BARBARA ORZECH *v.* GIACCO OIL COMPANY ET AL. (AC 43941)

Alvord, Moll and Norcott, Js.

Syllabus

The defendant employer, G Co., and its insurer appealed to this court from the decision of the Compensation Review Board affirming the Workers' Compensation Commissioner's award of survivorship benefits to the plaintiff. The plaintiff's deceased spouse, S, who had been an employee of G Co., slipped and fell while delivering oil to one of its customers. The fall aggravated S's existing knee injury to such an extent that he could no longer work or carry out his daily activities. S's physician recommended knee replacement surgery, however, S's health insurance had been canceled thirty days after the incident and he could not afford the procedure. S filed a workers' compensation claim relating to the compensability of the knee replacement surgery. Prior to the conclusion of the formal hearings before the commissioner, S died. Thereafter, the plaintiff filed a claim for survivorship benefits. Following the testimony of both expert and lay witnesses, the commissioner determined that S had died by suicide as a result of depression that stemmed from compensable work injuries and that the plaintiff was entitled to survivorship benefits. The defendants filed a petition for review of the commissioner's finding and award with the board, claiming that, inter alia, in accordance with *Sapko* v. *State* (305 Conn. 360), S's consumption of an excessive amount of alcohol and medication prior to his death constituted a superseding cause that broke the chain of causation between the work incident and S's death. The board disagreed and affirmed the commissioner's finding and award, and the defendants appealed to this court. *Held* that the board properly affirmed the commissioner's award

of survivorship benefits to the plaintiff: the commissioner's subordinate findings that the decedent developed depression following the work incident, that his compensable injuries were a substantial contributing factor to his development of depression, that the manner of his death was a suicide, and that his suicide stemmed from his depression, were reasonable and grounded in the evidence produced during the proceedings before the commissioner; moreover, the commissioner's finding that a chain of causation existed linking the decedent's compensable injuries to his death was supported by the record and was not the misapplication of law, as, unlike in *Sapko*, which involved a death resulting from an accidental overdose, in the present case, the decedent's manner of death, a suicide from acute intoxication, was an act not untethered to his compensable injuries or the depression that he thereafter developed.

Argued April 13—officially released October 19, 2021

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Eighth District finding that the plaintiff's decedent had sustained certain compensable injuries and awarding survivorship benefits, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the defendants appealed to this court. *Affirmed*.

Nicholas C. Varunes, for the appellants (defendants).

Andrew E. Wallace, for the appellee (plaintiff).

Opinion

MOLL, J. In this workers' compensation matter, the defendant employer, Giacco Oil Company (Giacco), and its insurer, Federated Mutual Insurance Company, appeal from the decision of the Compensation Review Board (board) affirming the finding and award of the Workers' Compensation Commissioner for the Eighth District (commissioner) of the Workers' Compensation Commission (commission) awarding survivorship benefits

under General Statutes § 31-306[1] to the plaintiff, Barbara Orzech, the surviving spouse of the deceased employee, Stanley Orzech (decedent). In awarding survivorship benefits to the plaintiff, the commissioner found that the decedent had died by suicide as a result of depression that he had developed stemming from compensable work injuries. On appeal, the defendants claim that the board improperly affirmed the commissioner's award of survivorship benefits to the plaintiff because the commissioner erred in finding a causal link between the decedent's compensable injuries and his death when (1) subordinate facts found by the commissioner were speculative or inconsistent with the evidence and (2) the record established that the decedent engaged in conduct prior to his death that constituted a superseding cause breaking the chain of causation between his compensable injuries and his death. We disagree and, accordingly, affirm the decision of the board.

The following facts, as found by the commissioner or as undisputed in the record, and procedural history are relevant to our resolution of this appeal. The decedent began working for Giacco in 1994, delivering oil and performing other related services. On November 1, 2016, while delivering oil to a customer's home, the decedent slipped and fell, sustaining injuries to his back, right shoulder, and knees (work incident). Prior to the work incident, the decedent received periodic medical treatment to alleviate his "long-standing knee problems . . . ." The decedent and his treating physician frequently discussed the likelihood that the decedent would need a total replacement of his right knee, but, before the work incident, the knee replacement surgery "was always 'down the road.' . . ." Following the work

[1] General Statutes § 31-306 provides in relevant part: "(a) Compensation shall be paid to dependents on account of death resulting from an accident arising out of and in the course of employment or from an occupational disease . . . ."

incident, the decedent's right knee pain became "unbearable," and he wished to proceed with the knee replacement surgery; however, the decedent's health insurance was canceled thirty days after the work incident, and he could not afford to proceed with the surgery.

The decedent filed a workers' compensation claim in relation to the work incident. The defendants did not deny that the work incident had occurred, but they did deny the extent of the decedent's injuries. In particular, the defendants repudiated that the work incident was a substantial contributing factor in the decedent's need for knee replacement surgery. On June 15, 2017, the commissioner held a formal hearing on the compensability of the knee replacement surgery, during which the decedent testified. At the conclusion of the hearing, the commissioner left the record open and scheduled another formal hearing for August 18, 2017.

On July 22, 2017, the plaintiff and the decedent attended a family gathering and, thereafter, went to a bar for drinks before returning home. According to the plaintiff, the decedent drank two beers at the family gathering and consumed approximately four beers and four shots of alcohol at the bar. On July 23, 2017, the plaintiff found the decedent dead in their home. Maura DeJoseph, a pathologist in the Office of the Chief Medical Examiner (OCME), determined that the cause of the decedent's death was "acute intoxication due to the combined effects of alcohol, eszopiclone [also known as Lunesta], lorazepam [also known as Ativan], sertraline [also known as Zoloft] and diphenhydramine [also known as Benadryl]," and that the manner of the decedent's death was a suicide. Thereafter, the plaintiff filed a claim for survivorship benefits. The commissioner held several formal hearings on the plaintiff's claim between February 8 and August 21, 2018. The commissioner heard testimony from multiple lay witnesses,

including the plaintiff, and from expert witnesses. Additionally, several exhibits were admitted into evidence, including the decedent's medical records, a police report, and reports prepared by the OCME.

In her brief submitted to the commission, the plaintiff asserted that the decedent died by suicide as a result of depression that he had developed because of his compensable injuries. In their brief submitted to the commission, the defendants argued that the evidence did not support findings that the decedent became depressed following the work incident and died by suicide. In addition, the defendants argued that, prior to his death, the decedent "intentionally imbibed an excessive amount of alcohol" and then overdosed on a myriad of medications, notwithstanding the decedent knowing that mixing alcohol with his medications was contraindicated. Analogizing this case to *Sapko* v. *State*, 305 Conn. 360, 44 A.3d 827 (2012), the defendants argued that the decedent's consumption of alcohol and the medications was a superseding cause that broke the chain of causation between the work incident and the decedent's death.

On December 24, 2018, the commissioner issued a finding and award ordering the defendants (1) "to accept the November 1, 2016 need for right total knee replacement as compensable and to pay benefits associated with this finding"[2] and (2) to pay survivorship benefits to the plaintiff in accordance with § 31-306, along with other benefits provided under the statute. The commissioner found in relevant part that (1) the decedent became depressed following the work incident, (2) the decedent's compensable injuries were a substantial contributing factor in causing the decedent's

[2] In this appeal, the defendants do not contest the commissioner's finding and award as to the compensability of the decedent's need for knee replacement surgery.

depression, and (3) as a result of his depression, the decedent intended to cause his own death and died by suicide. On January 22, 2019, Giacco filed motions to correct and for articulation. On January 28, 2019, the commissioner granted three of Giacco's requested corrections, which are inconsequential to this appeal, but denied the remainder of Giacco's motion to correct. On the same day, the commissioner denied Giacco's motion for articulation in its entirety.

The defendants subsequently filed a petition for review of the commissioner's finding and award. In their brief submitted to the board, the defendants argued that the commissioner's findings that the decedent became depressed following the work incident and that the manner of his death was a suicide were not supported by the evidence or were based on conjecture. In addition, they argued that the commissioner minimized the effect of the decedent's consumption of alcohol on his death. Relying on *Sapko*, the defendants maintained that the decedent's consumption of an excessive amount of alcohol and an excessive quantity of medications prior to his death constituted a superseding cause breaking the causal link between the decedent's compensable injuries and his death. In her brief submitted to the board, the plaintiff argued that the commissioner's findings were supported by the record and that the commissioner properly applied the law to the facts he found.

On January 30, 2020, the board issued a decision affirming the commissioner's finding and award. The board concluded that the record contained evidence, credited by the commissioner, "creating a chain of causation" linking the decedent's compensable injuries to his death. The board determined that there was evidence, including testimony by the plaintiff's expert witness, demonstrating that the decedent had died by suicide, and that the commissioner was not obligated to

credit evidence to the contrary. The board further determined that the commissioner was not required to credit evidence that militated against his finding that the decedent had developed depression. As to the defendants' argument that the commissioner did not adequately consider the effect of the decedent's consumption of alcohol on his death, the board determined that "it was reasonable for the commissioner to discount the theory that this was a death by misadventure due to the abuse of alcohol as the evidence clearly supports his conclusion that the decedent had wilfully 'ingested a shockingly high number of pills.' " This appeal followed. Additional facts will be set forth as necessary.

We first set forth the standard of review and legal principles applicable to the defendants' claims. "[T]he principles [governing] our standard of review in workers' compensation appeals are well established. . . . The board sits as an appellate tribunal reviewing the decision of the commissioner. . . . [T]he review . . . of an appeal from the commissioner is not a de novo hearing of the facts. . . . [Rather, the] power and duty of determining the facts rests on the commissioner [and] . . . [t]he commissioner is the sole arbiter of the weight of the evidence and the credibility of witnesses . . . . Where the subordinate facts allow for diverse inferences, the commissioner's selection of the inference to be drawn must stand unless it is based on an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them." (Internal quotation marks omitted.) *Vitti* v. *Milford*, 190 Conn. App. 398, 405, 210 A.3d 567, cert. denied, 333 Conn. 902, 214 A.3d 870 (2019). "It matters not that the basic facts from which the [commissioner] draws this inference are undisputed rather than controverted. . . . It is likewise immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially

selecting the inference [that] seems most reasonable and [the commissioner's] choice, if otherwise sustainable, may not be disturbed by a reviewing court." (Internal quotation marks omitted.) *Sapko* v. *State*, supra, 305 Conn. 371. "This court's review of [the board's] decisions . . . is similarly limited. . . . [W]e must interpret [the commissioner's finding] with the goal of sustaining that conclusion in light of all of the other supporting evidence. . . . Once the commissioner makes a factual finding, [we are] bound by that finding if there is evidence in the record to support it." (Internal quotation marks omitted.) *Vitti* v. *Milford*, supra, 405.

"Furthermore, [i]t is well settled that, because the purpose of the [Workers' Compensation Act (act), General Statutes § 31-275 et seq.] is to compensate employees for injuries without fault by imposing a form of strict liability on employers, to recover for an injury under the act a plaintiff must prove that the injury is causally connected to the employment. To establish a causal connection, a plaintiff must demonstrate that the claimed injury (1) arose out of the employment, and (2) [arose] in the course of the employment. . . .

"[I]n Connecticut traditional concepts of proximate cause constitute the rule for determining . . . causation [in workers' compensation cases]. . . . [T]he test of proximate cause is whether the [employer's] conduct is a substantial factor in bringing about the [employee's] injuries. . . . Further, it is the plaintiff who bears the burden to prove an unbroken sequence of events that tied [the employee's] injuries to the [employer's conduct]. . . . The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection. . . .

"As [our Supreme Court] previously [has] indicated, [the] court has defined proximate cause as [a]n actual

cause that is a substantial factor in the resulting harm . . . . Because actual causation, in theory, is virtually limitless, the legal construct of proximate cause serves to establish how far down the causal continuum tortfeasors will be held liable for the consequences of their actions. . . . The fundamental inquiry of proximate cause is whether the harm that occurred was within the scope of foreseeable risk created by the defendant's negligent conduct. . . . The question of proximate causation . . . belongs to the trier of fact because causation is essentially a factual issue. . . . It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement the question is one to be determined by the trier as a matter of fact." (Citations omitted; internal quotation marks omitted.) *Sapko* v. *State*, supra, 305 Conn. 371–73.

This appeal does not concern the compensability of the primary injuries sustained by the decedent as a result of the work incident; see footnote 2 of this opinion; rather, the crux of the appeal is the compensability of a subsequent injury, that being the decedent's death. In *Sapko* v. *State*, supra, 305 Conn. 360, our Supreme Court expressly adopted the "direct and natural consequence rule" for subsequent injury cases. Id., 383–85. In *Sapko*, our Supreme Court concluded that a workers' compensation commissioner had "properly applied the superseding cause doctrine in finding that [an employee's] compensable work injuries were not the proximate cause of his death." Id., 371. As our Supreme Court explained: "The commissioner's application of the superseding cause doctrine is in accord with the approach advocated by Professor Arthur Larson for determining causation when an employee, having suffered a compensable primary injury during the course of his employment, later sustains a second injury outside the course of employment for which the employee

seeks compensation, claiming that the second injury relates back to the primary injury in a sufficiently direct way. Professor Larson explains: 'A distinction must be observed between causation rules affecting the primary injury . . . and causation rules that determine how far the range of compensable consequences is carried, once the primary injury is causally connected with the employment. As to the primary injury, it has been shown that the "arising" test is a unique one quite unrelated to common-law concepts of legal cause, and . . . the employee's own contributory negligence is ordinarily not an intervening cause preventing initial compensability. But when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based [on] the concepts of "direct and natural results," and of [the employee's] own conduct as an independent intervening cause.' . . . 'The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.' . . . Professor Larson further explains that, when a subsequent injury or aggravation of the primary injury arises out of what he describes as a 'quasi-course' of employment activity, such as a trip to the doctor's office for treatment of the primary injury, 'the chain of causation should not be deemed broken by mere negligence in the performance of that activity . . . but only by intentional conduct which may be regarded as expressly or impliedly forbidden by the employer.' . . . Consequently, all the medical consequences and sequelae that flow from the primary injury are compensable. . . .

" 'When, however, the injury following the initial compensable injury does not arise out of a quasi-course activity, as when [an employee] with an injured hand

engages in a boxing match, the chain of causation may be deemed [to be] broken by either intentional or negligent [employee] misconduct.' . . . Thus, Professor Larson explains that 'compensability can be defeated by a certain degree of employee misconduct, and . . . that degree is something beyond simple negligence, and can best be described as an intentional violation of an express or implied prohibition in the matter of performing the act.' " (Citations omitted; footnotes omitted.) Id., 378–81. Observing that our appellate courts and courts in other jurisdictions had utilized the direct and natural consequence rule, the court stated that "the rule provides the best framework for analyzing the element of proximate cause in cases involving a subsequent injury or an aggravation of an earlier, primary injury." Id., 385.

Moreover, the court stated that "[d]ecisions in these sorts of cases are necessarily fact driven . . . ." (Internal quotation marks omitted.) Id.; see 1 L. Larson & T. Robinson, Larson's Workers' Compensation Law (2019) § 10.04, p. 10-13. "[T]herefore, results will vary depending on the case. Consequently, whether a sufficient causal connection exists between the employment and a subsequent injury is, in the last analysis, a question of fact for the commissioner. It is axiomatic that, in reaching that determination, the commissioner often is required to draw an inference from what [the commissioner] has found to be the basic facts. [As we previously have explained] [t]he propriety of that inference . . . is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited . . . . If supported by evidence and not inconsistent with the law, the . . . [c]ommissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor

can the opposite inference be substituted by the court because of a belief that the one chosen by the . . . [c]ommissioner is factually questionable. . . . Only if no reasonable fact finder could have resolved the proximate cause issue as the commissioner resolved it will the commissioner's decision be reversed by a reviewing court." (Citation omitted; internal quotation marks omitted.) *Sapko* v. *State*, supra, 305 Conn. 385–86. In addition, "[u]nless causation under the facts is a matter of common knowledge, the plaintiff has the burden of introducing expert testimony to establish a causal link between the compensable workplace injury and the subsequent injury. . . . When . . . it is unclear whether an employee's [subsequent injury] is causally related to a compensable injury, it is necessary to rely on expert medical opinion. . . . Unless the medical testimony by itself establishes a causal relation, or unless it establishes a causal relation when it is considered along with other evidence, the commissioner cannot reasonably conclude that the [subsequent injury] is causally related to the employee's employment." (Citation omitted; internal quotation marks omitted.) *Coughlin* v. *Stamford Fire Dept.*, 334 Conn. 857, 865–66, 224 A.3d 1161 (2020).

With these legal tenets in mind, we turn to the defendants' interrelated claims on appeal, which, taken together, challenge the commissioner's finding, as affirmed by the board, that a chain of causation existed linking the decedent's compensable injuries to his death. First, the defendants claim that the commissioner erred in making several subordinate findings forming the foundation of his finding that the decedent's compensable injuries and his death were causally linked. Second, the defendants claim that the commissioner committed error in failing to find that the decedent's consumption of alcohol and medications prior to his death constituted a superseding cause of his

death, thereby defeating compensability for his death. We disagree.

