasso*, 203 Conn. App. 333, 338–39, 248 A.3d 58, cert. denied, 336 Conn. 939, 249 A.3d 352 (2021).

A

The defendant first claims that there was insufficient evidence to convict him of criminal possession of a revolver in violation of § 53a-217c (a) (1). Although he concedes that he had knowledge of the revolver, the defendant argues that there was insufficient evidence to prove that he exercised dominion or control over it. The state counters that, because the defendant admitted that he owned the revolver and the evidence supported a finding that he lived at the apartment and shared the bedroom where the revolver was found, the jury reasonably could have concluded that the defendant had dominion and control over it. We agree with the state.

The following additional facts are relevant to this claim. While searching the bedroom of the apartment, Detective Daniel Schreiner found a loaded Taurus .38 special revolver and $2661 in cash inside a stackable drawer. The uniform arrest report, which the defendant signed while being processed, listed the apartment as his address. Subsequently, the police questioned the defendant at the Middletown police station. At that time, the defendant waived his *Miranda*[3] rights in writing. During questioning by detectives, the defendant stated that the revolver was his and that he had purchased it for $800 because he needed it to protect his family.

[3] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Section 53a-217c (a) provides in relevant part: "A person is guilty of criminal possession of a pistol or revolver when such person possesses a pistol or revolver, as defined in section 29-27, and (1) has been convicted of a felony . . . ."[4] General Statutes § 53a-3 (2) defines "possess" as "to have physical possession or otherwise to exercise dominion or control over tangible property . . . ." Because the gun was not found on the defendant's person, the state prosecuted the defendant under the theory of constructive possession.

As our Supreme Court recently explained, "there are two kinds of possession, actual and constructive. . . . [C]onstructive possession is possession without direct physical contact. . . . To establish constructive possession, the control must be exercised intentionally and with knowledge of the character of the controlled object. . . . Moreover, [when] the defendant is not in exclusive possession of the premises where the [contraband is] found, it may not be inferred that [the defendant] knew of the presence of the [contraband] and had control of [it], unless there are other incriminating statements or circumstances tending to buttress such an inference. . . . [A]lthough mere presence is not enough to support an inference of dominion or control, [when] there are other pieces of evidence tying the defendant to dominion [or] control, the [finder of fact is] entitled to consider the fact of [the defendant's] presence and to draw inferences from that presence and the other circumstances linking [the defendant] to the crime. . . .

"[A] case for constructive possession of a firearm often is necessarily built on inferences, and a jury may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable

[4] At trial, the parties stipulated that the defendant had a prior felony conviction.

and logical. . . . Although [p]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis . . . it must suffice to produce in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . [I]f the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation. . . . Therefore, [b]ecause [t]he only kind of an inference recognized by the law is a reasonable one . . . any such inference cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic . . . that [a]ny [inference] drawn must be rational and founded upon the evidence. . . . [A]lthough we do not sit as the seventh juror when we review the sufficiency of the evidence . . . we also must be faithful to the constitutional requirement that no person be convicted unless the [g]overnment has proven guilt beyond a reasonable doubt [and] take seriously our obligation to assess the record to determine . . . whether a jury could *reasonably* find guilt beyond a reasonable doubt." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Dawson*, Conn. , , A.3d (2021).

In support of his argument that the evidence was insufficient, the defendant argues that the evidence demonstrates only that he had knowledge of the revolver and, further, that the state never proved that he actually resided at the apartment at the time of the search. Relying on *State* v. *Gainey*, 116 Conn. App. 710, 977 A.2d 257 (2009), and *State* v. *Billie*, 123 Conn. App. 690, 2 A.3d 1034 (2010), the defendant contends that the evidence is insufficient to establish dominion and control over the revolver. We disagree.

In *Gainey*, police officers executed a search warrant on the defendant's residence, where they detained the defendant and a female individual inside. *State* v. *Gainey*, supra, 116 Conn. App. 712. While searching the apartment, the police found a set of keys and an eviction notice addressed to the defendant and Jane Doe in one of the bedrooms, as well as a scale. Id. Their search continued in the yard to a vehicle, which they unlocked with keys found in the bedroom. Id. Inside the vehicle was a cell phone instructional manual. Id. Officers then found fifteen bags of heroin hidden in the ashtray area of the vehicle's rear passenger compartment. Id., 712–13.

After the defendant was convicted of possession of narcotics on the theory that he constructively possessed the drugs, this court determined that the evidence was insufficient to establish constructive possession because there was "no more than a temporal and spatial nexus between the defendant and the contraband . . . ." Id., 722. As the court noted, "[t]he eviction notice, without more, was insufficient to show that the room in which it was found was the defendant's bedroom, and, further, it could not be used to show that the room was exclusively for the use of the defendant. Presumably, an eviction notice that was addressed to both the defendant and a Jane Doe would concern any inhabitant of the house. There was also testimony about a woman being inside the house when the warrant was served. The items found inside the vehicle do not buttress the inference of exclusive control, either. Again, paperwork regarding the house, even in the defendant's name, does not evince control, especially if the jury had to consider that the house was inhabited by at least two persons. Additionally, the testimony regarding the [cell phone] instruction book was that the defendant's name was decorated 'with hearts and designs' and does not overwhelm us that there is more than a temporal or spatial nexus between the defendant and the drugs

that were found in the backseat ashtray." Id., 722–23. As the court emphasized, "the search did not yield any insurance or registration cards, and the last registered owner of the vehicle was not the defendant." Id., 712. Because none of the evidence in the home was sufficient to demonstrate that the defendant owned the vehicle and, more specifically, connected him to the narcotics found therein, this court concluded that the state could not establish that the defendant exercised dominion and control over the narcotics. Id., 722–23.

In *Billie*, an informant told the police that he had witnessed a " 'black male' " place narcotics underneath the rear porch of a particular residence. *State* v. *Billie*, supra, 123 Conn. App. 692. In response, officers were dispatched to the residence, where they discovered a clear, plastic sandwich bag underneath the rear porch area containing twenty-two smaller, individually wrapped packages of crack cocaine. Id. The police then removed all but one of the smaller packages, replaced the sandwich bag in the hidden location, and set up surveillance of the property. Id. Several hours later, the police observed the defendant enter the driveway at the front of the property and walk to the location of the narcotics. Id., 693. After officers emerged and identified themselves, the defendant dropped the sandwich bag containing only the single package of crack cocaine along with another bag containing marijuana. Id. The defendant thereafter was convicted of possession of narcotics with intent to sell under General Statutes § 21a-277 (a). Id., 693–94.

On appeal, the defendant conceded that he had possession of the single package of cocaine recovered after his arrest but argued that the state failed to present sufficient evidence that he constructively possessed the remaining twenty-one packages. Id., 697–98. The state noted that the defendant "purposely entered the property, proceeded directly to the location of the narcotics

and immediately removed the sandwich bag from the hidden location without having to look or feel around," and that the defendant was a prior resident at the location. Id., 699. On appeal, this court reversed the judgment of conviction, reasoning that "the state's argument conflates the two separate requirements of constructive possession: knowledge and dominion and control." Id. The court stated: "[W]e believe that this evidence is relevant to whether the defendant had knowledge of the narcotics but does not support a reasonable inference of dominion and control. As this court has recognized, contraband found in a public area could have been secreted there by virtually anyone." (Internal quotation marks omitted.) Id.

In the present case, the defendant argues that, like the defendant in *Gainey*, he was not in exclusive possession of the apartment and the firearm was not found on his person, and, as in *Billie*, his statements to the police indicate that, at most, he had knowledge of the revolver. Therefore, he contends that the evidence was insufficient to prove that he exercised dominion or control over the revolver. The evidence, however, does not support his contention that he had only "mere knowledge" of the revolver, as the defendant admitted to the officers that he purchased the revolver for personal use. In the absence of evidence that the defendant was deprived of physical possession, his ownership of the revolver is the ultimate manifestation of dominion and control. See Black's Law Dictionary (6th Ed. 1990) p. 1106 (Ownership is defined as "[t]he complete dominion, title, or proprietary right in a thing or claim. . . . The right of one or more persons to possess and use a thing to the exclusion of others."). Furthermore, the defendant's statement that he purchased the revolver to protect his family supports the conclusion that he intended to exercise dominion and control over it by using it for that purpose.