I

We first address the defendants' claim that the board improperly affirmed the commissioner's decision awarding survivorship benefits to the plaintiff because the commissioner erred in making several subordinate findings supporting his finding that a chain of causation existed connecting the decedent's compensable injuries to his death. Specifically, the defendants challenge the commissioner's findings that (1) the decedent developed depression following the work incident, (2) the decedent's compensable injuries were a substantial contributing factor in his development of depression, (3) the manner of the decedent's death was a suicide, and (4) the decedent's suicide stemmed from his depression. We are not persuaded.

The record before the commissioner contained the following relevant evidence. According to a police report generated in relation to the decedent's death, after being dispatched to the home of the plaintiff and the decedent on July 23, 2017, a police officer discovered the decedent's body in a bedroom, naked and positioned with his feet on the ground and his back flat on the bed. There were "a few small white pills" on the decedent's legs and on the ground near his feet, and there were approximately 20 Ativan pills on the ground. Additionally, there were several medicine bottles located on a small dresser near the decedent, including (1) Ativan, indicating a directed dosage of one pill three times per day, last filled on June 23, 2017, with a quantity of 270 pills, fifty-four of which were found in the bottle, and (2) Lunesta, indicating a directed dosage of one pill nightly, last filled on July 18, 2017, with a quantity of thirty pills, none of which remained in the bottle.[3]

[3] The police report reflected that four other medicine bottles were found in the bedroom, one of which was not labeled and the rest of which contained

The officer spoke at the scene with the plaintiff, who told the officer, inter alia, that the decedent had been injured in November, 2016, that the decedent had "been battling with [workers'] compensation," that the decedent was taking medication for depression, and that she gave the decedent his medication every day "because he [did not] know what to take." The plaintiff further told the officer that she had no inclination that the decedent was contemplating suicide, although, "for the past few months, [the decedent] ha[d] said 'this is no life.' "

In a deposition, DeJoseph testified as follows. DeJoseph's role in the decedent's case was to determine the cause of death and the manner of death. She defined "cause of death" as "the etiologically-specific entity that resulted in the person dying, so what sets into motion all of the metabolic injuries or injuries that resulted in the death . . . ." DeJoseph determined that the cause of the decedent's death was acute intoxication resulting from the effects of alcohol and four medications, namely, Ativan (an antianxiety medication), Lunesta (a sleeping medication), Zoloft (an antidepressant), and Benadryl (an antihistamine). With respect to alcohol, at the time of his death, the decedent had a blood alcohol content of 0.162, which equates to approximately eight alcoholic drinks in one hour. The decedent also had alcohol in his stomach that had not yet been absorbed. DeJoseph could not determine, however, the precise number of alcoholic drinks that the decedent had consumed prior to his death. With respect to Ativan and Lunesta, at the time of his death, the decedent had more than therapeutic levels of those medications in his bloodstream, and several tablets—ten of Ativan and three of Lunesta—remained unabsorbed in his stomach. DeJoseph determined that Ativan and Lunesta were

medications that were not determined to have contributed to the cause of the decedent's death.

substantial factors causing the decedent's death. In addition, at the time of his death, the decedent had Zoloft and Benadryl in his system, both of which, DeJoseph determined, were contributing factors causing his death.

DeJoseph classified the decedent's manner of death as a suicide. She defined "manner of death" as "the circumstances under which the death occurred," which must be classified as one of the following: natural, accident, suicide, homicide, undetermined, or therapeutic complication. To classify a death as a suicide, DeJoseph explained that there must be "enough evidence to support that there was intent to end one's own life." In deaths involving intoxication, to establish intent, DeJoseph relies on "pill counts . . . knowing the levels of drug[s] in the [deceased's] body . . . knowing whether or not there are more pills than should be taken represented in the gastric contents . . . information from the [deceased's] family . . . [and] other information regarding [the deceased's] mental health." A deceased's mental health information is obtained from family members and medical reports, including toxicology reports that may reflect the presence of an antidepressant. In classifying the decedent's manner of death as a suicide, DeJoseph determined that the decedent exhibited an intent to take his own life on the basis of (1) the number of pills found in the decedent's stomach, (2) the number of pills unaccounted for and found around the decedent's body, which suggested that he intended to take more pills than those found in his stomach, and (3) DeJoseph's belief that the plaintiff typically controlled the decedent's medications, such that his ingestion of medications unbeknownst to the plaintiff was an unusual circumstance. DeJoseph also noted that a toxicology report indicated the presence of an antidepressant in the decedent's system.[4]

[4] The decedent's death certificate was admitted into the record. A portion of the death certificate completed by the OCME reflected that the decedent's

During a formal hearing held on April 3, 2018, the plaintiff testified in relevant part as follows. Prior to the work incident, the decedent was "a happy-go-lucky kind of guy who loved his job" and who, among other things, enjoyed telling jokes, mowed the lawn every day, took out the garbage every Sunday, dusted and organized a collection of miniature lighthouses that he kept, and maintained a koi pond. Following the work incident, "[e]verything" changed. For instance, the decedent experienced increased pain in his back, shoulder, and knees, spent most of his time at home lying in bed or sitting in a chair, used a cane to walk, ascended and descended stairs on his buttocks, and was no longer able to drive or to perform his regular activities, like maintaining the koi pond and mowing the lawn. Additionally, after the decedent's health insurance was canceled following the work incident, receiving medical care became difficult, and the decedent lacked insurance coverage to undergo knee replacement surgery. The decedent conveyed to the plaintiff that " '[t]his is no life.' "

In December, 2016, concerned that the decedent "wasn't acting himself,"[5] the plaintiff scheduled an appointment for the decedent to meet with Joseph Tomanelli, his primary care physician. According to a medical record, on December 15, 2016, after noting that the decedent had a "depressed mood," Tomanelli prescribed the decedent Zoloft, instructing that he take one fifty milligram tablet daily.

Donald Werner, the plaintiff's brother who lived with the plaintiff and the decedent, testified during a formal

cause of death was acute intoxication due to alcohol and the four medications described earlier in this opinion and that the decedent's manner of death was a suicide.

[5] The plaintiff testified that she scheduled the appointment with Tomanelli after observing the decedent crying in his chair, which upset her because it was uncharacteristic of the decedent.

hearing held on April 5, 2018, that, prior to the work incident, the decedent was a "lighthearted, outgoing person who cared about the people around him, [who] was always helping people, [and who was] always working around the house . . . ." Werner further testified that, following the work incident, the decedent experienced mobility problems with his back and his knees, "to the point where he would just come downstairs and sit in his chair, and nothing," and the decedent experienced a "[c]ontinued frustration with the process. He really wanted to start getting stuff done. He wanted to go back to work. And . . . it wore on him. It wore him out; and he would be tired all the time." Werner also testified that the decedent stated that he "[did not] know how much longer [he could] do this," although Werner did not interpret that statement to mean that the decedent was contemplating suicide. Additionally, the police report reflected that Werner, who was at home with the plaintiff when she discovered the decedent's body, told the police that the decedent had been experiencing severe pain since the work incident but that the decedent was "happy throughout the entire process and never showed signs that he wanted to hurt himself."

During the April 5, 2018 hearing, Alexa Jamieson, the plaintiff's daughter and the decedent's stepdaughter, testified that, prior to the work incident, the decedent was "fun loving, active, loved doing all his hobbies, like taking care of the house . . . doing random chores around the house . . . [and] was active and in a good mindset." She also testified that, following the work incident, the decedent was "more detached," spent less time socializing with her, spent more time in his bedroom, and "didn't . . . [want] to do anything anymore. The little things that he used to enjoy, he never enjoyed them anymore," including tending to his two dogs. Jamieson further testified that, in discussing his injur-

ies, the decedent conveyed to her that " 'this is no life. How can someone do this?' "

Both parties retained psychiatrists as expert witnesses. Mark Waynik, the plaintiff's expert, prepared a report dated October 31, 2017, opining that, within a reasonable degree of medical probability, the work incident was "a substantial contributing factor in [the decedent's] diagnosis of anxiety and depression, and ultimately his demise." Waynik's opinion was based on his review of the decedent's medical records, the OCME reports, the police report, the decedent's death certificate, and certain transcripts. Kenneth Selig, the defendants' expert, prepared a report dated December 24, 2017, opining that, within a reasonable degree of medical probability, there was insufficient evidence to conclude whether the decedent intended to die by suicide or whether, if he did die by suicide, the work incident was a substantial contributing factor in his death. Selig wrote, inter alia, that (1) the decedent remained active following the work incident, (2) the materials he reviewed did not suggest that the decedent suffered from severe depression, and (3) the circumstances of the decedent's death could lead to the conclusion that he unintentionally overdosed in an attempt to medicate himself. In preparing his opinion, Selig reviewed various materials, including the decedent's medical records, the OCME reports, the police report, the decedent's death certificate, Waynik's report, and certain transcripts.

During a formal hearing held on June 5, 2018, Waynik testified that, after reviewing additional materials, including Selig's report and transcripts of the formal hearings held in April, 2018, he maintained the opinion that, within a reasonable degree of medical probability, the work incident was a substantial contributing factor in the decedent's development of depression and subsequent suicide. In explaining the basis of his opinion, Waynik testified as follows. Waynik explained that

symptoms supporting a diagnosis for depression include a "depressed mood, weepiness, insomnia or hypersomnia, either oversleeping or undersleeping . . . overeating [or] undereating, hopelessness, helplessness, irritability, lack of energy, lack of drive, [and] lack of motivation." According to Waynik, on the basis of his review of the materials provided to him, the decedent exhibited most of these symptoms following the work incident. Prior to the work incident, the decedent was an active person and a "hard worker" who had persevered through prior injuries,[6] but, after the work incident, there was a "dramatic change in his personality and his behavior," as he became "dysfunctional," "weepy," "stoic," "withdrawn," "apathetic," and "anhedonic," remained mostly confined to a chair at home, and suffered from insomnia. The decedent's medical records did not reveal any indication that he suffered from depression prior to the work incident, but, thereafter, Tomanelli prescribed the decedent Zoloft. Waynik linked the decedent's depression to the chronic pain stemming from his compensable injuries, explaining that "it's very common in people who have any kind of chronic illness . . . [to] get depressed after a while. If anything goes on and on and doesn't go away, depression frequently results."

As to the manner of the decedent's death, Waynik testified that the quantity of medication that the decedent ingested, which was in excess of the amount needed for treatment, demonstrated an intent to die, such that the decedent did not accidentally kill himself. Waynik believed that, as a result of the depression that the decedent had developed, the decedent "didn't see any way out," "felt hopeless and ultimately [died by]

[6] The commissioner found that, prior to the work incident, the decedent sustained a back injury that required surgery, after which he returned to work.

suicide." Waynik further testified that, although his conclusion that the decedent died by suicide was partially based on DeJoseph's classification of the decedent's manner of death as a suicide, he would have reached the same conclusion without the benefit of DeJoseph's determinations.

At a formal hearing held on August 21, 2018, Selig testified that he maintained his opinion that, within a reasonable degree of medical probability, there was not enough evidence to establish that the decedent became significantly depressed following the work incident or that, if he did, his death was a suicide stemming from his depression.

In his finding and award, the commissioner found that, following the work incident, the decedent (1) was totally disabled from work and never regained a work capacity before his death, (2) spent most of his time at home confined to his bed or to a chair, (3) had to use his buttocks to ascend and descend stairs, and (4) could no longer drive, tend to his dogs and koi pond, mow the lawn, or walk long distances. The commissioner found that the decedent became depressed "because he could no longer work [and] was no longer physically active. He wanted the knee replacement surgery, but the [defendants were] denying the surgery and he could not afford to have it done, given that his health insurance had been canceled and he did not have the financial resources outside of health insurance." The commissioner further found that the compensable injuries were "a substantial contributing factor in causing [the decedent's] depression" and that, "[a]s a result of his depression, [the decedent] intended to cause his death and did [die by] suicide . . . ." In making his findings, the commissioner expressly credited Waynik's opinion as being "persuasive." In contrast, the commissioner discredited Selig's opinion as "not persuasive because [Selig] believes that it is possible for [the decedent] to

have accidentally taken such a high number of pills . . . . [Selig] was also unaware that [the decedent] did not have the option of putting his surgery through a health insurance plan." In affirming the commissioner's decision, the board determined that there was sufficient evidence supporting the commissioner's findings.

The defendants claim that, contrary to the board's determination, the commissioner's subordinate findings are untenable for several reasons. First, the defendants contend that Waynik either overlooked or was not privy to information that undercut his opinion that the decedent developed depression and died by suicide, rendering Waynik's opinion conjectural. In particular, the defendants rely on evidence indicating that the decedent remained hopeful following the work incident, anticipated undergoing surgery, and looked forward to returning to work. We are not persuaded. In cross-examining Waynik during the formal hearing, the defendants' counsel elicited testimony from Waynik that the decedent exhibited signs that he was not "hopeless" following the work incident. On redirect examination, however, Waynik testified that the decedent exhibited many signs of "hopelessness" and that an individual who is depressed can experience both "good days and bad days . . . ." Earlier, during direct examination, Waynik had elucidated that point in testifying that "one [good] day is not as significant as the several months prior to that where [the decedent] showed consistent depression, consistent withdrawal, [and] consistent depressive symptoms." Thus, we disagree with the defendants that Waynik ignored or failed to account for information contradicting his opinion; rather, the record reflects that Waynik maintained his opinion in spite of such information. The commissioner was entitled to credit Waynik's opinion, which was not based on conjecture.

The defendants also contend that the commissioner's finding that the decedent died by suicide is unreasonable because DeJoseph's determination that the manner of the decedent's death was a suicide was based on an erroneous factual predicate. Specifically, during her deposition, DeJoseph testified that one of the factors that she considered in classifying the manner of the decedent's death as a suicide was that the police report reflected that the plaintiff had told the police that she ordinarily controlled the distribution of the decedent's medications. DeJoseph believed that the decedent's consumption of his medications without the plaintiff's knowledge suggested an intent to die by suicide. During the proceedings before the commissioner, however, the plaintiff testified that she occasionally dispensed the decedent's medications to him at his request, but otherwise the decedent took his medications without her help. Thus, the defendants posit, DeJoseph's determination that the manner of the decedent's death was a suicide was unsupported by the facts, and the commissioner's reliance on DeJoseph's determination in finding that the decedent died by suicide was improper. This contention is unavailing. Even assuming that DeJoseph's determination was unreliable because it was based, in part, on incorrect information,[7] Waynik's testimony provided an independent basis supporting the commissioner's finding that the decedent died by suicide. Although Waynik testified that he partially relied on DeJoseph's determination in rendering his opinion, he further testified that he would have reached the same conclusion without having knowledge of DeJoseph's determination. Thus, the defendants' assertion fails.

The defendants' remaining contentions assert that the commissioner's subordinate findings are speculative or

[7] We note that DeJoseph testified that she relied on a number of other factors in making her determination, including the number of pills located around the decedent's body and the presence of an antidepressant in his system.

cannot reasonably be drawn from the evidence. We are not persuaded. Mindful of the limited scope of our review, we conclude that the commissioner's subordinate findings—that (1) the decedent developed depression following the work incident, (2) the decedent's compensable injuries were a substantial contributing factor in his development of depression, (3) the manner of the decedent's death was a suicide, and (4) the decedent's suicide stemmed from his depression—are reasonable and grounded in the evidence produced during the proceedings before the commissioner.

II

We next turn to the defendants' claim that the board improperly affirmed the commissioner's award of survivorship benefits to the plaintiff because the commissioner improperly failed to find that the decedent's conduct leading up to his death—his excessive consumption of alcohol and medications—constituted a superseding cause of his death, thus defeating compensability for his death. The defendants assert that the commissioner, as well as the board in affirming the commissioner's decision, ran afoul of the principles set forth by our Supreme Court in *Sapko* v. *State*, supra, 305 Conn. 360, in determining that there was an unbroken chain of causation linking the decedent's compensable injuries to his death. This claim is unavailing.

We begin with an overview of *Sapko*, a workers' compensation matter involving the death of a state correction officer. Id., 365. The cause of the officer's death was "multiple drug toxicity due to the interaction of excessive doses of Oxycodone and Seroquel . . . ." (Internal quotation marks omitted.) Id., 364. The manner of the officer's death, or the "nature of the [officer's] death" as described in *Sapko*, "was an accident and not suicide." (Internal quotation marks omitted.) Id., 365. Leading up to his death, in the course of his employ-

ment, the officer "experienced four incidents [that] gave rise to claims for workers' compensation benefits," the latest of which resulted in a compensable back injury. (Internal quotation marks omitted.) Id. The officer was prescribed several medications, including Oxycodone, to treat his back pain. Id. The officer was counseled on the proper use of pain management drugs and was required to participate in a controlled substances agreement. Id. Additionally, prior to sustaining the compensable back injury, the officer was being treated for major depression. Id. One week before his death, to abate symptoms of depression and racing thoughts that the officer was experiencing, the officer's treating psychiatrist prescribed him Seroquel, an antipsychotic medication. Id., 365–66.