Moreover, the argument that the state never proved that the defendant lived at the apartment in question is both unfounded and beside the point. First, there is abundant evidence from which the jury could have concluded that the defendant lived at the apartment where the revolver was found, and, indeed, counsel for the defendant conceded that the defendant spent time at the apartment with his wife and family. Second, unlike in *Gainey*, in which the contraband was found in the rear passenger compartment of a vehicle but the evidence was insufficient to connect it to the defendant, and unlike in *Billie*, in which the contraband was found outside of the defendant's residence in a space accessible to the public, the revolver here was found in the defendant's bedroom, an intimate and private area of his residence. See *State* v. *Rhodes*, 335 Conn. 226, 232, 249 A.3d 683 (2020) ("the record contains sufficient circumstantial evidence, beyond mere proximity, that the defendant knew the firearm was in the car, was in a position to control it, and intended to control it"). The fact that the defendant shared the bedroom with his wife does not preclude a finding of constructive possession. As we observed in *State* v. *Bowens*, 118 Conn. App. 112, 124–25 n.4, 982 A.2d 1089 (2009), cert. denied, 295 Conn. 902, 988 A.2d 878 (2010), in which the defendant did not own the vehicle in which the contraband was found, "[c]onstructive possession can be joint, does not require actual ownership of the firearm, and can be established through circumstantial evidence . . . ." (Internal quotation marks omitted.) Indeed, the fact that the revolver was found in the bedroom of the defendant's apartment merely reinforces the evidence of his ownership and intention to maintain dominion and control over it. Accordingly, we conclude that the evidence was sufficient to support a finding that the defendant constructively possessed the revolver found in the apartment.

B

The defendant next claims that the state presented insufficient evidence to support his conviction of possession of narcotics with intent to sell by a person who is not drug-dependent in violation of § 21a-278 (b). We disagree.

The following additional facts are relevant to the defendant's claim. When the police arrived at the apartment to execute their search warrant, the defendant's wife answered the door, joined by a large dog, a pit bull.[5] At the request of the police, the defendant's wife put the dog in a crate. While searching the apartment, Detective Jorge Yepes found 3.1 grams of crack cocaine inside the upper left drawer of a dresser in the bedroom.[6] The dresser also had both men's and women's clothes in it. In the pocket of one of the men's pants and on the bedroom floor, Yepes found two " 'used drug baggies,' " which later tested positive for cocaine residue. At trial, Sergeant Frederick Dirga testified that the pants appeared to be for a "heavyset, large male." At the time, the defendant was five feet, nine inches, in height and weighed 240 pounds. The police also found two Michael Kors watches in the bedroom on the top of the stackable storage containers. Baughnita Leary, the defendant's girlfriend, testified that the watches were gifts that she had given to the defendant. In the basement of the apartment, the police found a digital scale, typically used by drug dealers to measure cocaine for packaging for sale, inside a bag of men's clothing identified as belonging to the defendant. At the time of the search, the defendant was physically present in

[5] Sergeant Joseph Flynn testified at trial that pit bulls are favored by drug dealers in order to guard their product when it is unattended.

[6] Sergeant Frederick Dirga testified that, in Middletown, crack cocaine sells for $10 for 0.10 grams and that the crack cocaine found in the apartment had a street value of approximately $360.

front of the apartment. When the police searched the defendant's person, they found two cell phones.[7]

In addition to the watches and revolver establishing the defendant's residence at the apartment bedroom, Dirga testified at trial that he had seen the defendant "come and go" to and from the apartment "too many times to count" during the period of February to May, 2017, and that the defendant lived on the first floor. Detective Nathan Peck, to whom the defendant admitted that he owned the revolver, testified that he also witnessed the defendant "come and go" to and from the residence on numerous occasions.

The state also presented evidence that the defendant had various expensive expenditures that were inconsistent with his reported employment and wage history. For example, the state presented the arrest report, which was filled out by the police during their questioning of the defendant, in which the defendant listed his current occupation as "unemployed."[8] The state also

[7] Dirga testified on direct examination that drug dealers usually have two cell phones—a personal phone and one used for conducting business.

[8] The defendant's theory at trial was that he was not living in the apartment at the time of the search and that the expensive items in question were gifts bought for him by Leary. Leary testified that, in May, 2017, the defendant was living with her. She also testified that, after a tractor-trailer accident, which resulted in the death of her fiancé and two children in 2014, she received a substantial amount of money, became "very wealthy," and would "spoil" the defendant with expensive gifts. For example, she claimed that she gave the defendant $5000 in cash on May 1, 2017. Leary also testified that she bought the defendant a Victory Magnum motorcycle, as well as the Michael Kors watches found during the search of the defendant's apartment.

The prosecution countered this testimony by calling Peck as a rebuttal witness, who testified that the police executed a search warrant on Leary's residence the same day that they searched the defendant's apartment and did not find any men's clothing in her residence. During closing arguments, the prosecution also argued that Leary was biased and that her testimony about the gifts was not credible because she was the defendant's girlfriend, they were in a sexual relationship, and she admitted on cross-examination that she wanted to have children with the defendant.

To the extent that the defendant relies on Leary's testimony in his sufficiency of the evidence claims, we note that the jury was under no obligation

offered the testimony of Emilio Theodoratos, a wage employment agent from the Department of Labor. Theodoratos testified that he had reviewed the defendant's reported employment history. According to a Department of Labor automated benefits system report of the defendant's reported employment and wage history, there was no record of any employment during the first six months of 2017 and no record of employment at all in 2016. However, while searching the glove compartment of the defendant's automobile, the police located a bill of sale for a 2017 Victory motorcycle. That bill of sale indicated that the defendant paid for a $21,516.87 Victory Magnum motorcycle in full and in cash on February 8, 2017.

General Statutes (Rev. to 2017) § 21a-278 (b) provides in relevant part: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any narcotic substance, hallucinogenic substance other than marijuana, amphetamine-type substance, or one kilogram or more of a cannabis-type substance, except as authorized in this chapter, and who is not, at the time of such action, a drug-dependent person, for a first offense shall be imprisoned not less than five years or more than twenty years; and for each subsequent offense shall be imprisoned not less than ten years nor more than twenty-five years . . . ."

to credit Leary's testimony. "Questions of whether to believe or to disbelieve a competent witness are beyond our review." (Internal quotation marks omitted.) *State* v. *Whitnum-Baker*, 169 Conn. App. 523, 527, 150 A.3d 1174 (2016), cert. denied, 324 Conn. 923, 155 A.3d 753 (2017). On appeal, for a sufficiency of evidence claim, "we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Capasso*, supra, 203 Conn. App. 339.

The defendant argues that there was insufficient evidence to sustain his conviction because the state failed to prove beyond a reasonable doubt that he constructively possessed the cocaine. The state counters that the evidence and reasonable inferences drawn therefrom establish incriminating circumstances from which the jury could infer that the defendant knew of the presence and character of the cocaine and exercised dominion and control over it. We agree with the state.

"[T]o prove illegal possession of a narcotic substance, it is necessary to establish that the defendant knew the character of the substance, knew of its presence and exercised dominion and control over it. . . . Where, as here, the cocaine was not found on the defendant's person, the state must proceed on the theory of constructive possession, that is, possession without direct physical contact. . . . One factor that may be considered in determining whether a defendant is in constructive possession of narcotics is whether he is in possession of the premises where the narcotics are found. . . . Where the defendant is not in exclusive possession of the premises where the narcotics are found, it may not be inferred that [the defendant] knew of the presence of the narcotics and had control of them, unless there are other incriminating statements or circumstances tending to buttress such an inference. . . . To mitigate the possibility that innocent persons might be prosecuted for . . . possessory offenses and to assure that proof exists beyond a reasonable doubt, it is essential that the state's evidence include more than just a temporal and spatial nexus between the defendant and the contraband." (Citation omitted; internal quotation marks omitted.) *State* v. *Leon-Zazueta*, 80 Conn. App. 678, 683, 836 A.2d 1273 (2003), cert. denied, 268 Conn. 901, 845 A.2d 405 (2004).

In support of his claim of evidential insufficiency, the defendant relies on *State* v. *Nova*, 161 Conn. App.

708, 129 A.3d 146 (2015). In *Nova*, the police obtained a warrant to search both the defendant and an apartment building that the police believed was the defendant's residence. Id., 710. While surveilling the building in preparation for execution of the warrant, the police saw the defendant drive into the building's parking lot, exit the vehicle, and enter the apartment through the main entry door, which opened into the kitchen. Id., 710–11. The defendant then reemerged, ascending the external staircase of the balcony on the third floor, remained on the balcony for approximately one minute, and then descended from the balcony and returned to his vehicle. Id. When the police subsequently executed the search warrant on the apartment, they found drugs and drug paraphernalia in the kitchen and on the balcony. Id., 712. The search of the defendant revealed two cell phones but no cash or drugs. Id., 713.

In reversing the defendant's conviction, this court stated that "[i]t is undisputed that the defendant did not exclusively possess the apartment or make any incriminating statements. Thus, the question is whether the other circumstances were sufficiently incriminating to support an inference that the defendant constructively possessed the narcotics police discovered in the apartment." Id., 719. In its review of the record, the court determined that "there was no evidence that the defendant was observed carrying anything into the kitchen or onto the balcony, no evidence that he touched anything while in the kitchen or on the balcony, and no evidence that he left the kitchen or balcony with anything." Id., 722. Moreover, the court noted that it was speculative to conclude, "on the basis of the defendant's mere proximity to the packaging materials and his passage through the kitchen, that he controlled the cocaine found in the kitchen cabinets and garbage. The kitchen was a common area used by the apartment's occupants and was adjacent to the main entry door, requiring the

defendant, like anyone entering the apartment, to pass through it." Id., 723. Moreover, "there was no compelling correlation between the defendant simply being in the apartment where drugs and paraphernalia later were discovered and the conclusion that he constructively possessed those narcotics and paraphernalia." Id., 722–23. This court thus concluded that "the defendant's presence in the kitchen and on the balcony established nothing more than a temporal and spatial nexus between him and the cocaine and packaging materials found in those areas." Id., 721. The court further emphasized that, although the defendant had access to the apartment over a nine month span, "the defendant's relationship to the contraband, not his relationship to the apartment, is the proper focus of the constructive possession inquiry." Id., 725.

We are not persuaded that the facts in *Nova* compel a similar result here. First, as we have previously explained, the defendant's nonexclusive possession of the apartment, and the bedroom in particular, does not preclude a finding of constructive possession where "there are other incriminating statements or circumstances tending to buttress . . . an inference [of constructive possession]." (Internal quotation marks omitted.) *State* v. *Winfrey*, 302 Conn. 195, 211, 24 A.3d 1218 (2011); cf. *State* v. *Hill*, 201 Conn. 505, 516, 523 A.2d 1252 (1986) ("[t]he essence of exercising control is not the manifestation of an act of control but instead it is the act of being in a position of control coupled with the requisite mental intent"). In *State* v. *Winfrey*, supra, 211–13, for example, our Supreme Court concluded that the defendant was in constructive possession of contraband found in the console of his wife's vehicle, notwithstanding the presence of another passenger, on the basis of factors that made it more likely that the defendant, rather than the passenger or his wife, owned the contraband. See also *State* v. *Hill*, supra, 516 ("The phrase

'to exercise dominion or control' as commonly used contemplates a continuing relationship between the controlling entity and the object being controlled. Webster's Third New International Dictionary defines the noun 'control' as the 'power or authority to guide or manage.' ").

In considering what factors may reasonably manifest the exercise of dominion or control when a defendant is in nonexclusive possession of the premises where contraband is found, we find instructive our Supreme Court's decision in *State* v. *Butler*, 296 Conn. 62, 993 A.2d 970 (2010). In that case, the court recognized that, when a defendant is not in exclusive possession of a vehicle, evidence from which a jury reasonably can infer that a defendant is a narcotics trafficker, coupled with sufficient evidence connecting a defendant to the narcotics, may establish that a defendant exercised dominion and control over the narcotics. Id., 78–79. Specifically, the court observed that "there was significant evidence from which it was reasonable for the jury to infer that the defendant was a narcotics dealer. *Such an inference would also help support the further inference that the defendant had possessed the narcotics.* See *State* v. *Marshall*, 114 Conn. App. 178, 188, 969 A.2d 202 (evidence that defendant had sold narcotics from same vehicle to undercover agent relevant to dispel doubts about possession), cert. denied, 292 Conn. 911, 973 A.2d 661 (2009); *State* v. *Diaz*, 109 Conn. App. 519, 527, 952 A.2d 124 (claim of insufficient evidence to support possession of narcotics unavailing when '[t]he jury had before it ample evidence from which it could infer that the defendant was a drug seller and that his apartment was integral to that criminal enterprise'), cert. denied, 289 Conn. 930, 958 A.2d 161 (2008); *State* v. *Riser*, 70 Conn. App. 543, 553–54, 800 A.2d 564 (2002) (discovery of $1532 and other evidence demonstrating that defendant was trafficking crack cocaine supported

inference of possession of contraband)." (Emphasis added.) *State* v. *Butler*, supra, 79–80. The defendant in *Butler* was accompanied by two passengers in a rental vehicle that was stopped by the police for a motor vehicle violation. Id., 66–67. From their patrol car, the officers observed the defendant closing the center console of the vehicle, which subsequently was found to contain 21.5 grams of cocaine. Id. The Supreme Court held that evidence of that movement, in addition to evidence of $1369 in cash, several cell phones found on his person, and the fact that the defendant was operating a rental vehicle, was sufficient to demonstrate constructive possession. Id., 67, 79–80.

In the present case, the jury had before it a confluence of incriminating statements and circumstances that support the inference that the defendant was in a position of control over the narcotics and possessed the requisite mental intent. As we noted in part I A of this opinion, the evidence presented at trial was sufficient to establish the defendant's intention to maintain his dominion and control over the revolver found in the bedroom he shared with his wife. By the same token, the fact that the fully loaded revolver was in the defendant's bedroom was a relevant factor for the jury to consider in determining whether the defendant also intended to exercise dominion and control over the narcotics found there, as the jury had evidence before it that guns frequently are used by drug dealers to protect themselves, their cash, and their narcotics.[9] See, e.g., *State* v. *Butler*, supra, 296 Conn. 74 ("[w]e have often stated . . . that it is reasonable for police officers to suspect guns to be associated with illegal drug selling operations" (internal quotation marks omitted)); *State* v. *Mann*, 271 Conn. 300, 325, 857 A.2d 329 (2004) ("Connecticut courts

[9] Sergeant Joseph Flynn testified that the purpose of a firearm in the sale of narcotics was "to protect [the dealer] . . . [his] product, [and his] money . . . ."

repeatedly have noted that [t]here is a well established correlation between drug dealing and firearms," and "[f]ederal courts also have recognized this fact of life" (internal quotation marks omitted)), cert. denied, 544 U.S. 949, 125 S. Ct. 1711, 161 L. Ed. 2d 527 (2005). The evidence also established that the $2661 in cash discovered in the apartment bedroom not only was found in the same storage container as the revolver, but also was in denominations of five $100 bills; four $50 bills; ninety-six $20 bills; and several bills in smaller denominations. According to the testimony of Sergeant Joseph Flynn, those denominations were significant because crack cocaine typically is purchased in transactions of $20 at a time. With respect to the digital scale found in the basement in a bag with the defendant's clothes, Dirga testified that scales commonly are used to ensure that cocaine is accurately measured for packaging and distribution. Here, the cocaine found in the bedroom drawer weighed 3.1 grams, which, when broken down into amounts typical for sale, amounted to $360 worth of crack cocaine. In addition to that cocaine, officers found two baggies with cocaine residue, one of which was located in a pair of pants matching the defendant's size and build.

In analyzing a claim of constructive possession when a defendant has nonexclusive possession of the premises, we reiterate that the bedroom, unlike the kitchen in *Nova*, is not a common space but an intimate area of a home. As such, a jury reasonably could conclude that, for purposes of assessing the intention to exercise dominion and control, access to the bedroom would ordinarily be limited to the defendant and his wife. Further, the most incriminating statements and circumstances relating to the conduct of someone involved in the sale of narcotics—such as the revolver that the defendant admittedly owned, the large amount of cash found in the same storage container as the revolver,

the drug baggie found in a pair of men's pants matching the defendant's physical description, the digital scale found in the bag of the defendant's clothing, the two cell phones found on the defendant, and the evidence of the defendant's cash purchase of the Victory motorcycle—all implicate the defendant, rather than his wife. As in *Butler*, the cumulative effect of this evidence supports an inference that the defendant intended to exercise dominion and control over the narcotics and, therefore, constructively possessed the cocaine. See *State* v. *Slaughter*, 151 Conn. App. 340, 349–50, 95 A.3d 1160 (testimony about modus operandi of drug dealers coupled with defendant's conduct sufficient to establish constructive possession even though defendant's girlfriend was lessee of apartment where narcotics were found because there was no evidence to support belief that girlfriend knew of presence of drugs or was involved in sale of illicit drugs), cert. denied, 314 Conn. 916, 100 A.3d 405 (2014). We, therefore, conclude that the evidence before the jury was sufficient to support a finding that the defendant constructively possessed the cocaine found in the apartment.