Following the officer's death, his spouse sought survivorship benefits. Id., 362. A workers' compensation commissioner denied the spouse's claim, finding that (1) no causal relationship existed between the officer's compensable injuries and his psychiatric treatment, including his use of Seroquel, and (2) the elevated level of Oxycodone in the officer's system, by itself, did not cause the officer's death, but rather the officer's "ingestion of excessive quantities of Oxycodone and Seroquel, [al]though accidental, constitute[d] a superseding cause of his death." (Internal quotation marks omitted.) Id., 367–68. The commissioner further found that "[the officer's] work injuries . . . were neither a substantial factor nor the proximate cause of [his] death." (Internal quotation marks omitted.) Id., 368. The spouse appealed to the board, which affirmed the commissioner's decision. Id. The board concluded in relevant part that the commissioner had properly applied the superseding cause doctrine, and that "the record supported the commissioner's finding that an outside causal agency, namely, the [officer's] ingestion of excessive quantities of prescribed medication, had intervened and broken

the chain of causation between the [officer's] compensable injuries and his death." Id. The spouse appealed to this court, which affirmed the board's decision. *Sapko* v. *State*, 123 Conn. App. 18, 21, 1 A.3d 250 (2010), aff'd, 305 Conn. 360, 44 A.3d 827 (2012).

After granting certiorari, our Supreme Court affirmed this court's decision, albeit on different grounds.[8] *Sapko* v. *State*, supra, 305 Conn. 364. The court concluded that the board properly upheld the commissioner's finding "on the issue of proximate cause, in particular, his determination that the [officer's] ingestion of excessive quantities of Oxycodone and Seroquel constituted an intervening event that broke the chain of causation" linking the officer's compensable injuries to his death. Id., 386. The court determined that (1) there was expert testimony, credited by the commissioner, that the level of Oxycodone in the officer's system was twenty times higher than the therapeutic dosage, but the Oxycodone likely would not have been fatal in the absence of the officer's simultaneous overdose on Seroquel, (2) there was evidence supporting the commissioner's finding that the officer's treatment with Oxycodone was unrelated to his treatment with Seroquel and that the two drugs could be ingested together safely, and (3) there was evidence supporting the commissioner's finding that the officer was counseled as to the proper use of pain medications and had entered into a controlled substances agreement. Id., 386–87. Additionally, the court noted that the spouse had failed to present expert testimony demonstrating any medical causal connection between the officer's overdose and his primary

[8] On appeal from the board's decision in *Sapko*, this court disagreed with the board's conclusion that the superseding cause doctrine was applicable to the case and, thus, concluded that the board improperly upheld the commissioner's finding that the officer's ingestion of excessive quantities of medications was a superseding cause of his death. *Sapko* v. *State*, supra, 123 Conn. App. 24–26. Nevertheless, this court affirmed the board's decision on the basis of the board's proximate cause analysis. Id., 26, 29–30.

compensable injury and that the spouse's sole expert witness' testimony, which attempted to causally tie the officer's depression to his employment, was discredited by the commissioner. Id., 387–88.

The defendants argue that the present case is analogous to *Sapko* in that the decedent's consumption of an excessive amount of alcohol and medications constituted a superseding cause breaking the chain of causation between the decedent's compensable injuries and his death, such that his death cannot be deemed a direct and natural consequence of his compensable injuries. The defendants point to uncontroverted evidence in the record indicating that the decedent was cognizant that mixing alcohol with his medications was contraindicated, but he nevertheless consumed an excessive amount of alcohol and an excessive amount of medications before his death—actions, the defendants posit, that were too far removed from the compensable injuries to be treated as a link connecting the compensable injuries to the decedent's death.

We disagree with the defendants' contention that this case is analogous to *Sapko*. There is a critical distinction between *Sapko* and this case, namely, the manner of the officer's death in *Sapko* was an accident; id., 367–68; whereas, in the present case, the commissioner found the manner of the decedent's death to be a suicide—a finding that, for the reasons set forth in part I of this opinion, we may not disturb. The conclusion in *Sapko* that the officer's *accidental* overdose on medications, including one that had no connection to the officer's compensable injuries, was a superseding cause breaking the causal link between his compensable injuries and his *accidental* death is wholly sound. See id., 371. In contrast, when an employee's death is found to be a suicide that is the sequelae of a compensable injury, the employee's conduct in carrying out the suicide can-

not be regarded as a superseding cause defeating compensability; otherwise, the employee's suicide, by the mere virtue of the method by which the death occurred, would never be compensable under the workers' compensation laws of our state, which would conflict with our appellate precedent. See *Wilder* v. *Russell Library Co.*, 107 Conn. 56, 61–62, 139 A. 644 (1927); *Dixon* v. *United Illuminating Co.*, 57 Conn. App. 51, 61–62 n.8, 748 A.2d 300, cert. denied, 253 Conn. 908, 753 A.2d 940 (2000).

Here, the decedent's consumption of alcohol and medications, which, as the defendants note, the decedent knew to be contraindicated and which resulted in the acute intoxication constituting the physiological cause of the decedent's death, was the method by which the decedent died by suicide; it was not an act untethered to the decedent's compensable injuries and the depression he developed thereafter.[9] Put simply, the

[9] The defendants take issue with a finding made by the commissioner that the decedent "died . . . of a drug overdose. *Although he did have some alcohol in his bloodstream at the time of death*, he had ingested a shockingly high number of pills." (Emphasis added.) The defendants contend that the record establishes that the decedent had an excessive amount of alcohol in his body when he died, such that the commissioner minimized the impact of alcohol on the cause of the decedent's death. We do not construe the commissioner's finding as indicating that he overlooked the undisputed evidence in the record demonstrating that the cause of the decedent's death was acute intoxication as a result of the effects of both alcohol and medications. Earlier in his decision, the commissioner expressly stated that DeJoseph had determined that the mixture of both alcohol and medications had caused the decedent's death. We interpret the commissioner's finding, instead, as rejecting the notion, as the board described it, that the decedent suffered a "death by misadventure due to the abuse of alcohol . . . ." The commissioner found that the decedent had consumed a "shockingly high number of pills," which, for the commissioner, dispelled any suggestion that the decedent's death was accidental. This finding aligned with Waynik's testimony, which the commissioner cited in his decision, that the excessive quantity of medication that the decedent ingested suggested an intent to die. Moreover, the commissioner discredited Selig's expert testimony, in part, because of Selig's belief that it was possible for the decedent to have accidentally consumed the large quantity of medications that he did. Thus, we disagree with the defendants' position that the commissioner overlooked

decedent's conduct was a link in the chain connecting the compensable injuries to the decedent's death, not a superseding cause breaking the chain of causation.

We further note that how the decedent carried out his suicide is of no moment. Whether "an injured employee [dies by] suicide by alcohol alone or a combination of alcohol with other toxins should make no difference; suicide caused by depression arising from a compensable injury is compensable," regardless of how the suicide occurred. R. Carter et al., 19 Connecticut Practice Series: Workers' Compensation Law (Supp. 2020–2021) § 5:5, p. 164. That the decedent died by suicide by consuming alcohol and certain medications that bore no relation to his compensable injuries[10] does not affect our analysis.

In sum, iterating that "[d]ecisions in these sorts of cases are necessarily fact driven"; (internal quotation

that alcohol was a critical component causing the decedent's death.

Additionally, in their reply brief, the defendants thinly assert that there is no evidence demonstrating that the decedent's consumption of alcohol prior to his death was related to his suicide. The record reflects that the decedent, despite knowing that mixing alcohol with his medications was contraindicated, consumed a large amount of alcohol and later consumed a large quantity of medications, the combination of which caused his death. Although circumstantial, it is reasonable to infer from this evidence that decedent's consumption of alcohol was part and parcel of his suicide.

Finally, we note that there are two arguments that the defendants are not raising on appeal. First, the defendants do not argue that the decedent died by suicide as a result of alcoholism that was unrelated to his employment; indeed, as the defendants acknowledge in their appellate briefs, there is no evidence suggesting that the decedent was an alcoholic suffering from chronic alcohol abuse. Second, although, in their reply brief, the defendants make a passing reference to evidence implying that the decedent's judgment was impaired as a result of his consumption of alcohol, the defendants have not pursued an intoxication defense pursuant to General Statutes § 31-284 (a), which is an affirmative defense that must be asserted and proven by the defendants. See *Gamez-Reyes* v. *Biagi*, 136 Conn. App. 258, 274–75, 44 A.3d 197, cert. denied, 306 Conn. 905, 52 A.3d 731 (2012).

[10] The record reflects that the decedent was prescribed Ativan, one of the medications that DeJoseph determined to be a substantial factor in causing the decedent's death, prior to the work incident.

marks omitted) *Sapko* v. *State*, supra, 305 Conn. 385; see 1 L. Larson & T. Robinson, supra, § 10.04, p. 10-13; we conclude that the commissioner's finding, as affirmed by the board, that a chain of causation existed linking the decedent's compensable injuries to his death was supported by the record and not the result of a misapplication of law. Accordingly, we conclude the board properly affirmed the commissioner's award of survivorship benefits to the plaintiff.

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

SCOTT MENARD *v.* STATE OF CONNECTICUT

DARREN CONNOLLY *v.* STATE OF CONNECTICUT

ROBERT ZDROJESKI *v.* STATE OF CONNECTICUT

(AC 42342)

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

Syllabus

The plaintiffs, M and C, Connecticut State Police troopers who suffered injuries when a motor vehicle driven by a nonparty tortfeasor, B, struck a police cruiser, sending it into physical contact with them, sought to recover underinsured motorist benefits allegedly due under insurance coverage provided by the defendant state of Connecticut, a self-insurer, pursuant to a collective bargaining agreement. Following a bench trial, the trial court found, inter alia, that, to the extent B was underinsured, the state was contractually obligated to provide coverage to the plaintiffs, the plaintiffs' claims for damages caused by the alleged post-traumatic stress disorder (PTSD) they developed were not compensable under the underinsured motorist claims statute (§ 38a-336), and it calculated the plaintiffs' damages. The plaintiffs filed a joint appeal to this court. The parties then filed a stipulation before the trial court regarding sums that the plaintiffs had already received, and the court held a hearing to consider any reductions to the plaintiffs' damages. It concluded that certain workers' compensation benefits the plaintiffs had received were

deductible from the plaintiffs' damages, but that certain recoveries the plaintiffs received under the Dram Shop Act (§ 30-102) were not, adjusted the plaintiffs' damages accordingly, and rendered judgments for the plaintiffs. The plaintiffs then filed an amended joint appeal, and the state filed a cross appeal to this court. *Held*:

1. This court concluded that the plaintiffs' original joint appeal was not taken from final judgments and it must be dismissed for lack of subject matter jurisdiction, but the plaintiffs' amended joint appeal was jurisdictionally proper; final judgments were not rendered in the trial court until the court had reduced the plaintiffs' damages to account for certain sums received by the plaintiffs, which occurred after the original appeal had been filed; the plaintiffs' amended joint appeal encompassed all of the claims raised by the plaintiffs in their original joint appeal, and this court could review all of the plaintiffs' claims in the context of their amended joint appeal.
2. The trial court properly declined to award the plaintiffs damages related to their claims of PTSD, as those claims were not compensable under § 38a-336: guided by our Supreme Court's decision in *Moore* v. *Continental Casualty Co.* (252 Conn. 405), in which the term bodily was determined to relate to something physical and corporeal, as opposed to purely emotional, this court concluded that bodily injury in § 38a-336 (a) (1) (A) must necessarily be physical in nature, and, under that interpretation, PTSD, in and of itself as a purely emotional injury, could not be construed as a "bodily injury" within the purview of § 38a-336; moreover, guided by the rationale in *Moore*, in which the question was the legal meaning of "bodily injury" as defined in an insurance policy and not the medical or scientific question of the degree to which the mind and the body affect each other, this court was not convinced that the PTSD purportedly developed by the plaintiffs was transformed into a "bodily injury" under the statute by virtue of the physical manifestations accompanying it.
3. The trial court properly reduced the plaintiffs' damages by the sums of certain workers' compensation benefits they had received, as the statutory and regulatory scheme governing underinsured motorist coverage in Connecticut did not impose a requirement on a self-insurer to notify claimants of an election of permissive offsets under the applicable state regulation (§ 38a-334-6): although, as a self-insurer, the state must maintain a preaccident writing reflecting its election of permissive regulatory offsets as mandated by *Piersa* v. *Phoenix Ins. Co.* (273 Conn. 519) and clarified in *Garcia* v. *Bridgeport* (306 Conn. 340), it had no legal obligation to provide its employees with notice of its election to offset its liability for underinsured motorist benefits by the amount of any workers' compensation benefits paid, as our Supreme Court expressly construed § 38a-334-6 of the regulations not to be a notice provision, determining that it served the substantive function of specifying the basic requirement of how an insurer may limit its liability, and the court

made no mention of self-insurers providing claimants with copies of such written documents or otherwise notifying claimants of the election of permissive regulatory offsets; accordingly, it was sufficient for the state to maintain a written memorandum containing its election in its files as a public record.

4. The trial court committed error in declining to reduce C's damages by the sums he had recovered pursuant to the Dram Shop Act, as C was being compensated twice for the same injury; the parties stipulated that, among other sums received by C, he recovered certain sums from an establishment under the act as compensatory damages, and, without a reduction of C's damages to account for his dram shop recovery, C was compensated twice for the same injury in violation of the common-law rule precluding double recovery, a legal principle ingrained in this state's underinsured motorist laws.

5. This court concluded that, because neither plaintiff was entitled to recover damages against the state, the trial court, on remand, must render judgments in favor of the state in the plaintiffs' respective cases.

Argued March 9—officially released October 19, 2021

Procedural History

Actions to recover underinsured motorist benefits allegedly due under automobile insurance coverage provided by the defendant pursuant to a collective bargaining agreement, brought to the Superior Court in the judicial district of Hartford, where the matters were consolidated and tried to the court, *Shapiro, J.*; decision for the plaintiffs, and the plaintiffs appealed to this court; thereafter, the court, *Hon. Robert B. Shapiro*, judge trial referee, granted in part the defendant's motion for remittitur and a collateral source hearing and rendered judgments for the plaintiffs, from which the plaintiffs filed an amended appeal and the defendant cross appealed to this court; subsequently, the plaintiff Robert Zdrojeski withdrew his appeal. *Appeal dismissed in part*; *reversed in part*; *judgments directed.*

Daniel J. Krisch, with whom, on the brief, was *Jeffrey L. Ment*, for the appellants-cross appellees (plaintiffs Scott Menard and Darren Connolly).

David A. Haught, with whom, on the brief, was *Lorinda S. Coon*, for the appellee-cross appellant (state).

MOLL, J. In these underinsured motorist matters, the plaintiffs, Scott Menard and Darren Connolly, jointly appeal, and the defendant, the state of Connecticut, cross appeals, from the judgments of the trial court rendered in favor of the plaintiffs following a bench trial. In addition, the state cross appeals from the judgment of the trial court rendered in favor of a third plaintiff, Robert Zdrojeski,[1] after the bench trial. On appeal, the plaintiffs claim that the court improperly (1) declined to award them damages in relation to the post-traumatic stress disorder (PTSD) that they purportedly developed, and (2) reduced their damages by the sums of workers' compensation benefits that they had received. On cross appeal, the state claims that the court improperly declined to reduce the plaintiffs' damages by the sums that they had recovered pursuant to the Connecticut Dram Shop Act (dram shop act), General Statutes § 30-102. We dismiss, sua sponte, the plaintiffs' original joint appeal for lack of a final judgment. See part I of this opinion. As for the amended joint appeal and the cross appeal, we (1) reverse the judgments rendered in favor of the plaintiffs and (2) affirm the judgment rendered in favor of Zdrojeski.[2]

The following facts, as set forth by the trial court, and procedural history are relevant to our resolution of this appeal and this cross appeal. "[O]n September 1, 2012,

[1] This joint appeal, as later amended, was filed by Menard, Connolly, and Zdrojeski, but Zdrojeski subsequently withdrew his portion of the joint appeal and is not participating in the joint appeal or the cross appeal. For the purpose of clarity, we refer in this opinion to Menard, Connolly, and Zdrojeski individually by their surnames, and we refer to Menard and Connolly collectively as the plaintiffs.

[2] As we explain in footnote 17 of this opinion, although the state's cross appeal against Zdrojeski remains pending notwithstanding Zdrojeski's withdrawal of his portion of the joint appeal, as amended, the state has abandoned its claim on cross appeal against Zdrojeski.

[Menard, Connolly, and Zdrojeski] were on duty as Connecticut state troopers with the Connecticut State Police. At approximately 1:40 a.m. . . . Connolly was on patrol on Interstate 84 and pulled over a vehicle traveling westbound, due to suspected intoxicated driving, at exit 46 in Hartford, the Sisson Avenue exit. After reaching the bottom of the exit ramp, Connolly parked his [police] cruiser on the right side of the exit, under the directional sign, to the rear of the vehicle, which had stopped before the intersection with Sisson Avenue. The Sisson Avenue exit has four lanes at this point.

"Connolly exited his cruiser to speak with the driver of the vehicle and then returned to his cruiser. . . . Menard drove up to the scene also, parked his police cruiser and also exited to speak with the occupants of the vehicle [that] . . . Connolly had pulled over. Both cruisers had their lights activated.

"Connolly and Menard then began to approach the vehicle. Unbeknownst to Connolly and Menard . . . Zdrojeski also responded to the scene in his police cruiser. He parked his cruiser to the rear and left of Connolly's cruiser, and to the left of Menard's cruiser, in the right center travel lane, also with lights activated. Just after Zdrojeski arrived, another vehicle, driven by nonparty William Bowers, struck Zdrojeski's cruiser from behind, sending Zdrojeski's parked cruiser forward toward Connolly and Menard, where physical contact occurred.

"Menard attempted to jump clear of the cruiser, tumbled in the air, and came down on his head between Zdrojeski's cruiser and the stopped vehicle. Connolly pushed himself away from the cruiser, using his right arm against the hood of the cruiser. At the time of the impact, Zdrojeski had not gotten out of his cruiser. [Menard, Connolly, and Zdrojeski] were ambulatory

after the accident and were transported by ambulance to Hartford Hospital."

On June 10, 2014, the plaintiffs commenced separate underinsured motorist actions against the state. In the plaintiffs' respective one count complaints, which were substantively identical, the plaintiffs alleged in relevant part that (1) they sustained injuries from the accident, which occurred as a result of the negligence and/or carelessness of Bowers (nonparty tortfeasor), (2) their personal automobile liability insurance policies and the nonparty tortfeasor's automobile liability insurance policy were insufficient to compensate them in full for their injuries, (3) at the time of the accident, the state carried automobile liability insurance, including underinsured motorist coverage, for their benefit pursuant to a collective bargaining agreement between the state and the state police union, (4) the state was self-insured with respect to its underinsured motorist coverage, (5) pursuant to General Statutes § 38a-336,[3] the state was required to provide them with underinsured motorist coverage, and (6) the state had not disbursed underinsured motorist benefits to them for their injuries.

On January 30, 2017, the state answered the plaintiffs' complaints, admitting that it provides underinsured motorist coverage to state troopers who are parties to the aforementioned collective bargaining agreement, that it is self-insured with respect to that coverage, and that it had not remitted underinsured motorist benefits to the plaintiffs in relation to the accident. The state otherwise denied the plaintiffs' material allegations or left the plaintiffs to their proof. The state also asserted three special defenses. In its first special defense, the

[3] Although § 38a-336 has been amended by the legislature since the events underlying the present appeal; see Public Acts 2014, No. 14-20, § 1; Public Acts 2014, No. 14-71, § 1; Public Acts 2015, No. 15-118, § 69; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

state alleged that the plaintiffs' recoveries, if any, were "limited to the $1,000,000 amount of underinsured motorist coverage as set forth in the [state's] [s]elf-[i]nsured [m]otorist [c]overage [f]orm and any other terms and conditions of the [state's] self-insured coverage for the Department of Public Safety." In its second and third special defenses, the state alleged that, in the event that the plaintiffs succeeded on their claims, the state was entitled to certain reductions and setoffs. On January 31, 2017, the plaintiffs filed replies denying the special defenses.

The plaintiffs' respective cases were consolidated for trial and tried to the court, *Shapiro*, *J.*, over the course of several days in April and May, 2018. At the beginning of the first day of trial, at the parties' joint request, the court agreed to "focus in this initial stage on the questions of liability and damages without any question of offsets or coverage or collateral sources. And that's similar to the way a lot of cases are presented so we need not consider that. And [the court] understand[s] those issues are for a later day if necessary and that you'll be—if needed, we'll schedule another day for a hearing about those issues and hearing evidence that relates to that or to those things." Following trial, the parties filed posttrial briefs.

On August 24, 2018, the court issued a combined memorandum of decision addressing the plaintiffs' respective cases. With respect to liability, the court determined that (1) the accident was caused by the negligence of the nonparty tortfeasor, (2) the plaintiffs' conduct did not amount to negligence, and (3) to the extent that the nonparty tortfeasor was underinsured, the state was contractually obligated to provide underinsured motorist coverage to the plaintiffs for damages caused by the nonparty tortfeasor. As to damages, the court first

rejected a request by the plaintiffs to award them damages stemming from the PTSD that they allegedly developed, determining that (1) the plaintiffs' PTSD claims were not compensable under § 38a-336, and (2) the opinion of the plaintiffs' expert witness, Jennifer Honen, a licensed professional counselor who diagnosed the plaintiffs with PTSD, was not credible.

The court proceeded to calculate the plaintiffs' damages. The court determined that Menard's damages were $171,965.40, consisting of: $43,218.63 in lost wages; $11,839.68 in lost overtime; $56,907.09 in medical expenses; and $60,000 in noneconomic damages. The court calculated Connolly's damages to be $186,738.67, consisting of: $53,144.43 in lost wages; $27,409 in lost overtime; $36,185.24 in medical expenses; and $70,000 in noneconomic damages. In light of the parties' agreement at trial, the court ordered the parties to file a stipulation "account[ing] for items of economic damages which have been paid and for medical expense discounts . . . ." The court further stated that it would render judgments thereafter.

On September 11, 2018, the plaintiffs jointly filed a combined motion to reconsider and for additur, asserting that the court improperly declined to award them PTSD-related damages. On October 1, 2018, the state filed an objection. On November 13, 2018, after hearing argument on October 23, 2018, the court denied the plaintiffs' combined motion. On December 3, 2018, the plaintiffs filed a joint appeal.

On February 13, 2019, the parties filed a stipulation regarding sums that the plaintiffs had received "on account of the personal injuries sustained in the motor vehicle collision of September 1, 2012." As to Menard, the parties stipulated that he had recovered $253,723.30, consisting of: $130,223.63 in workers' compensation benefits for medical bills, lost wages, and permanent

partial disabilities, less $3583.33 that was repaid on a workers' compensation lien; a $10,750 recovery from the nonparty tortfeasor; a $33,000 personal underinsured motorist coverage payment; and an $83,333 dram shop payment.[4] As to Connolly, the parties stipulated that he had recovered $224,532, consisting of: $134,033 in workers' compensation benefits for medical bills, lost wages, and permanent partial disabilities, less $3583 that was repaid on a workers' compensation lien; a $10,750 recovery from the nonparty tortfeasor; and an $83,332 dram shop payment.[5] In addition, the parties represented that they were making no stipulations as to (1) "the state's right of [setoff] under the terms of the underinsured motorist coverage provided to the plaintiffs," (2) whether the stipulated amounts could be set off or credited against the damages awarded by the court, and (3) whether the plaintiffs' dram shop recoveries could be set off against the damages awarded by the court.

On March 6, 2019, the court held a hearing to consider any reductions to the plaintiffs' damages.[6] The parties

[4] The record before us does not reflect the policy limits of the nonparty tortfeasor, nor does it reflect the name of the dram shop.

[5] The parties further stipulated that, prior to trial, they had agreed that "the full amount of the [plaintiffs'] medical bills would be allowed into evidence without objection, but that any recovery for said medical bills would be limited to the actual amounts paid, with any adjustments to be handled as a [postjudgment] matter." To that end, the parties stipulated that the difference between Menard's medical expenses and the amount paid in satisfaction thereof by the state's workers' compensation insurance carrier was approximately $33,500, and that the difference between Connolly's medical expenses and the amount paid in satisfaction thereof was approximately $12,633.

[6] The court and the parties referred to the March 6, 2019 hearing as a collateral source hearing, a transcript of which was not ordered by any party in conjunction with this joint appeal, as amended, or this cross appeal. As reflected in its decision issued on May 16, 2019, however, the court reduced the plaintiffs' damages by noncollateral sources. For the sake of clarity, we avoid referring to the March 6, 2019 hearing as a collateral source hearing.

submitted briefs addressing whether the plaintiffs' damages could be reduced to account for (1) the workers' compensation benefits that the plaintiffs had received, and (2) the plaintiffs' dram shop recoveries.[7] On May 16, 2019, the court issued a combined memorandum of decision concluding that the workers' compensation benefits were deductible from the plaintiffs' damages, but that the dram shop recoveries were not. Taking into account the workers' compensation benefits, along with the additional sums stipulated to by the parties other than the dram shop payments, the court reduced Menard's damages to zero dollars and Connolly's damages to $32,905.67. The court then rendered judgments for the plaintiffs.[8] On May 24, 2019, the plaintiffs filed an amended joint appeal to encompass the judgments rendered by the court following the May 16, 2019 decision. On May 31, 2019, the state filed a cross appeal. Additional facts and procedural history will be set forth as necessary.

I

As a preliminary matter, we address, sua sponte, whether the plaintiffs' original joint appeal, filed on December 3, 2018, was taken from final judgments. "The jurisdiction of the appellate courts is restricted to appeals from judgments that are final. . . . The policy

[7] The record before us does not indicate that the plaintiffs objected to the court reducing their damages by the $10,750 payment that each plaintiff received from the nonparty tortfeasor or, in Menard's case, by the $33,000 personal underinsured motorist coverage payment that he received. The plaintiffs do not claim on appeal that the court committed error in deducting those amounts from their damages.

[8] Zdrojeski filed a separate action against the state seeking underinsured motorist benefits, which was consolidated with the plaintiffs' actions for trial. The court rendered judgment in favor of Zdrojeski in the amount of $29,963.03. The judgment rendered for Zdrojeski is not at issue in the joint appeal, as amended. See footnote 1 of this opinion. As for the state's cross appeal, the judgment rendered for Zdrojeski is at issue, but the state has abandoned its claim as to Zdrojeski. See footnote 17 of this opinion.

concerns underlying the final judgment rule are to discourage piecemeal appeals and to facilitate the speedy and orderly disposition of cases at the trial court level. . . . The appellate courts have a duty to dismiss, even on [their] own initiative, any appeal that [they lack] jurisdiction to hear. . . . We therefore must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim." (Citations omitted; internal quotation marks omitted.) *Wolfork* v. *Yale Medical Group*, 335 Conn. 448, 459, 239 A.3d 272 (2020). We conclude that the original joint appeal was not taken from final judgments, and, therefore, we lack subject matter jurisdiction to entertain it. We further conclude that the amended joint appeal is jurisdictionally proper and encompasses the claims raised by the plaintiffs in the original joint appeal.

Here, in the August 24, 2018 combined decision, the court determined in relevant part that, insofar as the nonparty tortfeasor was underinsured, the state was contractually required to afford underinsured motorist coverage to the plaintiffs for damages caused by the nonparty tortfeasor. In addition, the court calculated the full amount of damages established by the plaintiffs; however, the court expressly stated that it would render judgments in the plaintiffs' respective cases after the parties had filed a stipulation, in accordance with their agreement at trial, "account[ing] for items of economic damages which have been paid and for medical expenses discounts . . . ." The record reflects that the court rendered judgments in the plaintiffs' respective cases on May 16, 2019, after it had reduced the plaintiffs' damages to account for certain sums received by the plaintiffs. Under these circumstances, we conclude that no appealable final judgments were rendered until May 16, 2019. Accordingly, the original joint appeal, filed on December 3, 2018, was not taken from final judgments

and, therefore, must be dismissed for lack of subject matter jurisdiction.

Nevertheless, we may consider all of the plaintiffs' claims in the context of the amended joint appeal, filed on May 24, 2019, which was taken from final judgments. See Practice Book § 61-9 ("[i]f the original appeal is dismissed for lack of jurisdiction, any amended appeal shall remain pending if it was filed from a judgment or order from which an original appeal properly could have been filed"). The amended joint appeal encompasses all of the claims pursued by the plaintiffs in the original joint appeal. Thus, all of the plaintiffs' claims in the context of their amended joint appeal are properly before us for review. See *Featherston* v. *Katchko & Son Construction Services, Inc.*, 201 Conn. App. 774, 783, 244 A.3d 621 (2020), cert. denied, 336 Conn. 923, 246 A.3d 492 (2021), and cases cited therein.

II

Turning to the plaintiffs' amended joint appeal, the plaintiffs claim that the trial court improperly (1) declined to award them PTSD-related damages, and (2) reduced their damages by the sums of the workers' compensation benefits that they had received. We disagree.

A

We first address the plaintiffs' claim that the court improperly declined to award them PTSD-related damages. The dispositive contention raised by the plaintiffs is that the court committed error in concluding that their PTSD claims are not compensable under § 38a-336. We are not persuaded.[9]

[9] The plaintiffs also assert that the court erred in discrediting the opinion of their expert witness who diagnosed them with PTSD. In light of our determination that the court properly concluded that the plaintiffs' PTSD claims are not compensable under § 38a-336, we need not reach the merits of this claim of error.

The following additional facts and procedural history are relevant to our resolution of this claim. In their respective complaints, the plaintiffs alleged that, as a result of the accident, they sustained physical injuries and PTSD. During trial, in addition to testifying as to the physical injuries that they suffered, the plaintiffs testified as to emotional distress that they experienced following the accident. Menard testified, inter alia, that he had nightmares, intrusive thoughts, difficulty sleeping, and flashbacks of the accident, that he would wake up in cold sweats and "jump out of bed and scream," that he felt hypervigilant, short-tempered, and antisocial, and that he could not stand outside of his patrol car without feeling fearful. Connolly testified, inter alia, that he had irritability, nightmares, difficulty sleeping, and flashbacks of the accident. The plaintiffs' expert witness testified that she treated the plaintiffs following the accident and that it was her opinion that the plaintiffs had developed PTSD stemming from the accident.

In their joint posttrial brief, the plaintiffs both requested damages predicated, in part, on the alleged PTSD that they had developed. In its respective posttrial brief, the state argued that the plaintiffs could not recover damages for PTSD because the coverage that the state afforded them was premised on § 38a-336, which permits recovery for "damages because of bodily injury . . . ." General Statutes § 38a-336 (a) (1) (A). The state posited that the PTSD purportedly developed by the plaintiffs neither constituted a "bodily injury" compensable under the statute nor was derived from a predicate "bodily injury."

In declining to award the plaintiffs PTSD-related damages, the court determined that the terms of § 38a-336 are plain and unambiguous, although the court observed that the statute did not define " 'bodily injury.' " Relying on decisions by our Supreme Court supporting the proposition that "emotional distress,

without accompanying physical harm, does not constitute a 'bodily injury,' " the court concluded that the state's coverage, which coincided with § 38a-336, did not encompass the plaintiffs' PTSD claims. The court continued: "Here . . . the plaintiffs' PTSD claims are not a result of their personal injuries. Rather, they are premised on having gone through a life-threatening accident and having to reexperience similar work-related scenarios on a regular basis. Thus, there is no underinsured motorist coverage for these aspects of their claims since they do not constitute 'damages because of bodily injury' [under the statute]."

In their combined motion to reconsider and for additur, the plaintiffs asserted that the PTSD that they allegedly developed was accompanied by physical manifestations, "including sleeplessness, hyper alertness, rapid heart beating, sweating, anxiety, and outbursts of anger," such that the PTSD from which they suffer constitutes a "bodily injury" under § 38a-336 (a) (1) (A). In its objection, the state argued that the PTSD allegedly developed by the plaintiffs was a purely psychological injury and that the court correctly concluded that the statutory term "bodily injury" does not encompass such emotional distress. In denying the plaintiffs' combined motion to reconsider and for additur, the court maintained its reliance on precedent by our Supreme Court, providing that a " 'bodily injury' " does not encompass " 'emotional distress, without accompanying physical harm,' " and declined to consider out-of-state authority presented by the plaintiffs for the first time in their combined motion.

On appeal, the plaintiffs contend that the court's interpretation of § 38a-336 (a) (1) (A) was improperly narrow insofar as the court determined that the PTSD that they allegedly developed did not constitute a "bodily injury" under the statute. The plaintiffs assert that § 38a-336 (a) (1) (A) is ambiguous because there

is more than one reasonable reading of the statute vis-à-vis whether PTSD, with accompanying physical manifestations, is encapsulated within the terms of the statute requiring automobile liability insurance policies to provide uninsured and underinsured motorist coverage "for the protection of persons insured thereunder who are *legally entitled to recover damages because of bodily injury* . . . ." (Emphasis added.) General Statutes § 38a-336 (a) (1) (A). This claim is unavailing.

The plaintiffs' claim requires us to construe § 38a-336 (a) (1) (A), which "presents a question of statutory interpretation over which our review is plenary." (Internal quotation marks omitted.) *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, 205 Conn. App. 299, 325, A.3d (2021). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z[10] 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. . . . In interpreting statutes, words and phrases are to be construed according to their commonly approved usage . . . . Generally, in the absence of statutory definitions, we look to the contemporaneous dictionary definitions of words to ascertain their commonly approved usage." (Citation omitted; footnote in original; internal quotation marks omitted.) Id.

[10] "General Statutes § 1-2z provides: 'The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.' " *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, supra, 205 Conn. App. 325 n.28.

Section 38a-336 (a) (1) (A) provides: "Each automobile liability insurance policy shall provide insurance, herein called uninsured and underinsured motorist coverage, in accordance with the regulations adopted pursuant to section 38a-334, with limits for bodily injury or death not less than those specified in subsection (a) of section 14-112, for the protection of persons insured thereunder who are legally entitled to recover damages because of bodily injury, including death resulting therefrom, from owners or operators of uninsured motor vehicles and underinsured motor vehicles and insured motor vehicles, the insurer of which becomes insolvent prior to payment of such damages."

The parties do not cite, and our research has not revealed, any appellate case in this state that has interpreted the term "bodily injury" as used in § 38a-336 (a) (1) (A), which is not defined in the statute. We note that § 38a-334-2 (a) of the Regulations of Connecticut State Agencies, promulgated by the insurance commissioner pursuant to General Statutes § 38a-334,[11] defines "[b]odily injury," as used in §§ 38a-334-1 through 38a-334-9 of the regulations, to mean "bodily injury, sickness or disease, including death resulting therefrom . . . ." Section 38a-334-6 (a) of the regulations contains language similar to the statute, providing in relevant part: "The insurer shall undertake to pay on behalf of the insured all sums which the insured shall be legally entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle because of bodily injury sustained by the insured caused by an accident involving the uninsured or underinsured motor vehicle. . . ."