C

The defendant also claims that the state presented insufficient evidence to support his conviction of risk of injury to a child in violation of § 53-21 (a) (1).[10] The state's theory at trial was that the defendant had exposed his twelve year old stepdaughter to a risk of injury because his revolver was loaded and accessible in the stackable drawer in the bedroom. On appeal, the defendant argues, inter alia, that the mere presence of a firearm hidden in a storage container does not

[10] General Statutes § 53-21 (a) provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the . . . health of such child is likely to be injured . . . shall be guilty of . . . a class C felony . . . ."

constitute a situation in which a child is likely to be injured for purposes of § 53-21 (a) (1).

On our review of the record, we agree with the defendant. Moreover, the state concedes that it failed to present sufficient evidence with respect to the risk of injury to a child conviction. For that reason, the defendant's conviction of risk of injury to a child cannot stand.

II

As a final matter, the defendant claims that the court violated his right to compulsory process under the sixth amendment[11] by refusing to issue a capias for Yepes, who failed to appear at trial in response to a subpoena. The state concedes that the court mistakenly concluded that it could not issue a capias in the absence of in-hand service of the subpoena on Yepes. It nevertheless contends that the court's denial of defense counsel's request for a continuance to secure Yepes' testimony, which was predicated on the same compulsory process concern that animated his capias request, renders the capias issue academic, as the defendant cannot demonstrate that the court violated his right to compulsory process under the particular facts of this case. The state also argues, as an alternative ground of affirmance, that any violation of the defendant's right to compulsory process was harmless beyond a reasonable doubt. We agree with both of the state's arguments.

A capias is a vehicle to compel attendance at a judicial proceeding. See *Pembaur* v. *Cincinnati*, 475 U.S. 469, 472 n.1, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) ("[a]

[11] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." "[T]he sixth amendment [right] to compulsory process [is] made applicable to state prosecutions through the due process clause of the fourteenth amendment." (Internal quotation marks omitted.) *State* v. *Holley*, 327 Conn. 576, 593, 175 A.3d 514 (2018).

capias is a writ of attachment commanding [an] official to bring a subpoenaed witness who has failed to appear before the court to testify and to answer for civil contempt"); *DiPalma* v. *Wiesen*, 163 Conn. 293, 298, 303 A.2d 709 (1972) ("[i]f one is not warranted in refusing to honor a subpoena and it is clear to the court that his absence will cause a miscarriage of justice, the court [is permitted to] issue a capias to compel attendance"). As one court has noted, it is "an extraordinary measure"; *Wright* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-15-4006830-S (January 18, 2019) (67 Conn. L. Rptr. 659, 660); that involves the arrest of the witness in question. See General Statutes § 52-143 (e). In light of the gravity of such action, Connecticut law is clear that the issuance of a capias is not mandatory but, rather, rests in the sole discretion of the trial court. The trial court "has the authority to decline to issue a capias when the circumstances do not justify or require it. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Greene* v. *Commissioner of Correction*, 330 Conn. 1, 33, 190 A.3d 851 (2018), cert. denied sub nom. *Greene* v. *Semple*, U.S. , 139 S. Ct. 1219, 203 L. Ed. 2d 238 (2019). Our review of a court's ruling on a continuance request likewise is governed by the abuse of discretion standard. See *State* v. *Campbell*, 328 Conn. 444, 473, 180 A.3d 882 (2018) ("[t]here is no question but that the matter of a continuance is traditionally within the discretion of the trial judge which will not be disturbed absent a clear abuse" (internal quotation marks omitted)).

A

To properly consider the defendant's claim regarding the alleged violation of his right to compulsory process,

a detailed examination of the extensive procedural history of this case is necessary. During a pretrial hearing held on July 12, 2018, the court asked counsel whether they believed that trial could be completed within one week.[12] At that time, the prosecutor expressed confidence in his ability to conclude the state's case-in-chief in two days. Following defense counsel's representation of the defendant's witness list, the prosecutor indicated to the court that he had notified defense counsel on an earlier date that Yepes would not be available for trial. The prosecutor explained that, because Yepes was on vacation in Florida, he intended to call officers who witnessed what Yepes saw to testify at trial. When defense counsel indicated that he thought he could still subpoena Yepes in Florida, the prosecutor responded that Yepes was out of state for the month of July and reiterated that he had so apprised defense counsel on an earlier date.

On that same day, as well as during the court's advisement to venirepersons, the court stated that it anticipated evidence starting on July 16, 2018, and continuing for approximately one week, "plus or minus a day or two." The court further informed potential jurors that, although "nobody can really give you an end date . . . we anticipate about a week for all the evidence and the conclusion of the case."

During its case-in-chief, the state established that Officers Schreiner, Mark Lemieux, Dirga, and Yepes executed the search warrant on the apartment. Both Schreiner and Dirga testified that Yepes was on vacation in Florida for the month of July. Dirga also testified that he was present during the search of the apartment bedroom and had observed Yepes when he found the

[12] The record indicates that counsel were reminded by e-mail that the court would be adhering to the original trial schedule, with voir dire commencing on July 11, 2018, and evidence beginning on July 16, 2018 through July 20, 2018, or until a verdict was reached.

crack cocaine inside the bedroom dresser and the baggies containing cocaine residue in the pocket of the men's pants and on the bedroom floor.

At the end of the day on July 16, 2018, the court reviewed the remaining schedule with the jury and, on the basis of the prosecutor's representations, indicated that the state intended to conclude its case-in-chief on Thursday, July 19. On July 18, the state presented the testimony of six witnesses and then indicated that it likely would conclude its case-in-chief the next morning. On July 19, the state rested its case. At that time, the defendant moved for a judgment of acquittal, which the court denied.

Defense counsel then asked the court for a recess to contact his witnesses. Upon his return, defense counsel informed the court that he was not prepared to begin the defendant's case until the next morning. Counsel, therefore, requested a continuance. Although the court acknowledged that the jury was aware that the case could "spill out" to the following week, after asking counsel whether he could secure a witness for that afternoon, the court ultimately granted the defendant's request to continue the case to the next day, July 20.

Prior to adjournment, the prosecutor asked the court to ask defense counsel "if he's going to need any of the police officers because what happens is, he subpoenas them . . . [t]hey cannot get a hold of [defense counsel], and then, they end up calling me to find out about whether or not they are required to be here . . . ." The prosecutor noted that three police officers who had been subpoenaed by the defendant to appear that morning had been released from their subpoenas.[13] For that reason, the prosecutor wanted to know whether those officers would be needed the next day, as their previous

[13] Those officers were Peck, Dirga, and Lemieux.

attempts to contact defense counsel had been unsuccessful. In response, defense counsel assured the court that he would "make personal phone calls to each and every one of them, to the chief of the police department, whatever it takes if they're saying they're having a problem reaching me." Court then adjourned at 11:33 a.m. on July 19.

The following day, defense counsel began his case by calling Leary, whose testimony concluded at 11:25 a.m. Defense counsel then informed the court that he "ha[d] several witnesses . . . coming at two o'clock" who were all law enforcement officers. When the court inquired as to whether counsel had a witness who could fill the gap before the afternoon recess, defense counsel replied: "I believe that [the prosecutor] represented that one of the subpoenaed witnesses, Detective Yepes, is not available?" In response, the prosecutor reiterated that the testimony at trial already had established that Yepes was currently out of state and would be for the entire month of July, and that the prosecutor previously had apprised defense counsel of that fact "quite some time ago." The court then recessed for ten minutes at 11:55 a.m. after asking defense counsel to contact his witnesses to determine whether any could testify before the 1 p.m. lunch recess. When the proceeding reconvened at 12:31 p.m., defense counsel represented to the court that he believed his witness was "on his way up" to the courtroom. At that time, the marshals indicated to the court that the witness in question was not in the building. The court thus adjourned for the lunch recess. Prior to doing so, the court instructed defense counsel to contact *all* of his witnesses during the lunch recess to ensure they were ready to testify "one after the other" beginning at 2 p.m. At that time, defense counsel represented to the court that he already had done so.

When the proceeding resumed after the luncheon recess, the court asked defense counsel to call his next

witness. Counsel then replied, "I'm not sure he's available but, at this time, the defense would call Detective George Yepes." The court immediately excused the jury and the following colloquy occurred:

"[The Prosecutor]: Your Honor, this is done very blatantly for effect before the jury.

"The Court: Well, I'm going to address that in a minute. . . . [Defense counsel], [i]f you are going to make—

"[Defense Counsel]: I'm sorry?

"The Court: If you're going to call a witness that you know that's not available—

"[Defense Counsel]: Well, my understanding was, he's coming back Thursday.

"[The Prosecutor]: No, no, no, no.

"[Defense Counsel]: Unless I go[t] that confused.

"[The Prosecutor]: That wasn't . . . the testimony."

The court then asked Attorney Corey Heiks, cocounsel for the defense, who had called Yepes as a witness, to address the issue. Heiks stated that defense counsel's "office has properly sent out subpoenas, one of which being Detective George Yepes. It's our understanding Detective Yepes would be coming back from Florida by Thursday. Here we are Friday, every reasonable inclination that he would be here and available. The Middletown Police Department accepted service . . . of the subpoena for him. . . . [The] defense's strategic purpose of the . . . order of witnesses that he was very imperative and we would like to call now because he was the supervisor. We heard testimony that all the officers were doing what Detective Yepes instructed them to do. [He] . . . and, I believe, it was Peck, they're the ones that are privy with the incident

report, the only one, to my understanding, that has ever been made. We know two officers didn't bother making reports, and that's why, at this time, I feel that Detective Yepes would be available and we'd able to proceed forward."

In response, the prosecutor stated: "I told . . . [defense counsel] before the jury selection process even commenced that [Yepes] was away for the entire month of July in Florida, so he knew it. Do you know when they dropped off the subpoena for [Yepes], knowing that? This Monday, July 16th. Okay? And he—there was testimony from a witness who stated that [Yepes] was going to be out for the month of July. So, for them to then say, we heard he was coming back Thursday, is simply not true. . . . They knew he was gone for the month of July. There was testimony of that. I told [defense counsel] he would be gone for the month of July." The court asked defense counsel if he had in-hand service for Yepes, and defense counsel replied that he did not and instead served the subpoena on the Middletown Police Department, which accepted service on his behalf. The court then asked defense counsel to call their next witness, and the defense called Detective Michael Fonda, who was present and testified.

Following Fonda's testimony, the defense called Schreiner as a witness, but Schreiner was not present. After the court excused the jury, defense counsel represented that Schreiner properly had been subpoenaed and was in the state but that efforts to contact him in order to secure his timely presence had been unsuccessful. Defense counsel thus asked the court to issue a capias for Schreiner. The court replied that it was unwilling to issue a capias in the absence of proof of in-hand service of the subpoena.[14] Defense counsel

[14] In a colloquy with defense counsel, the court also explained the significance of a capias:

"The Court: If you're asking the court to arrest somebody—

"[Defense Counsel]: Not arrest him, just order him here.

"The Court: Well, that's what a capias is."

represented that a member of the police department had stated that he would accept service of the subpoena and "would inform everybody" of it. When the court asked if he had another witness, defense counsel responded, "[w]ell, actually, no. [Schreiner would] be the last witness, but he's not here and he refuses to come, I guess." The prosecutor then requested that the court ask defense counsel what method was used to contact Schreiner because the officer had testified at trial days earlier and "could have been apprised" of "when, approximately, he would be needed." Furthermore, the prosecutor reiterated that, "as I told you yesterday, I have had several officers say to me they could not get in touch with [defense counsel]." The court then stated that it was going to take a fifteen minute recess and instructed defense counsel to "do what you need to do to get the next witness in here if that's what you wish to do . . . ."

When court resumed, defense counsel represented that he had spoken to an officer at the Middletown Police Department, who was under the impression that Schreiner and Yepes were in the state and may be present at 4 p.m. that day. When defense counsel suggested continuing the case until the following Monday as one of the options moving forward, the court responded by recounting the proceedings thus far and emphasized that defense counsel had been on notice that the state was going to rest the day before, that the court already had given defense counsel a continuance for that day, and that defense counsel had assured the court that he had three witnesses who would take one hour each. The court also repeated its belief that it could not issue a capias without in-hand service of the subpoena and stated that, "[d]ropping a subpoena to the local police department, it may or may not be enough [in order] to issue a capias." Defense counsel then stated that he had "made every effort" and that he had "proof via

e-mails, via phone calls . . . .'' Defense counsel further assured the court that subpoenas had been issued after the court reminded him that proof of phone calls was inadequate for a capias.

After the prosecutor noted that there was no corroboration of service, the court asked defense counsel if he had a copy of the subpoena that he issued to Schreiner. Defense counsel stated, ''[y]es, I do.'' The court then demanded to see it. Instead of producing the subpoena, however, defense counsel stated that he could ''produce phone records since [the prosecutor] is, basically, saying that I'm a liar.'' Defense counsel then offered to have the marshal come in and ''tell exactly how she served, and who she served,'' to which the court replied: ''[T]hat's not what I asked you. I asked you if you have a subpoena.'' Defense counsel then represented that he did have a subpoena ''but not in my possession at this moment.''

The court reiterated that it would like to see whether counsel had copies of the subpoena. Defense counsel responded, ''okay,'' after which the record indicates there was a pause before counsel continued: ''Your Honor, would e-mail be sufficient? If they give me copies from e-mail or they—[do you] want to see the actual hard copy?'' Defense counsel then stated that ''[a] marshal was not available to bring them today, but . . . is available next week . . . or I could drive back to my office. . . . We have copies there . . . .'' In light of the foregoing, the court decided to adjourn for the weekend and informed defense counsel that it was his obligation to have his witnesses at court the following Monday. The court further instructed the parties to prepare written briefs on what options were available for the court if the defendant's witnesses were not present at that time.

When trial resumed on Monday, July 23, 2018, the court asked if the defense had any witnesses. Defense

counsel replied that he would have witnesses only if Yepes was present and represented that Yepes, like Schreiner, had been lawfully subpoenaed.[15] The prosecutor at that time represented that a subpoena had been delivered to the Middletown Police Department seven days earlier, but that Yepes "was never notified of when he was supposed to be here" because "[h]e's been out of state." The prosecutor also informed the court that the state had secured the presence of Schreiner, whom the defendant requested to call days earlier, and asked the court to ask defense counsel if he intended to call Schreiner as a witness. Defense counsel indicated that he planned to call Schreiner after Yepes' testimony concluded. The court then asked defense counsel to make an offer of proof regarding Yepes' anticipated testimony. Defense counsel stated: "Well, [Yepes] is the one that everybody said he told them what to do and he is in charge and he signed off on everything. Nobody else has a report. Okay? Nothing else is involved in a report except for him. Okay? That's my offer of proof." When the court informed counsel that Yepes was not the officer who had authored the report, defense counsel simply responded, "[o]kay." The court then asked defense counsel if Yepes' testimony "would be cumulative to what other Middletown police officers have already testified to," and counsel replied, "[m]aybe." The court then asked counsel if he was asking for a continuance, and defense counsel replied, "No. . . . I don't want a continuance. I want Detective Yepes."

When defense counsel then confirmed that he had another witness, the court asked counsel to call that

[15] Defense counsel also indicated that he had prepared a brief "on subpoenas . . . and how a police officer is supposed to be served." In response, the court stated: "That's not really what I asked to be briefed. What I asked to be briefed is, if you did not have any witnesses present today, how should we proceed with trial?" Defense counsel then responded by suggesting that the court consider entering a missing witness nolle as to Yepes; the court responded that it did not have the discretion to do so.

witness. Defense counsel declined to do so, stating: "I am not calling a witness out of order. You can't—you can't force that." In response, the court again asked defense counsel if he was requesting a continuance, and defense counsel replied: "No. I'm asking for Detective Yepes to be here. If you want to continue the case until Detective Yepes is back from Florida, I'm fine with that." The court overruled that objection and ordered the defense to call its next witness, whereupon Schreiner took the witness stand.

Following Schreiner's testimony,[16] the court asked defense counsel if he had any further witnesses, and, in the presence of the jury, he replied: "Yes, I do. Detective Yepes." The jury once again was excused, and the court again asked defense counsel if he wanted a continuance. Defense counsel declined that offer, stating: "No. I'm asking for Detective Yepes to be present, as he should be under the law." The court again asked defense counsel if he had effected in-hand service of the subpoena; defense counsel replied that he had not but maintained that he was not required to do so under the rules of practice. The court at that time stated that it could not issue a capias for a witness who had not been served in hand.

When defense counsel thereafter informed the court that he had no witnesses other than Yepes, the court again asked for an offer of proof. Defense counsel replied: "All the officers involved in that investigation, all reported verbally to Detective Yepes, who was in charge. None of them have writings." When pressed by the court, defense counsel stated that he was unsure

[16] The sum and substance of Schreiner's testimony in the defendant's case-in-chief amounted to confirmation that Yepes was in charge of the investigation and that Schreiner believed that Yepes currently was out of state on the basis of what Yepes had told him before his vacation.

who had written the incident report,[17] but he believed that Dirga and Yepes may have signed it.