[11] General Statutes § 38a-334 (a) provides in relevant part: "The Insurance Commissioner shall adopt regulations with respect to minimum provisions to be included in automobile liability insurance policies issued after the effective date of such regulations . . . ."

Although neither § 38a-336 (a) (1) (A) nor the regulations shed additional light on the meaning of "bodily injury" in the statute, our Supreme Court has had occasion to consider the ordinary use of the term "bodily." In *Moore* v. *Continental Casualty Co.*, 252 Conn. 405, 746 A.2d 1252 (2000), our Supreme Court concluded that an allegation of emotional distress arising out of economic loss did not trigger an insurer's duty to defend under a homeowners insurance policy providing coverage for "[b]odily [i]njury," which was defined in the policy to mean "bodily harm, sickness or disease . . . ." (Internal quotation marks omitted.) Id., 410. One ground on which the court relied in reaching that conclusion was that "the word bodily as ordinarily used in the English language strongly suggests something physical and corporeal, as opposed to something purely emotional. Webster's Third New International Dictionary confirms this notion, and associates the term bodily with the physical aspects of the human body, and contrasts it with the nonphysical aspects of the human experience such as the mental and spiritual.[12] In the insurance policy, the word bodily is used as an adjective to modify the terms injury, harm, sickness and disease. Including purely emotional harm arising out of economic loss as a form of bodily injury would be tantamount to defining the term bodily injury with an antonym. At the very least, such a construction would render the term bodily superfluous as an adjective modifying the term injury. It is fair to infer that the use of the term bodily was employed in the policy both accurately and purposefully." (Footnote in original.) Id., 410–11.

[12] "Webster's Third New International Dictionary defines 'bodily' as 'having a body or a material form: PHYSICAL, CORPOREAL . . . of or relating to the body . . . concerning the body . . . BODILY contrast with *mental* or *spiritual* . . . .' " (Emphasis in original.) *Moore* v. *Continental Casualty Co.*, supra, 252 Conn. 411 n.6.

We find the application in *Moore* of the ordinary meaning of "bodily" to be persuasive in our construction of § 38a-336 (a) (1) (A). We interpret "bodily" in § 38a-336 (a) (1) (A) to concern "something physical and corporeal, as opposed to something purely emotional." *Moore* v. *Continental Casualty Co.*, supra, 252 Conn. 410. Because "bodily" is used as an adjective to modify "injury," a "bodily injury" under the statute must necessarily be physical in nature. Under this interpretation, PTSD, in and of itself as a purely emotional injury, cannot be construed as a "bodily injury" within the purview of the statute.

The plaintiffs assert that the PTSD that they purportedly developed was accompanied by physical manifestations, such as nightmares and difficulty sleeping, thereby bringing their PTSD claims within the realm of § 38a-336 (a) (1) (A). Our application of *Moore*, however, forecloses this contention. In *Moore*, in rejecting the plaintiff's argument that emotional distress stemming from economic loss fell within the definition of "[b]odily [i]njury" in the homeowners insurance policy, our Supreme Court observed that an "overwhelming majority of jurisdictions" had concluded that, as a matter of law, the term "bodily injury" in a liability insurance policy "does not include emotional distress *unaccompanied by physical harm*." (Emphasis added; internal quotation marks omitted.) *Moore* v. *Continental Casualty Co.*, supra, 252 Conn. 411–12. Notably, the court did not go on to state that emotional distress accompanied by physical symptoms of such distress would constitute a "bodily injury" under such policies. Id., 412–15. In fact, the court expressly disagreed with the rationale of *Voorhees* v. *Preferred Mutual Ins. Co.*, 128 N.J. 165, 607 A.2d 1255 (1992), in which the Supreme Court of New Jersey concluded that the term " 'bodily injury' " in a homeowners insurance policy, defined in the policy to mean " 'bodily harm, sickness or disease,' "

''encompasses emotional injuries accompanied by physical manifestations,'' such as nausea, stomach pains, and headaches. Id., 175, 179; *Moore* v. *Continental Casualty Co.*, supra, 413. Our Supreme Court determined that *Voorhees*, and decisions by other courts having reached similar conclusions, ''find ambiguity where there is none, and are contrary to the plain meaning of the language of the insurance policy and the reasonable expectations of the parties to the policy.'' *Moore* v. *Continental Casualty Co.*, supra, 414.

Moreover, in rejecting an argument by the plaintiff premised on the proposition that ''modern medical science teaches that emotional distress is accompanied by some physical manifestations''; id.; our Supreme Court in *Moore* stated: ''It is undoubtedly true that emotional distress ordinarily might be accompanied by some physical manifestations, such as an altered heart rate and altered blood pressure, and perhaps other such manifestations as changes in the size of the pupils, and sleeplessness and headaches. That does not mean, however, that 'bodily harm, sickness or disease,' as used in the insurance policy in this case, necessarily includes emotional distress caused by economic loss. The question in this case is the legal meaning of '''[b]odily [i]njury''' as defined in the policy. It is not the medical or scientific question of the degree to which the mind and the body affect each other.'' Id., 415; see also *Taylor* v. *Mucci*, 288 Conn. 379, 387, 952 A.2d 776 (2008) (noting that our Supreme Court in *Moore* ''rejected the plaintiff's claim that emotional distress fell within the policy's definition of 'bodily harm' because it was accompanied by physical manifestations'').

As we determined earlier in this opinion, a ''bodily injury'' under § 38a-336 (a) (1) (A) must be physical in nature. Guided by our Supreme Court's rationale in *Moore*, we are not convinced that the PTSD purportedly developed by the plaintiffs was transformed into a

"bodily injury" under the statute by virtue of the physical manifestations accompanying it.

In their appellate briefs, the plaintiffs also analyze the language immediately preceding "bodily injury" in § 38a-336 (a) (1) (A), providing that uninsured and underinsured motorist coverage is to be provided in each automobile liability insurance policy "for the protection of persons insured thereunder who are *legally entitled to recover damages because of* bodily injury . . . ." (Emphasis added.) General Statutes § 38a-336 (a) (1) (A). We recognize that "[i]t is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions. . . . [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous. . . . Because [e]very word and phrase [of a statute] is presumed to have meaning . . . [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." (Internal quotation marks omitted.) *Towing & Recovery Professionals of Connecticut, Inc.* v. *Dept. of Motor Vehicles*, 205 Conn. App. 368, 373–74, 257 A.3d 978 (2021). Read in its entirety, we perceive no reasonable construction of the language in § 38a-336 (a) (1) (A) that alters our conclusion that the plaintiffs' PTSD claims are not compensable under the statute. Cf. *Connecticut Ins. Guaranty Assn.* v. *Fontaine*, 278 Conn. 779, 786–88, 900 A.2d 18 (2006) (concluding that phrase " 'because of bodily injury' " in professional liability insurance policy was ambiguous with respect to whether coverage extended to defendant's loss of consortium claim predicated on husband's bodily injury).

As an aside, we observe that, arguably, the plaintiffs' alleged PTSD could be deemed to be compensable under § 38a-336 (a) (1) (A) if the PTSD stemmed directly from the physical injuries that the plaintiffs sustained

from the accident, which unequivocally constitute "bodily injur[ies]" under the statute. As the trial court found, however, "the plaintiffs' PTSD claims are not a result of their personal injuries. Rather, they are premised on having gone through a life-threatening accident and having to reexperience similar work-related scenarios on a regular basis." We do not construe the plaintiffs' claims on appeal as challenging that finding or, in fact, to be asserting that their alleged PTSD resulted from their physical injuries.

In sum, we conclude that the plaintiffs' PTSD claims are not compensable under § 38a-336, and, therefore, the court did not err in declining to award the plaintiffs PTSD-related damages.

B

We next address the plaintiffs' claim that the court improperly reduced their damages by the sums of the workers' compensation benefits that they had received. The plaintiffs contend that the court incorrectly concluded that, pursuant to § 38a-334-6 (d) (1) (B) of the Regulations of Connecticut State Agencies, the state properly had elected to reduce the limits of its uninsured/underinsured motorist coverage by the amount of workers' compensation benefits paid to the plaintiffs, notwithstanding that the state, although maintaining a written document reflecting its election, failed to provide notice of its election to its employees, including the plaintiffs. We reject the plaintiffs' claim of error.[13]

[13] On the basis of their respective appellate briefs, the parties appear to presume that, as a precondition of the trial court reducing the plaintiffs' damages by the sums of the workers' compensation benefits that the plaintiffs received, the state must have made a proper offset election pursuant to § 38a-334-6 (d) (1) (B) of the Regulations of Connecticut State Agencies. The parties do not address whether § 38a-334-6 (d) (1) (B) concerns only reductions of an insurer's *coverage limits*, as opposed to the *damages* recoverable by the insured, and the implications thereof. Because we reject the merits of the plaintiffs' claim that the state failed to make a proper offset election under § 38a-334-6 (d) (1) (B) of the regulations, we decline to discuss further the scope of the regulation.

The following additional facts and procedural history are relevant to our resolution of this claim. Prior to the March 6, 2019 hearing, the parties stipulated that (1) Menard had been paid $130,223.63 in workers' compensation benefits, $3583.33 of which had been repaid on a workers' compensation lien, and (2) Connolly had been paid $134,033 in workers' compensation benefits, $3583 of which had been repaid on a workers' compensation lien.

In a separate joint stipulation, filed on February 26, 2019, the parties further stipulated that, at the time of the accident on September 1, 2012, the state maintained a memorandum, dated January 10, 2012, described by the parties as the state's "statement and summary of its auto[mobile] liability insurance coverage, including its self-insured coverage, for the fleet of [s]tate owned vehicles, as adopted by the State of Connecticut Insurance and Risk Management Board for the policy year [December 31, 2011 through December 31, 2012]" (memo). The memo, a copy of which was appended to the stipulation, provided in relevant part that "[i]t is the intent of the [state] in designing and funding its self-insurance program to avail itself of all rights and benefits conferred to insurers under . . . [§] 38a-336, the applicable Regulations of Connecticut State Agencies, including § 38a-334-6, and the case law interpreting those statutes and regulations. The [s]tate specifically reserves the right to limit its liability pursuant to . . . [§] 38a-334-6 (d) [of the regulations] by reducing the limits of its [uninsured/underinsured motorist] coverage by all sums . . . paid or payable under any workers' compensation law . . . ." The parties also stipulated that the memo "is a public record, created by the [state] Insurance and Risk Management Board and maintained in its insurance/risk management files and created in the ordinary course of business," that the state "does not distribute [the memo] to the [s]tate

employees who may operate [s]tate owned vehicles, and that the [s]tate does not distribute [the memo] to the employees' union or union representatives."

In their joint briefs filed in connection with the March 6, 2019 hearing, the plaintiffs argued that the state had not notified its employees, including the plaintiffs, of its election under § 38a-334-6 (d) (1) (B) of the regulations to reduce its underinsured motorist coverage limits by workers' compensation benefits paid or payable to claimants. The plaintiffs posited that, without providing such notice, the state could not avail itself of the permissive offset for workers' compensation benefits authorized under § 38-334-6 (d) (1) (B) of the regulations. In its respective brief, the state argued in relevant part that it maintained the memo, which documented its election of permissive offsets pursuant to § 38-334-6 (d) (1) (B) of the regulations, in accordance with the requirements of *Piersa* v. *Phoenix Ins. Co.*, 273 Conn. 519, 871 A.2d 992 (2005), and that it had no legal obligation to provide notice of said election to the plaintiffs. In concluding that a reduction of the plaintiffs' damages to account for the workers' compensation benefits was appropriate, the court determined that (1) the memo reflected the state's election of permissive offsets under § 38a-334-6 (d) of the regulations, (2) § 38a-334-6 of the regulations does not mandate that a self-insurer must provide notice to claimants of its adoption of permissive regulatory offsets, and (3) no legal authority had been cited requiring the state to distribute the memo to its employees or their union representatives, which, the court observed, was a public record maintained in the state's files, for notification purposes.

The plaintiffs challenge the court's conclusion that the state was entitled, under § 38a-334-6 (d) (1) (B) of the regulations, to offset its liability for uninsured/underinsured motorist benefits by the amount of the workers' compensation benefits paid to the plaintiffs

notwithstanding that the state had failed to provide notice of its election of that permissive regulatory offset. The crux of the plaintiffs' claim is that the state, which is a self-insurer for its underinsured motorist coverage, should not be subject to less stringent requirements than a commercial insurer, which is obligated to include its election of permissive offsets to its underinsured motorist coverage in a written policy provided to its insured. The state argues that, although, as a self-insurer, it must maintain a preaccident writing reflecting its election of permissive regulatory offsets as mandated by *Piersa* v. *Phoenix Ins. Co.*, supra, 273 Conn. 519, it has no legal obligation to provide its employees with notice of said election. We agree with the state.

Our resolution of the plaintiffs' claim requires us to consider whether the statutory and regulatory scheme governing underinsured motorist coverage in Connecticut imposes a requirement on self-insurers to notify claimants of the self-insurers' election of permissive offsets under § 38a-334-6 (d) of the regulations. "The interpretation of statutes and regulations is a question of law over which our review is plenary." *MSW Associates, LLC* v. *Planning & Zoning Dept.*, 202 Conn. App. 707, 726, 246 A.3d 1064, cert. denied, 336 Conn. 946, 251 A.3d 77 (2021).

Section 38a-334 (a) provides in relevant part: "The Insurance Commissioner shall adopt regulations with respect to minimum provisions to be included in automobile liability insurance policies issued after the effective date of such regulations . . . ." Section 38a-336 (a) (1) (A) provides: "Each automobile liability insurance policy shall provide insurance, herein called uninsured and underinsured motorist coverage, in accordance with the regulations adopted pursuant to section 38a-334, with limits for bodily injury or death not less than those specified in subsection (a) of section 14-112, for

the protection of persons insured thereunder who are legally entitled to recover damages because of bodily injury, including death resulting therefrom, from owners or operators of uninsured motor vehicles and underinsured motor vehicles and insured motor vehicles, the insurer of which becomes insolvent prior to payment of such damages."

Section 38a-334-6 (a) of the Regulations of Connecticut State Agencies, promulgated by the insurance commissioner pursuant to § 38a-334 (a), provides in relevant part: "The insurer shall undertake to pay on behalf of the insured all sums which the insured shall be legally entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle because of bodily injury sustained by the insured caused by an accident involving the uninsured or underinsured motor vehicle. . . ." Subsection (d) (1) of § 38a-334-6 of the regulations provides in relevant part: "The limit of the insurer's liability may not be less than the applicable limits for bodily injury liability specified in subsection (a) of section 14-112 of the general statutes, except that the policy may provide for the reduction of limits to the extent that damages have been . . . (B) paid or are payable under any workers' compensation law . . . ."

Section 38a-334-6 (d) (1) of the regulations contemplates the existence of a "policy" reflecting an insurer's election of permissive offsets to its underinsured motorist coverage. " 'Policy' " is defined by statute as "any document, including attached endorsements and riders, purporting to be an enforceable contract, which memorializes in writing some or all of the terms of an insurance contract." General Statutes § 38a-1 (17). As our Supreme Court recognized in *Piersa* v. *Phoenix Ins. Co.*, supra, 273 Conn. 519, "[t]his definition invokes the traditionally understood insurance policy, with the characteristics of an enforceable written contract between insurer and insured, memorializing the terms

of that contract. That definition does not fit comfortably within a self-insurance context because in such a context the insurer and insured are one and the same, and there is no enforceable contract between them." Id., 527. Thus, as the court determined in *Piersa*, a self-insurer, such as the state in this case, must satisfy unique conditions in order to take advantage of the permissive offsets authorized by § 38a-334-6 (d) of the regulations. Id.

In *Piersa*, a police officer brought an action against his self-insured municipal employer seeking uninsured motorist benefits. *Piersa* v. *Phoenix Ins. Co.*, 82 Conn. App. 752, 753–54, 848 A.2d 485 (2004), rev'd, 273 Conn. 519, 871 A.2d 992 (2005). The municipality moved for summary judgment, inter alia, on the ground that the police officer had received workers' compensation benefits in excess of its uninsured motorist coverage. Id., 754–55. In objecting to the motion for summary judgment, the police officer argued that the municipality could not limit its coverage by the amount of workers' compensation benefits that he received because it "failed to exercise its permissive right to do so by means of a writing." Id., 755. The trial court rendered summary judgment for the municipality, which this court affirmed. Id., 755, 768.

After granting certiorari, our Supreme Court reversed this court's judgment, construing § 38a-334-6 (d) (1) of the regulations "to require a municipal self-insurer that wishes to impose permitted limits on its obligations as such to do so by a written document that appropriately provides for reduction of limits." *Piersa* v. *Phoenix Ins. Co.*, supra, 273 Conn. 527. In construing § 38a-334-6 of the regulations, the court determined that the regulation "is not . . . a notice provision; it is a provision that specifies the basic requirement of how an insurer—self or commercial—may limit its liability." Id., 539.

Additionally, in describing the parameters of the "written document" alluded to, the court "emphasize[d] that there is no particular form that a self-insured entity must use in order to take advantage of the permitted reductions in limits. The required written document may be part of its written notice to the [insurance] commissioner of its election to be self-insured, pursuant to [General Statutes] § 38a-371 (c)[14] . . . . Or . . . it may be as part of a written document that the self-insured entity maintains in its files. Nor is it necessary for the document to repeat verbatim the language of the regulation that the [self-insurer] intends to adopt as limits on its coverage. . . . [T]he [self-insurer] could adopt those limits by appropriate language indicating incorporation by reference. The purpose of the document is to require the self-insured entity to fulfill its obligation as insurer by providing a kind of rough equivalence to the obligation of a commercial insurer to limit its coverage by appropriate language in its policy of insurance. Any document that reasonably fulfills that purpose will suffice." (Footnote added.) Id., 531.