The court at that time recounted for the record the extensive procedural history underlying the issue, emphasizing that defense counsel had been aware prior to trial, and before the subpoena was issued, that Yepes was out of state and that defense counsel had the opportunity to cross-examine the other police officers involved in the search of the apartment. The court noted that, on July 9, 2018, "we had a hearing on motions" at which the prosecutor "informed the parties that [Yepes] was out of state. . . . Evidence commenced . . . on [July] 16. Tuesday, we took a recess and . . . Thursday, July 19, the state rested in the morning, one witness. I asked [defense] counsel that morning . . . how many witnesses [he] intended to call. I was told three witnesses. I asked how long were those witnesses going to last, and I was told about an hour each, not including what the state would cross-examine. . . . Counsel indicated that he needed a continuance to get his witnesses. I granted that continuance. . . . At approximately twelve o'clock that day of July 19, I granted [another] continuance for the defense to begin [its case on] Friday morning. Friday, the defense had one witness in the morning. I asked where the other witnesses were. [Defense counsel was] not aware of where they were. I granted a continuance until two o'clock where [the defendant] produced one witness. At that time, the defense still did not have any other witnesses. So, at 3 p.m., I granted [an additional] continuance [until the following Monday] for the defense to produce its other witnesses. This morning, [the defense] produced one witness who, really, had no testimony. The only remaining witness from this defense is [Yepes], a witness [who] is in Florida, was in Florida by the time

[17] The incident report in question was not admitted into evidence and is not part of the record in this appeal.

. . . the . . . subpoena was issued [and] continues to be in Florida. . . . Counsel for the defense had had ample opportunity to cross-examine all of the other police officers involved [in the May 31, 2017 search of the apartment], by their own admission.

"The defense feels that it's necessary to call [Yepes, who] . . . I would classify as a cumulative witness. I've asked the defense if they're asking for another continuance. They're not asking for another continuance, but [are insisting on the testimony of Yepes, who] is not in the state of Connecticut. So, then, the question is, how do we proceed."

The court then suggested that the only option for the defendant to secure Yepes' testimony would be to ask for a continuance and reiterated that "[i]t's 10:30 a.m. [The defendant has] called one witness who, really, had nothing to say." Defense counsel at that time stated that "the only way to resolve this properly, for [the defendant] to get a fair trial, is to continue the case when Detective Yepes is available." The prosecutor objected to that continuance request on the grounds that (1) the state had notified defense counsel prior to trial that Yepes was going to be in Florida for the month of July and defense counsel had been afforded ample time to secure his attendance on or before July 23, (2) Yepes' proffered testimony would be cumulative given that other Middletown police officers already had testified as to their observations of Yepes, (3) counsel had failed to produce a marshal to testify as to when the subpoena had been served, (4) there was a lack of evidence on the return of process on the subpoena, (5) a continuance would disrupt the trial because Yepes was not scheduled to return from Florida until weeks later on August 6, 2018, and (6) it was likely that jurors would become unavailable given the parameters they had been given regarding the approximate length of the trial.

The court thereafter denied defense counsel's request for a continuance. In so doing, the court emphasized that counsel already had been afforded multiple continuances in order to produce his witnesses, his request was untimely, the probable duration of the continuance pending Yepes' return would be too long, Yepes' testimony, as proffered, "would be cumulative" of evidence already before the jury, and that counsel had had the opportunity to cross-examine and confront six to eight police officers. The court further concluded that the denial of the request for a continuance "would not impair the defendant's ability to defend himself with respect to these matters."

After the state's rebuttal witness and the defendant's surrebuttal witness had finished testifying, defense counsel again indicated for the record that he wanted to call Yepes. The evidence thereafter was submitted to the jury, which returned a verdict of guilty, and this appeal followed.

B

With that context in mind, we turn to § 52-143, which governs the issuance of a capias in this state.[18] That statute "authorizes the trial court to issue a capias to compel the appearance of a witness who fails to appear without justification. The statute does not, however, make it *mandatory* for the court to issue a capias when a witness under subpoena fails to appear; issuance of a capias is in the discretion of the court . . . [which] has the authority to decline to issue a capias when the circumstances do not justify or require it. . . . Judicial discretion is always a legal discretion, exercised

[18] General Statutes § 52-143 (e) provides in relevant part: "If any person summoned by . . . any public defender . . . fails to appear and testify, without reasonable excuse . . . the court or judge, on proof of the service of a subpoena containing the statement as provided in subsection (d) of this section . . . may issue a capias directed to some proper officer to arrest the witness and bring him before the court to testify."

according to the recognized principles of equity. . . . [T]he action of the trial court will not be disturbed on appeal unless it acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action." (Emphasis in original; internal quotation marks omitted.) *State* v. *Payne*, 40 Conn. App. 1, 18, 669 A.2d 582 (1995), aff'd, 240 Conn. 766, 695 A.2d 525 (1997), overruled in part on other grounds by *State* v. *Romero*, 269 Conn. 481, 849 A.2d 760 (2004). At the same time, if the trial court "never exercised any discretion because it believed its authority to do so was lacking," our review on appeal is plenary. (Internal quotation marks omitted.) *Moye* v. *Commissioner of Correction*, 168 Conn. App. 207, 238, 145 A.3d 362 (2016), cert. denied, 324 Conn. 905, 153 A.3d 653 (2017).

1

Relying on *State* v. *Burrows*, 5 Conn. App. 556, 500 A.2d 970 (1985), cert. denied, 199 Conn. 806, 508 A.2d 33 (1986), the defendant argues that the court improperly declined to issue a capias in the absence of in-hand service of Yepes.[19] Although he acknowledges that our review of such claims generally is governed by the abuse of discretion standard, the defendant maintains that, under *Burrows*, the court's mistake of law effectively obviates that standard of review because the court could not have exercised any discretion when it believed it lacked the authority to do so. In response, the state concedes that in-hand service is not required but argues that, under the particular circumstances of this case, the issuance of a capias alone, without the granting of a continuance for the time needed to enforce

[19] In *Burrows*, this court concluded that "the trial court erred when it ruled it had no power to issue a capias because of the admitted lack of in-hand service of the intended witness." *State* v. *Burrows*, supra, 5 Conn. App. 560.

it, would have been a futile act. Furthermore, because the defendant has not challenged the propriety of the court's denial of his request to continue the trial until Yepes returned to Connecticut several weeks later, which request was intertwined with the capias issue, the state submits that the defendant cannot establish a violation of his right to compulsory process. On the particular facts of this case, we agree with the state.

The right to compulsory process is memorialized in the sixth amendment. As our Supreme Court has explained, "[t]he federal constitution require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense. . . . The sixth amendment . . . [guarantees] the right to offer the testimony of witnesses, and to compel their attendance, if necessary, [and] is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . . When defense evidence is excluded, such exclusion may give rise to a claim of denial of the right to present a defense." (Internal quotation marks omitted.) *State* v. *Tomas D.*, 296 Conn. 476, 497, 995 A.2d 583 (2010), overruled in part on other grounds by *State* v. *Payne*, 303 Conn. 538, 34 A.3d 370 (2012). In *Tomas D.*, our Supreme Court emphasized that the right to compulsory process is *not* unqualified, and instructed that "a defendant may not successfully establish a violation of his rights to present a defense and to compulsory process without first taking reasonable steps to exercise those rights." Id., 498. More specifically, the court observed that, "[t]o exercise his sixth amendment compulsory process rights diligently, a defendant is required to utilize available court procedures, such as the issuance of subpoenas, as well as requests for continuances or material witness warrants that may be reasonably necessary to effectuate the service process." Id.; see also *State* v. *Lubesky*,

195 Conn. 475, 478–80, 488 A.2d 1239 (1985) (rejecting compulsory process claim arising from inability to find state witness who already had testified because defendant failed to request continuance or move for mistrial); *Schwartzmiller* v. *State*, 108 Idaho 329, 330–31, 699 P.2d 429 (App. 1985) (defendant's "diligence in exercising his sixth amendment right" is "relevant factual [inquiry]"), review denied, Idaho Supreme Court, Docket No. 15231 (June 20, 1985); *State* v. *Timblin*, 254 Mont. 48, 51, 834 P.2d 927 (1992) (compulsory process inquiry includes consideration of "defendant's diligence in exercising [s]ixth [a]mendment rights"). In concluding that the defendant's right to compulsory process was not violated, our Supreme Court held that the failure to seek a continuance to secure the live testimony of a witness is "a significant factor in concluding that the defendant's federal compulsory process rights have not been violated . . . ." *State* v. *Tomas D.*, supra, 500.