In a subsequent decision, our Supreme Court further expounded on *Piersa*. In *Garcia* v. *Bridgeport*, 306 Conn. 340, 51 A.3d 1089 (2012), the court considered the issue of whether, without a preaccident writing requesting lesser coverage limits pursuant to § 38a-336

[14] General Statutes § 38a-371 (c) provides: "Subject to approval of the Insurance Commissioner the security required by this section, may be provided by self-insurance by filing with the commissioner in satisfactory form: (1) A continuing undertaking by the owner or other appropriate person to perform all obligations imposed by this section; (2) evidence that appropriate provision exists for the prompt and efficient administration of all claims, benefits, and obligations provided by this section; and (3) evidence that reliable financial arrangements, deposits or commitments exist providing assurance for payment of all obligations imposed by this section substantially equivalent to those afforded by a policy of insurance that would comply with this section. A person who provides security under this subsection is a self-insurer. A municipality may provide the security required under this section by filing with the commissioner a notice that it is a self-insurer."

(a) (2),[15] a self-insured municipality was deemed to provide unlimited underinsured motorist coverage. Id., 343. The court held that "a self-insurer is deemed to provide the minimum statutory underinsured motorist coverage" and, thereby, "[a] self-insurer need not prove the existence of a document requesting the minimum statutory coverage limits." Id., 371. In so holding, the court distinguished *Piersa*, observing that the matter before it concerned § 38a-336 (a) (2), "a statutory notice provision requiring an insurer to obtain the informed consent of the insured"; id., 353; whereas *Piersa* addressed § 38a-334-6 of the regulations, which is "not such a notice provision, [but rather] a provision that specifies the basic requirement of how an insurer—self or commercial—may limit its liability." (Internal quotation marks omitted.) Id. The court clarified that it was leaving "undisturbed [its] conclusion in *Piersa* that, to take advantage of permissible offsets provided by § 38a-334-6 (d) of the [regulations], a self-insurer must maintain a written document, either in its files or with the commissioner of insurance." Id., 370.

In a footnote in *Garcia*, our Supreme Court made the following additional observations regarding *Piersa*: "The [municipal] defendant has not asked us to reconsider our holding in *Piersa*. Therefore, although we conclude that the reasoning of *Piersa* cannot be

[15] General Statutes § 38a-336 (a) (2) provides in relevant part: "Notwithstanding any provision of this section, each automobile liability insurance policy issued or renewed on and after January 1, 1994, shall provide uninsured and underinsured motorist coverage with limits for bodily injury and death equal to those purchased to protect against loss resulting from the liability imposed by law unless any named insured requests in writing a lesser amount, but not less than the limits specified in subsection (a) of section 14-112. Such written request shall apply to all subsequent renewals of coverage and to all policies or endorsements that extend, change, supersede or replace an existing policy issued to the named insured, unless changed in writing by any named insured. No such written request for a lesser amount shall be effective unless any named insured has signed an informed consent form . . . ."

extended to § 38a-336 (a) (2), we leave for another day both reconsideration of the distinction we made in *Piersa* between that statute and § 38a-334-6 (d) (1) (B) of the [regulations], and the application of our 'rough equivalence' doctrine for self-insurers to justify a prior writing requirement. We note that the 'rough equivalence' achieved by requiring a self-insurer to elect regulatory limits of liability in writing is unlike the other applications of this doctrine that we examine in this opinion. Under *Piersa*, a self-insurer is faced with a pro forma administrative burden, but there is no notice to claimants, such as the plaintiff in this case, and no balancing of cost against benefit by the insured. In the individual commercial insurance context, the policy language requirement serves both as a way for insurers to limit liability and as a way for an insured, as the ultimate potential claimant for uninsured motorist coverage, to provide consent to the cost and benefit tradeoff implied by the election of offsets." Id., 358 n.15.

Our Supreme Court's analyses in *Piersa* and *Garcia* are instructive to our resolution of the plaintiffs' claim. Our Supreme Court expressly construed § 38a-334-6 of the regulations *not* to be a notice provision; rather, the court determined that the regulation serves the "substantive function" of "specif[ying] the basic requirement of how an insurer—self or commercial—may limit its liability." (Internal quotation marks omitted.) *Garcia* v. *Bridgeport*, supra, 306 Conn. 361; see also *Piersa* v. *Phoenix Ins. Co.*, supra, 273 Conn. 539. In addition, the court explained that the written document required for a self-insurer to elect a permissive regulatory offset "may be part of [the self-insurer's] written notice to the [insurance] commissioner of its election to be self-insured . . . [o]r . . . it may be as part of a written document that the self-insured entity maintains in its files." *Piersa* v. *Phoenix Ins. Co.*, supra, 531; see also *Garcia* v. *Bridgeport*, supra, 370 ("to take advantage

of permissible offsets provided by § 38a-334-6 (d) of the [regulations], a self-insurer must maintain a written document, either in its files or with the commissioner of insurance"). The court made no mention of self-insurers providing claimants with copies of such written documents or otherwise notifying claimants of the election of permissive regulatory offsets. In fact, the court explicitly stated in *Garcia* that "[u]nder *Piersa*, a self-insurer is faced with a pro forma administrative burden, *but there is no notice to claimants* . . . ." (Emphasis added.) *Garcia* v. *Bridgeport*, supra, 358 n.15.

Informed by *Piersa* and *Garcia*, we conclude that, as a matter of law, the state was not required to notify its employees, including the plaintiffs, of its election, pursuant to § 38a-334-6 (d) (1) (B) of the regulations, to offset its liability for uninsured/underinsured motorist coverage by the amount of workers' compensation benefits paid to the plaintiffs in order to avail itself of that permissive regulatory offset. Rather, it was sufficient for the state to maintain the memo, containing said election, in its files as a public record. Accordingly, the plaintiffs' claim fails.

III

Turning to the state's cross appeal, the state claims that the trial court committed error in declining to reduce the plaintiffs' damages by the sums that they had recovered pursuant to the dram shop act.[16] Specifically, the state asserts that (1) the court incorrectly construed *American Universal Ins. Co.* v. *DelGreco*,

[16] General Statutes § 30-102 provides in relevant part: "If any person, by such person or such person's agent, sells any alcoholic liquor to an intoxicated person, and such purchaser, in consequence of such intoxication, thereafter injures the person or property of another, such seller shall pay just damages to the person injured, up to the amount of two hundred fifty thousand dollars, or to persons injured in consequence of such intoxication up to an aggregate amount of two hundred fifty thousand dollars, to be recovered in an action under this section . . . ."

205 Conn. 178, 530 A.2d 171 (1987), to prohibit the reduction of the plaintiffs' damages to account for their dram shop recoveries, and (2) the court's failure to deduct the plaintiffs' dram shop recoveries from their damages resulted in the plaintiffs being compensated twice for the same injuries in contravention of the common-law prohibition against double recovery. Limiting our analysis to the portion of the state's cross appeal directed to Connolly, we agree.[17]

The following additional facts and procedural history are relevant to our resolution of this claim. Prior to the March 6, 2019 hearing, the parties stipulated that Connolly had received $83,332 from an establishment under the dram shop act. In their principal joint brief filed in connection with the March 6, 2019 hearing, the plaintiffs argued that *DelGreco* prohibited the limitation of an insurer's underinsured motorist coverage to account for sums received by the insured under a dram shop policy. In its respective brief, the state argued in

[17] In part II B of this opinion, we conclude that the court properly reduced the plaintiffs' damages by the sums of workers' compensation benefits that the plaintiffs had received. Taking into account the workers' compensation benefits, along with the additional sums stipulated to by the parties other than the dram shop payments, the court reduced Menard's damages to zero dollars and Connolly's damages to $32,905.67. Because Menard's damages cannot be further reduced, we consider only whether the court improperly declined to deduct Connolly's dram shop recovery from his damages.

Additionally, although Zdrojeski has withdrawn his portion of the joint appeal, as amended; see footnote 1 of this opinion; the state has not withdrawn its cross appeal as to Zdrojeski, leaving the cross appeal pending against him. See Practice Book § 61-8 ("[e]xcept where otherwise provided, the filing and form of cross appeals, extensions of time for filing them, and all subsequent proceedings shall be the same as though the cross appeal were an original appeal"); *Schurman* v. *Schurman*, 188 Conn. 268, 270, 449 A.2d 169 (1982) ("withdrawal of an appeal does not preclude continued prosecution of a previously filed cross appeal"). In its appellate briefs, however, the state has briefed its claim on cross appeal only with respect to Menard and Connolly. Thus, we deem the state's claim on cross appeal as to Zdrojeski to be abandoned, and, on that basis, we affirm the judgment rendered in favor of Zdrojeski.

relevant part that Connolly's damages should be reduced by the amount of his dram shop recovery to prevent him from receiving a double recovery. The state further argued that *DelGreco* was inapposite because the insured in that case was not compensated twice for the same injury. In declining to subtract Connolly's dram shop recovery from his damages, the court concluded that it was bound by the holding in *DelGreco* that an insurer's underinsured motorist coverage could not be reduced by sums obtained by the insured under a dram shop policy.

The state contends that the court's reliance on *DelGreco* was misplaced because, unlike the present case, the insured in *DelGreco* did not receive a double recovery. The plaintiffs maintain that *DelGreco* is dispositive of the state's claim. We conclude that *DelGreco* does not govern the precise issue before us.

A brief summary of *DelGreco* is apropos. In *DelGreco*, the decedent died from injuries sustained after being struck by a motor vehicle. *American Universal Ins. Co.* v. *DelGreco*, supra, 205 Conn. 179. The parties stipulated that the decedent's estate sustained damages in excess of $100,000. Id., 180. Following the accident, the estate was paid (1) the $20,000 limit under the tortfeasor's motor vehicle liability policy and (2) the $20,000 limit under the dram shop policy of an establishment against which the estate had pursued a claim under the dram shop act. Id., 179–80. Thereafter, the estate submitted a claim for underinsured motorist benefits to the decedent's automobile insurer, which had issued a policy to the decedent providing underinsured motorist coverage in the amount of $40,000 per accident and basic reparation benefits in the amount of $5000. Id., 180. The parties stipulated that the insurer was entitled to a credit for (1) the $20,000 liability insurance payment under the tortfeasor's policy and (2) a $2335.80 payment that the insurer had made in basic reparation benefits,

but the parties disputed whether the insurer was entitled to a setoff for the $20,000 dram shop payment. Id.

The dispute was submitted to a panel of arbitrators, which entered an award in the estate's favor on the ground that, pursuant to the state statutory and regulatory scheme governing underinsured motorists, the insurer was not entitled to a setoff for the dram shop payment. Id., 181–83. The Superior Court subsequently confirmed the arbitration award. Id., 183. The insurer appealed to this court, and our Supreme Court transferred the appeal to itself. Id., 183–84.

On appeal, our Supreme Court affirmed the Superior Court's judgment. Id., 199. The court first considered the language of General Statutes (Rev. to 1983) § 38-175c (b) (1), as amended by Public Acts 1983, No. 83-267, § 2, and No. 83-461 (now § 38a-336 (b)), which provides in relevant part that "[a]n insurance company shall be obligated to make payment to its insured up to the limits of the policy's uninsured motorist coverage *after the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident* have been exhausted by payment of judgments or settlements . . . ." (Emphasis added.) *American Universal Ins. Co.* v. *DelGreco*, supra, 205 Conn. 192. The court concluded that dram shop policies did not constitute " 'bodily injury liability bonds or insurance policies' " within the meaning of the statute. Id., 195–96. The court next considered § 38-175a-6 (d) (now § 38a-334-6 (d)) of the Regulations of Connecticut State Agencies, which provides in relevant part that "[t]he limit of the insurer's liability may not be less than the applicable limits for bodily injury liability specified in subsection (a) of section 14-112 of the general statutes, except that the policy may provide for the reduction of limits to the extent that damages have been . . . paid by or on behalf of *any person responsible for the injury* . . . ." (Emphasis added.) *American Universal*

Ins. Co. v. *DelGreco*, supra, 182 n.4, 197–98. The court concluded that a dram shop was not an entity " 'responsible for the injury' " under the regulation and that the regulation did not expressly authorize reductions of coverage limits for dram shop payments. Id., 198–99. In sum, the court held that the statute and the regulation "do not allow an insurer to reduce its liability for underinsured motorist coverage by an amount of money received by the insured pursuant to a dram shop policy." Id., 199.

It is apparent that the issue addressed in *DelGreco* is distinct from the inquiry presently before us. In *DelGreco*, the court concluded that, under the statutory and regulatory scheme governing underinsured motorists in Connecticut, an insurer is not entitled to offset a dram shop payment against the limit of its underinsured motorist coverage. Id. The question in the present case, however, is whether a claimant's damages can be reduced by the sum of a dram shop payment in order to prevent a double recovery as proscribed by common law. *DelGreco* did not contemplate this discrete issue. Indeed, the court in *DelGreco* acknowledged that "the sums due the decedent's estate, even if all were to be collected, [were] far short of the damages suffered," thereby foreclosing the possibility of a double recovery in that case. Id., 198. Thus, the trial court improperly relied on *DelGreco* to determine that the dram shop payment received by Connolly was not deductible from his damages.

Having concluded that *DelGreco* is inapposite, we turn to the state's contention that, without a reduction of Connolly's damages to account for his dram shop recovery, Connolly was compensated twice for the same injury in violation of the common-law rule precluding double recovery. We agree.[18]

[18] Our conclusion that *DelGreco* is inapposite and that Connolly would obtain an impermissible double recovery without a reduction of his damages by the sum of his dram shop recovery is in accord with commentary in

Damages recovered under the dram shop act are compensatory. See *Gionfriddo* v. *Gartenhaus Cafe*, 15 Conn. App. 392, 399–400, 546 A.2d 284 (1988), aff'd, 211 Conn. 67, 557 A.2d 540 (1989). Thus, the state's claim requires us to "confront the legal question of whether a plaintiff is entitled to recover compensatory damages twice for the same conduct. Because such a determination involves a question of law, our review is plenary." *Rowe* v. *Goulet*, 89 Conn. App. 836, 848, 875 A.2d 564 (2005).

"[T]he rule precluding double recovery is a simple and time-honored maxim that [a] plaintiff may be compensated only once for his just damages for the same injury. . . . Connecticut courts consistently have upheld and endorsed the principle that a litigant may recover just damages for the same loss only once. The social policy behind this concept is that it is a waste of society's economic resources to do more than compensate an injured party for a loss and, therefore, that the judicial machinery should not be engaged in shifting a loss in order to create such an economic waste."

"the leading treatise regarding Connecticut's uninsured [and underinsured] motorist law . . . ." *Vitti* v. *Allstate Ins. Co.*, 245 Conn. 169, 179 n.9, 713 A.2d 1269 (1998); see J. Berk & M. Jainchill, Connecticut Law of Uninsured and Underinsured Motorist Coverage (4th Ed. 2010). In the treatise, the authors observe that, in *DelGreco*, "[t]he claimant . . . was not made 'whole' and, clearly, no 'double recovery' to the estate was present. Although the *limits* of coverage were not reduced (because the dram shop was not deemed to be an 'automobile tortfeasor' under the regulation), it would certainly appear reasonable that the amount of *damages*, if duplicated, should be reduced accordingly." (Emphasis in original.) J. Berk & M. Jainchill, supra, § 4.9.D, p. 464 n.91; see also id., § 6.2, p. 510 n.11 ("The reduction of coverage *limits* and the reduction of *damages* are distinct issues, turning on different concepts. The reduction of coverage limits is unique to the [uninsured/underinsured motorist] context while the reduction of damages to prevent a double recovery is, it is submitted, a universal concept." (Emphasis in original.)); id., 511–12 (observing that, pursuant to *DelGreco*, moneys received from nonautomobile tortfeasor will not reduce insurer's coverage obligation, but that "the damage award should be reduced by such payments to the extent that a 'double recovery' is present").

(Internal quotation marks omitted.) *Mahon* v. *B.V. Unitron Mfg., Inc.*, 284 Conn. 645, 663, 935 A.2d 1004 (2007).

The legal principle prohibiting double recovery is ingrained in this state's underinsured motorist laws. Section 38a-336 (b) provides in relevant part that "[a]n insurance company shall be obligated to make payment to its insured up to the limits of the policy's uninsured and underinsured motorist coverage after the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident have been exhausted by payment of judgments or settlements, *but in no event shall the total amount of recovery from all policies . . . exceed the limits of the insured's uninsured and underinsured motorist coverage. . . .*" (Emphasis added.) Our Supreme Court has described § 38a-336 (b) as "emphasiz[ing]" the "policy objective of adhering to the time-honored rule that an injured party is entitled to full recovery only once for the harm suffered." (Internal quotation marks omitted.) *Vitti* v. *Allstate Ins. Co.*, 245 Conn. 169, 186 and n.17, 713 A.2d 1269 (1998).

As our Supreme Court has further explained, "[i]t has often been stated that [t]he public policy established by [§ 38a-336] is that every insured is entitled to recover for the damages he or she would have been able to recover if the [under]insured motorist had maintained [an adequate] policy of liability insurance. . . . However, [t]he statute does not require that [under]insured motorist coverage be made available when the insured has been otherwise protected . . . . Nor does the statute provide that the [under]insured motorist coverage shall stand as an independent source of recovery for the insured, or that the coverage limits shall not be reduced under appropriate circumstances. The statute merely requires that a certain minimum level of protection be provided for those insured under automobile liability insurance policies . . . ." (Citations omitted;

internal quotation marks omitted.) *Guarino* v. *Allstate Property & Casualty Ins. Co.*, 315 Conn. 249, 255–56, 105 A.3d 878 (2015). Moreover, "General Statutes § 38a-335 (c), which sets forth minimum policy provisions for automobile liability policies, provides in part that '[i]n no event shall any person be entitled to receive duplicate payments for the same element of loss.' " *Fahey* v. *Safeco Ins. Co. of America*, 49 Conn. App. 306, 310, 714 A.2d 686 (1998).

Our Supreme Court's decision in *Gionfriddo* v. *Gartenhaus Cafe*, 211 Conn. 67, 557 A.2d 540 (1989), provides additional guidance. In *Gionfriddo*, the decedent died from injuries sustained in a collision with a motor vehicle operated by an intoxicated driver. Id., 69. The decedent's estate recovered $1,187,763 in compensatory, exemplary, and treble damages in an action filed against the tortfeasor and the lessor of the tortfeasor's motor vehicle. Id. Thereafter, the estate commenced an action against the establishment where the tortfeasor had imbibed alcohol prior to the collision, asserting one claim pursuant to the dram shop act and another claim of wanton and reckless misconduct.[19] Id., 69–70. The establishment moved for summary judgment on those claims, contending that satisfaction of the judgment in the estate's preceding action against the tortfeasor and the lessor for the same injuries precluded the estate's recovery in the current action. Id., 70. The trial court denied the motion for summary judgment. Id. Following an ensuing jury trial, the jury returned a verdict for the establishment, and the court rendered judgment in its favor. Id. This court affirmed the judgment, although it determined that the trial court had improperly denied the establishment's motion for summary judgment. Id.

[19] The estate also asserted negligence and public nuisance claims, but those claims were stricken and judgment was rendered thereon in favor of the establishment. *Gionfriddo* v. *Gartenhaus Cafe*, supra, 211 Conn. 69.

After granting certiorari, our Supreme Court affirmed this court's decision, "dispos[ing] of th[e] case by paying heed to the simple and time-honored maxim that [a] plaintiff may be compensated only once for his just damages for the same injury." (Internal quotation marks omitted.) Id., 71. In so ruling, the court observed that (1) the damages claimed by the estate in the dram shop action were identical to those recovered in the preceding action, and (2) the estate never claimed that the verdict for compensatory damages in the preceding action was insufficient. Id., 75–76.

Here, the parties stipulated that, among other sums received by Connolly "on account of the personal injuries sustained in the motor vehicle collision of September 1, 2012," Connolly recovered $83,332 from an establishment under the dram shop act. Without a reduction in his damages accounting for his dram shop recovery, Connolly was compensated twice for the same injury in contravention of the common-law rule precluding double recovery. See also General Statutes § 38a-335 (c).

In sum, the court committed error in declining to reduce Connolly's damages by the sum of his dram shop recovery. Taking into account the $83,332 dram shop payment that Connolly received, the court should have further reduced Connolly's damages from $32,905.67 to zero dollars.

IV

At this juncture, we observe that, as a result of our conclusions in parts II and III of this opinion, neither plaintiff is entitled to recover damages against the state. Under these circumstances, on remand, judgments must be rendered in favor of the state in the plaintiffs' respective cases. See *Fileccia* v. *Nationwide Property & Casualty Ins. Co.*, 92 Conn. App. 481, 496, 886

A.2d 461 (2005) (directing that, on remand, if sum recovered by insured from tortfeasor exceeded insured's damages, then trial court should reduce insured's damages to zero and render judgment in favor of insurer), cert. denied, 277 Conn. 907, 894 A.2d 987 (2006); *Hunte* v. *Amica Mutual Ins. Co.*, 68 Conn. App. 534, 536, 539, 792 A.2d 132 (2002) (concluding that trial court properly rendered judgment for insurer when jury returned verdict for insured in amount less than total of insured's recovery from tortfeasor and insurer's payment of basic reparation benefits); *Fahey* v. *Safeco Ins. Co. of America*, supra, 49 Conn. App. 312 (concluding that trial court properly rendered judgment for insurer when jury returned verdict for insured in amount less than insured's recovery from tortfeasor). Accordingly, with respect to Menard, in favor of whom the court rendered judgment notwithstanding that his damages had been reduced to zero dollars, we must reverse the judgment and remand the matter with direction to render judgment for the state. Similarly, with respect to Connolly, we must reverse the judgment and remand the matter with direction to render judgment for the state.

The original joint appeal is dismissed for lack of final judgments; as to the amended joint appeal and the cross appeal, the judgments as to Scott Menard and Darren Connolly are reversed and the cases are remanded with direction to render judgments in favor of the state consistent with this opinion, and the judgment as to Robert Zdrojeski is affirmed.

In this opinion the other judges concurred.

S. B-R. *v.* J. D.*
(AC 43256)

Alvord, Alexander and Eveleigh, Js.

Syllabus

The plaintiff, a college student, obtained an order of civil protection as to the defendant, a fellow student. The trial court found that the plaintiff, who had been subjected to disturbing comments by the defendant via e-mail and text messages as well as in person, including that he wanted to jump on her back in rage, had a reasonable fear for her physical safety. Accordingly, the court issued the order of civil protection as to the defendant pursuant to statute (§ 46b-16a). On the defendant's appeal to this court, *held* that the trial court abused its discretion in issuing the order of civil protection: the court failed to conduct the necessary analysis when it applied only the subjective standard to the plaintiff's apprehension of fear, rather than the required subjective-objective standard of reasonable fear, and improperly determined that the plaintiff's subjective apprehension was sufficient to make the necessary determination for stalking pursuant to § 46b-16a; moreover, there was insufficient evidence for the court to conclude that the defendant would continue to stalk or to commit acts designed to intimidate or retaliate against the plaintiff, as the plaintiff testified that there had been no communications between the defendant and her for several months preceeding the hearing, the defendant testified that he had withdrawn from the college for a semester and had walked away without approaching or speaking with the plaintiff the only time he saw her, and the testimony that both students would be returning as students to the college did not alone establish reasonable grounds to find that the defendant would continue to stalk the plaintiff.

(*One judge dissenting*)

Argued April 7—officially released October 19, 2021

Procedural History

Application for an order of civil protection, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Edward R. Karazin, Jr.*, judge trial referee, rendered judgment granting the

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018); we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

application, from which the defendant appealed to this court. *Reversed*; *judgment directed.*

Stephen A. Lebedevitch, for the appellant (defendant).

Harold R. Burke, for the appellee (plaintiff).

Opinion

ALEXANDER, J. The defendant, J. D., appeals from the judgment of the trial court granting the application for an order of civil protection for the plaintiff, S. B-R. On appeal, the defendant claims that the court erred in finding that there were reasonable grounds to believe that he committed acts of stalking and would continue to stalk the plaintiff. We agree with the defendant that the court abused its discretion when it issued the order of civil protection because (1) it did not apply an objective standard in its determination of "reasonable fear" on the first element of stalking, and (2) there was insufficient evidence on the second element to conclude that the defendant would continue to stalk or to commit acts designed to intimidate or retaliate against the plaintiff. Accordingly, we reverse the judgment of the trial court and remand this case with direction to vacate the order of civil protection.

The following facts and procedural history are relevant to this appeal. The parties were classmates at a community college. Text messages and e-mails between the plaintiff and the defendant, sent between February 28 and March 3, 2019, demonstrate the relationship between the parties prior to late February, 2019. In an e-mail sent to the plaintiff during this period, the defendant wrote that, "[i]n the fall when you asked me to help you study I poured in hours many into preparation." In a text message sent from the plaintiff to the defendant she indicated, "I'm sorry [J. D.] but I think you just blew the friendship we had." After the

defendant responded with multiple text messages to the plaintiff, apologizing, the defendant wrote, "I hate myself for this sorry. I'm shit. Good luck on your exams." When the plaintiff sent another text where she again indicated that she did not want to be "friends," the defendant responded to this text: "[Okay]. I didn't think you'd read the e-mails. We are done. Please read the cheat sheet I sent you."

Between February 28 and March 3, 2019, the defendant made disturbing comments to the plaintiff in person, over e-mail, and through text messages. Specifically, on February 28, 2019, the defendant made a comment to the plaintiff regarding her breasts, and, on March 1, 2019, the defendant sent an e-mail to the plaintiff stating: "Honestly I want to jump on your back a little a rage and that would be dumb." Thereafter, the plaintiff falsely told the defendant that she was going to get married so that he would stop communicating with her. On March 3, 2019, the defendant sent the plaintiff an "absurd amount of e-mails," complaining, in part, about how the plaintiff's marriage would "interfere between us"[1] and also a text message wherein he expressed suicidal thoughts. After March 3, 2019, there were no communications of any nature between the parties.

On or about July 8, 2019, the plaintiff filed an application for an order of civil protection, pursuant to General Statutes § 46b-16a.[2] A hearing on the application was

[1] The e-mail from the defendant to the plaintiff reads: "I'm sorry. I didn't mean to act rude. I'm sorry for being a bad friend. I was self-conscious because I wasn't a great friend for you, which is my fault. I believed our friendship would've ended anyways, because maybe marriage would've separated us."

[2] The plaintiff had attempted twice prior to serve the defendant with notice of the application for a civil protection order, however, those attempts failed because the defendant could not be located. The plaintiff was able to serve the defendant on her third attempt with the assistance of a private investigator.

held on July 22, 2019. At the conclusion of the hearing, the court issued an oral decision granting the order of civil protection. The court's decision reads:

"The Court: Okay. I remember in law school—and I'll date myself when I give you this example—but the question was, could Whistler's Mother assault Muhammad Ali? He was our golden person, Olympic champion heavyweight boxer, and, Whistler's Mother was a little old [lady] in a portrait, rocking in a chair. And, the quick answer was how could that be? And, the test of an assault did not require physical contact, the apprehension was enough. So, if there was apprehension by Muhammad Ali from her then, that would be an assault. And, the test here [is] not what [the defendant's] thoughts are and his actions, but rather [the plaintiff's] apprehension.

"Statute is very clear that indicates that such person causes reasonable fear—the conduct of the defendant causes reasonable fear for the physical safety. So she's made it very clear she's very apprehensive, her conduct on the stand indicated she's reliving some of these things. *Things which depending on your level of threshold and thickness of skin become more or less significant*. But, it's very clear that this is very upsetting to her, and it's affected her ability to carry on life's activities.

"So the court finds that a restraining order will issue. The [defendant] shall not assault, threaten, abuse, harass, follow, interfere with, or stalk her. The [defendant] shall stay away from her home or wherever she shall reside. The [defendant shall] not contact in any matter, including written, electronic, or telephone contact. And not contact home, workplace, or others with whom the contact would likely cause annoyance or alarm to her. I'm going to order the [defendant] stay 100 [yards] away from her." (Emphasis added.)

On July 29, 2019, the defendant filed a motion to reargue pursuant to Practice Book § 11-12. The court summarily denied the defendant's motion. This appeal followed.[3]

On appeal, the defendant argues that the court abused its discretion in issuing the order of civil protection because "the [c]ourt failed to find that the actions of the defendant met the elements of the stalking statute" and because the court "failed to find that [the defendant's] actions were likely to continue in the future." In particular, the defendant argues that the court improperly focused on the plaintiff's "apprehension," while ignoring the continuation requirement set out in § 46b-16a (b). We agree with the defendant that the court abused its discretion in issuing the order of civil protection because the court did not apply an objective standard in finding that the plaintiff's fear was reasonable and because there was insufficient evidence to conclude that the defendant would continue to stalk or to commit acts designed to intimidate or retaliate against the plaintiff.

"We begin our analysis by setting forth the relevant legal principles and applicable standard of review. We apply the same standard of review to civil protection orders under § 46b-16a as we apply to civil restraining orders under General Statutes § 46b-15. Thus, we will not disturb a trial court's orders unless the court has abused its discretion or it is found that it could not

[3] Following the filing of this appeal, the defendant filed a motion requesting the court to enforce an automatic stay. On August 23, 2019, after hearing arguments from both the defendant and the plaintiff, the court terminated the stay. On August 27, 2019, the defendant filed a motion for review of the termination of the stay with this court, which granted review but denied the requested relief. On August 27, 2019, the defendant filed a motion for articulation, which the trial court denied on December 9, 2019. The defendant filed a motion for review of the denial of his motion for articulation with this court, which granted review but denied the requested relief.

reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion . . . we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Our deferential standard of review, however, does not extend to the court's interpretation of and application of the law to the facts. It is axiomatic that a matter of law is entitled to plenary review on appeal." (Internal quotation marks omitted.) *C. A.* v. *G. L.*, 201 Conn. App. 734, 738–39, 243 A.3d 807 (2020).

Section 46b-16a provides in relevant part: "(a) Any person who has been the victim of . . . stalking may make an application to the Superior Court for relief under this section . . . . (b) . . . If the court finds that there are reasonable grounds to believe that the respondent has committed acts constituting grounds for issuance of an order under this section and will continue to commit such acts or acts designed to intimidate or retaliate against the applicant, the court, in its discretion, may make such orders as it deems appropriate for the protection of the applicant. . . ."

In order for a court to issue an order of civil protection under § 46b-16a on the basis of stalking, it must find that there are reasonable grounds to believe that the defendant both stalked the plaintiff and will continue to commit such acts. See *C. A.* v. *G. L.*, supra, 201 Conn. App. 740; see also *Kayla M.* v. *Greene*, 163 Conn. App. 493, 506, 136 A.3d 1 (2016) ("an applicant for a civil protection order on the basis of stalking pursuant to § 46b-16a must prove only that there are

reasonable grounds to believe that every element is met and that such conduct will continue" (internal quotation marks omitted)). If a court issues an order without a proper finding or without sufficient evidence to support such a finding, as to either stalking or the continuation of such acts, it will constitute an abuse of discretion. See *C. A.* v. *G. L.*, supra, 739.

We begin with the trial court's determination on the first element of the statute, specifically, that the defendant's conduct caused the plaintiff to reasonably fear for her safety. We conclude, after a thorough review of the record, that the court failed to conduct the necessary analysis when it applied only the subjective standard of apprehension of fear, taken from a definition of assault, rather than the required subjective-objective standard of reasonable fear.

Section 46b-16a (a) defines stalking as "two or more wilful acts, performed in a threatening, predatory or disturbing manner of: Harassing, following, lying in wait for, surveilling, monitoring or sending unwanted gifts or messages to another person directly, indirectly or through a third person, by any method, device or other means, that causes such person to reasonably fear for his or her physical safety." "The standard to be applied in determining the reasonableness of the victim's fear in the context of the crime of stalking is a subjective-objective one. . . . As to the subjective test, the situation and the facts must be evaluated from the perspective of the victim, i.e., did she in fact fear for her physical safety. . . . If so, that fear must be objectively reasonable, i.e., a reasonable person under the existing circumstances would fear for his or her personal safety."[4] (Citations omitted; internal quotation marks omitted.) *C. A.* v. *G. L.*, supra, 201 Conn. App. 740.

[4] A previous revision of § 46b-16a had no subjective requirement, only requiring that a defendant's conduct cause a "reasonable person to fear." See *C. A.* v. *G. L.*, supra, 201 Conn. App. 740 n.6.

In its analysis, the court began with an anecdote, asking, "could Whistler's Mother assault Muhammad Ali?" The court provided the hypothetical analogy in order to set up a test of subjective apprehension in relation to the defendant's actions, rather than applying the subjective-objective standard required by § 46b-16a (a). See *C. A.* v. *G. L.*, supra, 201 Conn App. 740. In applying this logic, the court diluted the necessary finding that the "reasonable fear" be both subjectively and objectively reasonable and, instead, determined that the plaintiff's subjective "apprehension" was sufficient to make the necessary determination for stalking. The court continued to use only a subjective standard wherein it expressly found that "it's very clear that this is very upsetting to her." Further, that use was apparent when the court stated that the plaintiff's apprehension is dependent "on [a person's] level of threshold and thickness of skin . . . ."

Although the trial court's discussion can be construed as finding that the plaintiff was subjectively in fear for her safety, the trial court failed to determine whether the plaintiff's "apprehension" was *objectively* reasonable. As a result of the court's failure to apply the correct standard, it abused its discretion in issuing the protective order.

In addition to applying an improper analysis on the reasonable fear prong, the court failed to make a finding that the defendant would continue to commit acts of stalking against the plaintiff. At the hearing on the plaintiff's application for an order of civil protection in July, 2019, the plaintiff presented no evidence that the defendant would continue to stalk her. The plaintiff testified that there had been no communications between the defendant and her since March 3, 2019. The defendant testified that at some point after March 3, 2019, he dropped all of his classes and withdrew from the community college for that semester. He further testified

that in mid-April, 2019, he saw the plaintiff from a distance on the campus and walked away without contacting or communicating with her. Moreover, the defendant clearly conveyed to the plaintiff by both text messages and e-mails that he understood that their friendship was over and that he would cease communication with her. Although there was testimony that both parties would be returning as students to the community college in the fall of 2019, this evidence alone does not establish reasonable grounds for the court to find that the defendant would continue to commit such acts of stalking or acts designed to intimidate or retaliate against the plaintiff.