In this case, the record reveals that, although the court articulated its mistaken belief that in-hand service of the subpoena was required to effectuate a capias, the court's consideration of the defendant's sixth amendment right to compulsory process—specifically, the right to offer testimony of certain witnesses and to compel, if necessary, their attendance—was intertwined with its deliberation on whether to grant a continuance until Yepes returned to Connecticut. The court specifically found that "[t]he only remaining witness from this defense is a witness that is in Florida, was in Florida by the time . . . the . . . subpoena was issued, [and] continues to be in Florida. . . . Counsel for the defense had had ample opportunity to cross-examine all of the other police officers involved . . . in the [May 31, 2017 search of the apartment], by their own admission. . . . The defense feels it is necessary to call [Yepes, who] . . . I would classify as a cumulative witness. I've asked the defense if they're asking for

another continuance. They're not asking for another continuance, but the witness is not in the state of Connecticut. So, then, the question is, how do we proceed." The court then stated that the only option for the defendant to be able to produce Yepes would be to ask for a continuance and reiterated that "[i]t's 10:30 a.m. We've called one witness who, really, had nothing to say."

Having previously insisted on the issuance of a capias, defense counsel responded that "the only way to resolve this properly, for [the defendant] to get a fair trial, is to continue the case when Detective Yepes is available."[20] Following the state's objection to another continuance, the court then considered the factors set forth in *State* v. *Godbolt*, 161 Conn. App. 367, 374–75, 127 A.3d 1139 (2015), cert. denied, 320 Conn. 931, 134 A.3d 621 (2016).[21] The court emphasized that the defendant already had been afforded two continuances in

[20] Notwithstanding the requirement articulated in *State* v. *Tomas D.*, supra, 296 Conn. 498, 500, that a defendant must take reasonable steps to exercise the rights to present a defense and compulsory process, including the request for a continuance, defense counsel in the present case subsequently characterized the court's action as "forcing [him] to . . . ask for a continuance."

[21] In *State* v. *Godbolt*, supra, 161 Conn. App. 367, this court stated: "A reviewing court is bound by the principle that [e]very reasonable presumption in favor of the proper exercise of the trial court's discretion will be made. . . . 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 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. . . . In the event that the trial court acted unreasonably in denying a continuance, the reviewing court must also engage in harmless error analysis. . . .

"Among the factors that may enter into the court's exercise of discretion in considering a request for a continuance are 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; the defendant's personal responsibility for the timing of the request; [and] the likelihood that the denial would substantially impair the defendant's ability to defend himself . . . . We are especially hesitant to find an abuse of discretion

order to produce his witnesses; his request was untimely; the probable duration of the continuance until Yepes' return weeks later would be too long; Yepes' testimony, as proffered, "would be cumulative" of evidence already before the jury; and the defense had the opportunity to cross-examine and confront one-half dozen other police officers. Accordingly, the court concluded that the denial of defense counsel's request for a continuance "would not impair the defendant's ability to defend himself with respect to these matters" and, thus, denied the request.[22]

On our exhaustive review of the record, we conclude that the court properly proceeded to consider the issue of whether a continuance of two weeks was necessary in light of the right to compulsory process concerns raised by defense counsel and his repeated attempts to call Yepes as a witness. The record indicates that the court had before it uncontroverted evidence that Yepes had been out of state at all relevant times and would remain so for another two weeks until August 6, 2018. In light of Yepes' unavailability, and mindful of the extensive factual and procedural history regarding the issue, the court concluded that a continuance was the only viable option for securing his presence as a witness. The court further determined, despite the compulsory process concerns articulated by defense counsel, that a continuance was not warranted under the facts of this case. Given the particular procedural history of this case, the court's findings of fact, which were based

where the court has denied a motion for continuance made on the day of the trial. . . .

"Lastly, we emphasize that an appellate court should limit its assessment of the reasonableness of the trial court's exercise of its discretion to a consideration of those factors, on the record, that were presented to the trial court, or of which that court was aware, at the time of its ruling on the motion for a continuance." (Internal quotation marks omitted.) Id., 374–75.

[22] The defendant has not challenged the propriety of that determination in this appeal.

on sworn testimony before it with respect to Yepes' unavailability, the interwoven nature of defense counsel's capias and continuance requests, and the fact that the defendant has not challenged the court's decision denying his request for a continuance, we conclude that the defendant has not demonstrated that his right to compulsory process was violated in the present case.

2

Even if we were to conclude otherwise, the defendant could not prevail. The state alleges, as an alternative ground of affirmance, that any violation of the defendant's right to compulsory process stemming from the court's refusal to issue a capias did not constitute harmful error. We agree.

In *State* v. *Burrows*, supra, 5 Conn. App. 559–60, this court held that the state bears the burden of proving that a violation of a defendant's right to compulsory process was harmless beyond a reasonable doubt. We conclude that the state has met that burden in this case.

"Whether a constitutional violation is harmless in a particular case depends upon the totality of the evidence presented at trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . Whether such error is harmless in a particular case depends upon a number of factors, such as the importance of the [witness] in the prosecution's case, whether the [testimony of the witness] was cumulative, the presence or absence of evidence corroborating or contradicting the [witness] . . . and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the [witness] on the trier of fact and the result of trial." (Internal quotation marks omitted.) *State* v. *Quail*, 168 Conn. App. 743, 762–63, 148 A.3d 1092, cert. denied, 323 Conn. 938, 151 A.3d 385 (2016).

First, with respect to the importance of Yepes' testimony, we are persuaded that Yepes' testimony would have been cumulative of evidence that was already before the jury. Although Yepes was the officer who found the cocaine, Dirga testified on direct examination that he personally observed Yepes when he discovered the cocaine in the upper left dresser drawer, and Dirga was cross-examined by the defense. While Yepes was present when the defendant confessed that the gun was his, the defendant's confession was witnessed by other officers whom the state called to testify. Lemieux and Peck testified at trial that they heard the defendant's confession as well. Defense counsel, when questioned by the trial court about the materiality of Yepes' testimony, also conceded that Yepes' anticipated testimony might have been "cumulative to what other Middletown police officers have already testified to." In light of the foregoing, while denying the defendant's request for a continuance on July 23, 2018, the court made a finding that Yepes was a witness whose testimony would have been cumulative of other evidence already before the court. Accordingly, this factor weighs in favor of the state.

Next, with respect to the strength of the prosecution's case, we first conclude that the refusal to issue a capias or grant defense counsel a continuance to secure Yepes' testimony was harmless with respect to the criminal possession of a revolver charge because the defendant had confessed to the police that the gun belonged to him.[23] It is well established that "[a] confession, if sufficiently corroborated, is the most damaging evidence of guilt . . . and in the usual case will constitute the overwhelming evidence necessary to render harmless any errors at trial." (Internal quotation marks omitted.) *State* v. *Williams*, 202 Conn. App. 355, 370, 245 A.3d

[23] In this appeal, the defendant has not raised any claim regarding that confession.

830, cert. denied, 336 Conn. 917, 245 A.3d 802 (2021); see *State* v. *Iban C.*, 275 Conn. 624, 645, 881 A.2d 1005 (2005); see also *Arizona* v. *Fulminante*, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) ("[a] confession is like no other evidence"). With respect to the possession with intent to sell conviction, as discussed in part I B of this opinion, the jury reasonably could have found that the defendant had constructive possession of the cocaine that the police found in the upper left dresser drawer, particularly because the officers also discovered in the defendant's bedroom a drug baggie in a pair of men's pants matching the defendant's physical description that tested positive for cocaine residue. In addition, the officers found other evidence commonly associated with drug dealing during their search of the apartment, including the defendant's revolver, the large amount of cash in various denominations that was located in the same storage container as the revolver, the digital scale in a bag with the defendant's clothes, the presence of a pit bull, and the two cell phones found on the defendant.

Finally, we conclude that the potential impact of Yepes' testimony was largely inconsequential. In *State* v. *Burrows*, supra, 5 Conn. App. 560, this court determined, in considering the defendant's alibi defense, that "the expected testimony of the witness [for whom the court refused to issue a capias] . . . loom[ed] as a large exculpatory element in the trial of the defendant." As a result, this court concluded that the absence of the witness' testimony would have had an impact on the trial and, thus, constituted harmful error. See id. Unlike in *Burrows*, the defendant here never proffered that Yepes' testimony would undermine the state's evidence against him. Indeed, given that Yepes discovered the cocaine and heard the defendant confess that the gun was his, the evidence in the record before us indicates that, had Yepes been compelled to testify, his testimony

likely would have been adverse to the defense, and the defendant never articulated to the court a reason for it to believe otherwise. Accordingly, we conclude that the state has demonstrated that any violation of the defendant's right to compulsory process stemming from the court's refusal to issue a capias was harmless beyond a reasonable doubt.

The judgment is reversed only as to the conviction of risk of injury to a child and the case is remanded with direction to render judgment of acquittal on that count and to resentence the defendant accordingly; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* GERRY L. GOODE (AC 43841)

Prescott, Alexander and DiPentima, Js.

Syllabus

Convicted, after a jury trial, of the crime of criminal damage to a landlord's property in the first degree, the defendant appealed to this court claiming that the state presented insufficient evidence to establish the element of specific intent. The defendant entered into a residential lease with the victim for a property in Windsor. Subsequently, the victim went to the property during the lease term and discovered that it was damaged. The victim informed the defendant that he wanted to return with a home improvement contractor to estimate the damage to the property. The defendant refused to allow the victim subsequent access to the property, and, when the victim and the contractor eventually returned, a police officer had to accompany them. *Held* that the defendant could not prevail on his claim that the state presented insufficient evidence to establish that he specifically intended to damage the victim's property: the state produced testimonial and photographic evidence of the substantial damage to the entirety of the victim's property, and this severe damage provided the jury with a basis to reasonably find the necessary specific intent to find the defendant guilty, and the jury reasonably could have inferred, from the extent of the damage, that the damage was not caused

by accident or neglect; moreover, the defendant's conduct after damaging the victim's property indicated his consciousness of guilt, which the jury could have relied on to infer his specific intent.

Argued September 9—officially released October 5, 2021

Procedural History

Substitute information charging the defendant with the crimes of criminal damage to a landlord's property in the first degree and larceny in the sixth degree, brought to the Superior Court in the judicial district of Hartford, geographical area number fourteen, and tried to the jury before *Prats*, *J.*; verdict and judgment of guilty of criminal damage to a landlord's property in the first degree, from which the defendant appealed to this court. *Affirmed.*

Brian D. Russell, for the appellant (defendant).

Meryl Gersz, deputy assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Donna Mary Parker*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Gerry L. Goode, appeals from the judgment of conviction, rendered after a jury trial, of criminal damage to a landlord's property in the first degree in violation of General Statutes § 53a-117e.[1] On appeal, the defendant claims that the state presented insufficient evidence to establish the element of specific intent. We disagree, and, accordingly, affirm the judgment of conviction.

The jury reasonably could have found the following facts. On September 2, 2014, the defendant entered into

[1] General Statutes § 53a-117e (a) provides: "A tenant is guilty of criminal damage of a landlord's property in the first degree when, having no reasonable ground to believe that he has a right to do so, he intentionally damages the tangible property of the landlord of the premises in an amount exceeding one thousand five hundred dollars."

a residential lease with the victim, Daniel C. Nolan, with respect to property located at 26 Whitney Circle in Windsor. The property was in good condition at the time the lease commenced, and the defendant was obligated to maintain the property in a clean and safe condition.

In December, 2017, the defendant called the victim to request reimbursement for a repair to the furnace. The victim agreed to pay the defendant but also indicated that he wanted to inspect the property. The defendant initially demurred, but after several delays, he acquiesced to the victim's request. The victim went to the property at the end of December, 2017, to discover that the property was "very much trashed [and] destroyed." After some discussion, the victim informed the defendant that he wanted to return with a home improvement contractor to estimate the damage to the property. The defendant refused to allow the victim subsequent access to the property, so when the victim and the contractor eventually returned, a police officer had to accompany them. The victim also commenced eviction proceedings, which ultimately resulted in the defendant leaving the property on July 11, 2018.

Following the defendant's departure, the victim took numerous photographs depicting the damage to the entirety of the property. The victim contacted the police and Officer Michael Tustin commenced an investigation. Tustin described the entire property as "very damaged" and noted the "ripped up" carpets, the very strong smell of urine and feces, missing pieces of sheetrock from the walls, exposed electrical cable, the presence of garbage throughout, and significant water damage. The victim needed professional services to restore the property, which took approximately eight and one-half months. The restoration cost $25,600.

The state charged the defendant with criminal damage of a landlord's property in the first degree in violation of § 53a-117e, and larceny in the sixth degree in violation of General Statutes § 53a-125b. Following a two day trial, the jury found the defendant guilty with respect to the former and not guilty as to the latter. The court imposed a sentence of two and one-half years of incarceration, execution suspended, and three years of probation. This appeal followed.

The defendant's sole claim on appeal is that the state failed to produce sufficient evidence that he specifically intended to damage the victim's property. "Our Supreme Court has noted that [a] party challenging the validity of the jury's verdict on grounds that there was insufficient evidence to support such a result carries a difficult burden. . . . In particular, before [an appellate] court may overturn a jury verdict for insufficient evidence, it must conclude that no reasonable jury could arrive at the conclusion the jury did. . . . Although the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense . . . each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . .

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

"Additionally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all

possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [jury], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [jury's] verdict of guilty." (Citation omitted; internal quotation marks omitted.) *State* v. *Stephenson*, 207 Conn. App. 154, 164–65, A.3d (2021).

We agree with the parties that § 53a-117e is a specific intent crime, because it requires, inter alia, that a tenant intentionally damage a landlord's property in an amount exceeding $1500. See, e.g., General Statutes § 53a-3.[2] "Intent is a question of fact, the determination of which should stand unless the conclusion drawn by the trier is an unreasonable one. . . . [T]he [jury is] not bound to accept as true the defendant's claim of lack of intent or his explanation of why he lacked intent. . . . Intent may be, and usually is, inferred from the defendant's verbal or physical conduct. . . . Intent may also be inferred from the surrounding circumstances. . . . The use of inferences based on circumstantial evidence is necessary because direct evidence of the accused's state of mind is rarely available. . . . Intent may be gleaned from circumstantial evidence . . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Internal quotation marks omitted.) *State* v. *Pjura*, 200 Conn. App. 802, 808–809, 240 A.3d 772, cert. denied, 335 Conn. 977,

[2] General Statutes § 53a-3 provides in relevant part: "(11) A person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct . . . ."

241 A.3d 131 (2020); see also *State* v. *Best*, 337 Conn. 312, 320, 253 A.3d 458 (2020) (state of mind of one accused of crime is often most significant and, at same time, most elusive element of crime charged, and, because it is practically impossible to know what accused is thinking or intending at given moment, state of mind usually proved by circumstantial evidence); *State* v. *Morlo M.*, 206 Conn. App. 660, 690, A.3d (2021) (intent almost always proved by circumstantial evidence).

The state produced both testimonial and photographic evidence of the substantial damage to the entirety of the victim's property. This included holes in the sheetrock, shattered mirrored closet doors, broken closet doors, burn marks on a butcher block kitchen countertop, a damaged refrigerator, damage to vanities and kitchen cabinets, a broken railing, garbage throughout the property, mold and water damage, cracked and broken tile flooring, broken towel bars, damaged carpeting, hardwood and trim, and animal feces[3] in most of the rooms of the property. The severe and widespread damage provided the jury with a basis to reasonably find the necessary specific intent to find the defendant guilty of violating § 53a-117e. In other words, the jury reasonably could have inferred from the extent of the damages in different areas of the property that the damage was not caused by accident or neglect but, instead, was done with the specific intent to cause the damage. See, e.g., *State* v. *Stephenson*, supra, 207 Conn. App. 166 ("[w]e therefore also must bear in mind that jurors are not expected to lay aside matters of common knowledge or their own observations and experiences [and] [c]ommon sense does not take flight when one enters a courtroom" (internal quotation marks omitted)).

[3] Although the lease permitted the defendant to have two declawed cats on the property, when the victim inspected the property in December, 2017, he observed that dogs were present.

Finally, the defendant's conduct after damaging the victim's property indicated his consciousness of guilt, which the jury could have relied on to infer his specific intent. See id., 171–72. Specifically, the defendant failed to notify the victim of the damage, initially delayed granting the victim access to the property, and refused to allow the victim and a contractor into the property until the police were called. On the basis of the totality of the evidence produced at trial by the state, and the reasonable inferences drawn therefrom, the jury reasonably could have found that the defendant specifically intended to damage the victim's property. For these reasons, we conclude that the defendant's sufficiency claim is without merit.

The judgment is affirmed.