Although we recognize that "the court is presumed to know the law and apply it correctly to its legal determinations"; *Iacurci* v. *Sax*, 139 Conn. App. 386, 396, 57 A.3d 736 (2012), aff'd, 313 Conn. 786, 99 A.3d 1145 (2014); the court's decision is devoid of the necessary finding that the defendant would continue to stalk the plaintiff. Moreover, the court made no reference to any testimony or exhibits in support of its findings. The court's singular mention of "statute" relates only to whether the defendant's actions caused the plaintiff "reasonable fear." Thus, the court's analysis is limited to only the first element of whether the defendant "stalked" the plaintiff and does not reveal that the court considered the second element, as required by the relevant statute.

In *Kayla M.* v. *Greene*, supra, 163 Conn. App. 506, this court explained that "an applicant for a civil protection order on the basis of stalking pursuant to § 46b-16a must prove only that there are '*reasonable grounds to believe*' *that every element is met and that such conduct will continue*." (Emphasis added.) In the present case, the court failed to make the requisite findings pursuant to the statute by limiting its analysis to "reasonable fear"—an analysis that was itself incorrect.

The dissent concludes that "[the defendant's] testimony that he never thought about hurting anyone else is not credible" and that this overall lack of credibility supports a finding of continuing conduct. The dissent makes this credibility determination even though the trial court made no findings as to the credibility of the defendant. Rather, the trial court was clear that "the test [it applied] here [was] not what [the defendant's] thoughts are and his actions, but rather [the plaintiff's] apprehension." The trial court, therefore, made no determination as to the defendant's thoughts, actions, or credibility and found such considerations to be irrelevant.

Given the dearth of evidence on the critical factual question of whether the defendant would continue to stalk the plaintiff, we conclude that the court could not reasonably find that the continuing conduct element of § 46b-16a was proven. We therefore conclude that the court abused its discretion in issuing an order of civil protection for the plaintiff against the defendant.

The judgment is reversed and the case is remanded with direction to vacate the order of civil protection.

In this opinion, ALVORD, J., concurred.

EVELEIGH, J., dissenting. I respectfully dissent. I disagree with the conclusion of the majority that (1) the trial court did not apply an objective standard to the first element of stalking in its determination of "reasonable fear" and (2) there is insufficient evidence to support a finding that it was reasonably likely that the defendant, J. D., would continue to stalk or to commit acts designed to intimidate or retaliate against the plaintiff, S. B-R., as required for an order of civil protection pursuant to General Statutes § 46b-16a. To the contrary, I would conclude that (1) the trial court correctly followed the statute, and (2) there is sufficient evidence

in the record to support the trial court's decision granting the plaintiff's application for an order of civil protection pursuant to § 46b-16a. Accordingly, I would affirm the judgment of the trial court.[1]

I begin by setting forth the factual background of this action, as gleaned from the record. At all relevant times, the plaintiff and the defendant were students at a community college, where they were both enrolled in the college's nursing program. On July 8, 2019, the plaintiff filed an application for an order of civil protection. A hearing was held on the plaintiff's application on July 22, 2019, at which both the plaintiff and the defendant testified.

The plaintiff testified that she knew the defendant from school and that, on or about February 28, 2019, the defendant had sent her an "absurd amount of e-mails stating that, first, my marriage would have intervene[d] with things between us . . . ." When asked whether she was married, the plaintiff explained that she was not and that, in an effort to get the defendant to stop communicating with her, she had lied to the defendant and told him that she was getting married. When asked whether the defendant had made any statements to her that made her fear for her personal safety, the plaintiff responded yes. Specifically, she testified about an e-mail that the defendant had sent her on or about March 1, 2019, which stated: "Honestly, I want to jump on your back a little a rage and that would be dumb." The plaintiff further testified that, on March 3, 2019, the defendant sent her text messages about being suicidal, and that, on February 28, 2019, while in the presence of another person, he had made comments about her breasts that made her fearful of his conduct. With

[1] Our Supreme Court has not yet ruled on the issue of whether a § 46b-16a protective order may be granted when (1) there is prior evidence of criminal stalking, (2) there is a threat of a future criminal act, and (3) the defendant's testimony is not credible.

respect to the comments about her breasts, the plaintiff stated that the defendant "was being cocky and . . . was trying to intimidate [her]." Although the plaintiff acknowledged that the communications from the defendant ceased after March 3, 2019, she testified in July, 2019, that his communications with her caused her to fear for her personal safety, that she still feared for her personal safety, that she planned to attend classes at the community college in the fall, and that she feared that her safety would be at risk if she had any contact with the defendant.

The defendant testified that, in the upcoming fall semester, he did have classes with the plaintiff at the community college. He also acknowledged that he suffers from "a major depressive disorder," which includes suicidal thoughts. Although he claimed that the symptoms underlying the disorder are "all controlled," he also acknowledged that all of the symptoms have "not gone yet."

The court granted the plaintiff's application for an order of civil protection in an oral decision, stating that the "[s]tatute is very clear that indicates that such person causes reasonable fear—the conduct of the defendant causes reasonable fear for the physical safety.[2] So she's made it very clear [that] she's very apprehensive, her conduct on the stand indicated she's reliving some of these things. Things which, depending on your level of threshold and thickness of skin, become more or less significant. But, it's very clear that this is very upsetting to her, and it's affected her ability to carry on life's activities." (Footnote added.) The court ordered the defendant not to have any contact with the plaintiff and to stay 100 yards away from the plaintiff,

[2] The court clearly relied on General Statutes § 53a-181e (a), which provides that a person is guilty of stalking in the third degree when such person "recklessly causes another person to reasonably . . . fear for his or her physical safety . . . ."

and its order was effective for one year, until July 22, 2020.[3]

The decision of the majority to reverse the judgment of the trial court hinges on the majority's conclusion that (1) the trial court did not apply an objective standard to the first element of stalking in its determination of "reasonable fear," and (2) "the plaintiff presented no evidence that the defendant would continue to stalk her."[4] I disagree and would conclude, after "allow[ing] every reasonable presumption in favor of the correctness of [the trial court's] action"; (internal quotation marks omitted) *Kayla M.* v. *Greene*, 163 Conn. App. 493, 504, 136 A.3d 1 (2016); that the trial court's decision

[3] Although the order of civil protection has expired, the present appeal is not moot. See *C. A.* v. *G. L.*, 201 Conn. App. 734, 736 n.4, 243 A.3d 807 (2020) (applying to order of civil protection under § 46b-16a principle that "expiration of a six month domestic violence restraining order issued pursuant to General Statutes § 46b-15 does not render an appeal from that order moot due to adverse collateral consequences" (internal quotation marks omitted)).

[4] The majority mentions in its decision the fact that the trial court made no explicit finding on the record that "the defendant would continue to commit acts of stalking against the plaintiff" but never states that such an express finding is required. Pursuant to § 46b-16a (b), a trial court may issue an order of civil protection if it finds "that there are reasonable grounds to believe that the respondent has committed acts constituting grounds for issuance of an order . . . and will continue to commit such acts or acts designed to intimidate or retaliate against the applicant . . . ." This court has explained previously that "an applicant for a civil protection order on the basis of stalking pursuant to § 46b-16a must prove only that there are 'reasonable grounds to believe' that every element is met and that such conduct will continue." *Kayla M.* v. *Greene*, 163 Conn. App. 493, 506, 136 A.3d 1 (2016). Neither the statute nor case law directs that the court's findings must be written or express. Moreover, appellate courts "presume that the trial court, in rendering its judgment . . . undertook the proper analysis of the law and the facts." (Internal quotation marks omitted.) *Brett Stone Painting & Maintenance, LLC* v. *New England Bank*, 143 Conn. App. 671, 681, 72 A.3d 1121 (2013). In the present case, given the trial court's reference, in its oral decision, to the "very clear" requirements of the "statute," it reasonably can be inferred that the court relied on the language in the statute in rendering its decision.

was reasonably supported by the evidence in the record or the inferences drawn therefrom.

I agree with the majority that a subjective-objective test applies to the statute. I respectfully disagree, however, with the majority's conclusion that the trial court did not consider the objective part of the test. The trial court was reading from the statute when it issued its decision. Its emphasis on the subjective part of the test does not necessarily mean that the objective part was excluded. In Connecticut, our appellate courts do not presume error on the part of the trial court. See *Carothers* v. *Capozziello*, 215 Conn. 82, 105, 574 A.2d 1268 (1990). Rather, "we presume that the trial court, in rendering its judgment . . . undertook the proper analysis of the law and the facts." *S & S Tobacco & Candy Co.* v. *Greater New York Mutual Ins. Co.*, 224 Conn. 313, 322, 617 A.2d 1388 (1992). In my view, the reference to Muhammed Ali and Whistler's Mother, and to a person with thin skin, may be interpreted as an example of the judge considering how much each case had to be determined on the basis of the facts and circumstances surrounding it, and whether a reasonable person would be fearful under the circumstances. Indeed, in cases in which there has been no finding by the trial court, appellate courts have searched the record to see if the trial court's decision had an adequate basis in the record. Thus, in *Brett Stone Painting & Maintenance, LLC* v. *New England Bank*, 143 Conn. App. 671, 681, 72 A.3d 1121 (2013), in which a finding of default was a critical element in the case and the trial court had not made that explicit finding, the Appellate Court reviewed the record in its conclusion that an implicit finding of default was warranted. Likewise, in *Young* v. *Commissioner of Correction*, 104 Conn. App. 188, 190 n.1, 932 A.2d 467 (2007), cert. denied, 285 Conn. 907, 942 A.2d 416 (2008), in which the question of whether the habeas petitioner was in custody had not been decided in order

for the petitioner to maintain the habeas action, the Appellate Court was able to infer from the transcript the facts on which the trial court's decision appeared to have been predicated. In the present case, the transcript is replete with the defendant's admissions to his deplorable conduct. These admissions would certainly justify the inference that the objective standard had been met.

In *Kayla M.* v. *Greene*, supra, 163 Conn. App. 506, this court explained that "an applicant for a civil protection order on the basis of stalking pursuant to § 46b-16a must prove only that there are 'reasonable grounds to believe' that every element is met and that such conduct will continue." In *Kayla M.*, this court found that "there was sufficient evidence in the record from which the court reasonably could have concluded that there were reasonable grounds to believe that the plaintiff subjectively feared for her physical safety." Id., 511. Specifically, this court found that the trial court had credited the plaintiff's statements in her affidavit that she felt threatened by the defendant Edward Greene after he had grabbed her arm at her workplace and sent her a threatening e-mail, and that the trial court reasonably could have inferred, on the basis of those facts, that the plaintiff feared for her physical safety. Id. Moreover, although Greene testified at the hearing on the plaintiff's application for a civil protection order that "he had no intention of ever communicating with the plaintiff again"; id.; the trial court nevertheless found that he was " 'unnaturally obsessed' " with the plaintiff, and it reasonably inferred, on the basis of that obsession, that he "would continue his previous course of conduct." Id., 511, 512.

In the present case, the court reasonably could have found, on the basis of the testimony presented, that there were reasonable grounds to believe that the plaintiff feared for her physical safety and that the defendant

would continue in his course of conduct. We do not expect our trial judges to be soothsayers. All that is required is that there is a reasonable probability that the defendant will repeat the reported conduct such that there is a risk of imminent harm to the plaintiff. In this case, I cannot say that the decision of the trial court was an abuse of discretion or that its finding regarding the plaintiff's clear apprehension of the defendant was clearly erroneous.

The record here clearly shows that the defendant's conduct toward the plaintiff was truly bizarre and frightening. Clearly, the conduct was aberrant, obsessive, and delusional. He also threatened future assaultive conduct against the plaintiff when he said that he wanted to "jump on [her] back," in rage, even though he acknowledged that "that would be dumb." He further indicated delusional behavior when, in response to the plaintiff's statement to him that she was getting married, he stated that her marriage would interfere with their relationship. There was no relationship between the plaintiff and the defendant. On the basis of the plaintiff's testimony, however, the trial court reasonably could have inferred that the defendant wanted more than a mere friendship and that the plaintiff must have realized that, as she otherwise would not have invented the story about being married. See *In re Adalberto S.*, 27 Conn. App. 49, 54, 604 A.2d 822 ("court may draw reasonable, logical inferences from the facts proven"), cert. denied, 222 Conn. 903, 606 A.2d 1328 (1992).

The defendant also testified that he has a major depressive disorder that causes him to have suicidal thoughts and that the disorder, which caused his actions, has not fully gone away. Much like in *Kayla M.* v. *Greene*, supra, 163 Conn. App. 512, in which this court upheld the issuance of a civil protection order based, in part, on the defendant's obsession with the plaintiff, the defendant in the present case was fixated

on the plaintiff, as evidenced by the numerous unwanted e-mail and text messages that he sent to her. In testifying about his major depressive disorder,[5] the defendant stated that he thinks about things over and over, and he also acknowledged that the symptoms and depression associated with his disorder have not gone away yet. The trial court reasonably could have inferred from that testimony that it was reasonably probable that he would continue his conduct toward the plaintiff when school resumed. See *State* v. *Richards*, 196 Conn. App. 387, 397, 229 A.3d 1157 ("in determining whether the evidence supports a particular inference . . . an inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference" (internal quotation marks omitted)), cert. granted, 335 Conn. 931, 236 A.3d 218 (2020); *Hannon* v. *Redler*, 117 Conn. App. 403, 406, 979 A.2d 558 (2009) ("[i]t is within the province of the trial court to find facts and draw proper inferences from the evidence presented" (internal quotation marks omitted)); *Lupoli* v. *Lupoli*, 38 Conn. App. 639, 643, 662 A.2d 809 ("the role of the trial court as fact finder [is] to judge the credibility of the witnesses, to weigh the evidence and to draw logical inferences and conclusions from the facts proven"), cert. denied, 235 Conn. 907, 665 A.2d 902 (1995).

I also think it is important to note that the trial court in the present case had the benefit of hearing from both

[5] A significant portion of the defendant's testimony on direct examination concerned his major depressive disorder, from which the defendant readily acknowledged that he suffers. He also testified and acknowledged that one of the behaviors of his disorder is obsessive type behavior. Under these circumstances, the court was free to accept or reject all or part of the defendant's testimony about his obsessive type behavior. See *Kayla M.* v. *Greene*, supra, 163 Conn. App. 511–12 (court reasonably could have inferred from evidence produced at hearing that defendant was " 'unnaturally obsessed' " with plaintiff, and, on basis of that obsession, court could have inferred that defendant would continue his previous course of conduct).

parties during the hearing and judging their credibility. The court could have accepted or rejected all or a part of the defendant's testimony. "Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Internal quotation marks omitted.) *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 171 Conn. App. 61, 93–94, 156 A.3d 539 (2017), aff'd, 333 Conn. 343, 216 A.3d 629 (2019). It would strain credulity for the court to have accepted the defendant's testimony that he had ideas of hurting himself only and never anyone else, when he clearly had issued a threat to jump on the plaintiff's back in rage. Further, the court obviously did not choose to accept the defendant's testimony that his condition was under control when the hearing occurred only a few months after his bizarre acts and he was going to attend the same school with the plaintiff in September. Moreover, the defendant freely admitted that he had considered suicide. Such an act of violence would certainly justify a trial judge to find that a protective order should issue to protect someone who had spurned him and against whom he had made a threat to jump on her back in rage.

The threat of future conduct has to be a significant element in any trial court's decision to issue a protective order, and there certainly was sufficient evidence of a probability of future assaultive conduct here to cause reasonable fear in the plaintiff and to satisfy the objective standard requirement. "[A]n applicant for a civil protection order on the basis of stalking pursuant to § 46b-16a must prove only that there are reasonable

grounds to believe that every element is met and that such conduct will continue. . . . In determining whether there are reasonable grounds to believe that stalking occurred, it is instructive that, in the criminal context, [t]he phrase reasonable grounds to believe is synonymous with probable cause. . . . While probable cause requires more than mere suspicion . . . the line between mere suspicion and probable cause necessarily must be drawn by an act of judgment formed in light of the particular situation and with account taken of all the circumstances." (Citations omitted; internal quotation marks omitted.) *Kayla M.* v. *Greene*, supra, 163 Conn. App. 506. The defendant's credibility, or lack thereof, is a key element in this determination.

The majority concludes that it must reverse because the court did not consider the objective standard and there is no evidence of future conduct. I respectfully disagree because of the defendant's threat of jumping on the plaintiff's back in rage, his unwanted e-mails, the comment about the plaintiff's breasts, and his overall lack of credibility. I further disagree because it would be the rare case in which a defendant testified that he would keep doing the acts which brought him before the court or told someone else to that effect. The defendant in this case engaged in obsessive behavior. At the hearing, he admitted that part of his major depressive disorder has an obsessive component, namely, that he would keep thinking about the same thing over and over. He further testified that his condition was not fully resolved, as he must take medication every night and get treatment from counselors and therapists. Because he had threatened the plaintiff, his testimony that he never thought about hurting anyone else is not credible. In my view, reviewing both the evidence and the reasonable inferences derived therefrom, there clearly was no abuse of discretion in this matter.

For the foregoing reasons, I respectfully dissent.