CHRISTINA DOLAN *v.* RUSSELL J. DOLAN
(AC 43674)

Alvord, Alexander and Vertefeuille, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court granting the plaintiff's motions for modification and appellate attorney's fees. The parties had one minor child together. At the time of the dissolution, the plaintiff lived in West Hartford and the defendant lived in Andover, Massachusetts. Incorporated into the judgment of dissolution was a separation agreement which provided that, following the completion of the child's 2018-2019 academic year, the plaintiff would relocate to an area within one hour from her place of employment in Hartford, and that the defendant would make efforts to explore relocation to an area in Massachusetts such that the parties were to be within thirty minutes of each other. Subsequently, the plaintiff filed a motion for modification alleging a change in circumstances in her employment, namely, that she received a promotion and that she would no longer be able to relocate and maintain her employment. She requested that she and the minor child be permitted to remain residing in West Hartford. Following a hearing, the court granted the plaintiff's motion, and the defendant appealed to this court. The trial court then granted the plaintiff's motion for attorney's fees to defend the appeal and the defendant amended his appeal. *Held*:

1. The trial court did not abuse its discretion in granting the plaintiff's motion for modification, as the plaintiff's promotion represented a substantial change in circumstances that warranted modification of the parties' dissolution agreement with respect to parenting access and location: the court credited the testimony of the plaintiff regarding her promotion, which provided her an increase in salary and provided potential career growth, but no longer allowed her to work remotely on a routine basis and relocate to Massachusetts as the parties originally intended, and that she had looked into employment elsewhere, but that she would be starting from the bottom; moreover, the court also made factual findings that directly addressed factors related to the best interests of the child, including that the plaintiff's financial stability was in the best interests of the child, the plaintiff's financial independence was critical given that the defendant's failure to ensure that she had timely access to funds following the divorce put her in a vulnerable financial position, and that it was in the best interests of the child to continue residing primarily in the Hartford area, supported by the plaintiff's testimony as to the child's academic progress, friendships with children in the neighborhood

and at school, relationships with teachers at school and after-school childcare, and involvement in sports.

2. The trial court did not abuse its discretion in awarding the plaintiff attorney's fees to defend the appeal; the court expressly and reasonably found that its failure to award attorney's fees would undermine its prior financial orders, and such finding was supported by the record, namely, the plaintiff's testimony that, in order to pay her counsel fees, she had obtained funds from her investments and retirement account, the assets that had been awarded to her in the dissolution.

Argued February 3—officially released March 29, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Miller*, *J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Margaret Murphy*, *J.*, granted, inter alia, the plaintiff's motion for modification, and the defendant appealed to this court; subsequently, the court, *Margaret Murphy*, *J.*, granted the plaintiff's motion for appellate attorney's fees, and the defendant filed an amended complaint. *Affirmed.*

David V. DeRosa, for the appellant (defendant).

Brandy N. Thomas, with whom, on the brief, was *Jennifer Shukla*, for the appellee (plaintiff).

Opinion

ALVORD, J. In this dissolution matter, the defendant, Russell J. Dolan, appeals from the judgment of the trial court granting two postjudgment motions filed by the plaintiff, Christina Dolan. On appeal, the defendant claims that the court improperly granted the plaintiff's (1) motion for modification and (2) motion for appellate attorney's fees. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. The parties were

married in 2008 and have one minor child together. In 2017, the plaintiff commenced a dissolution action against the defendant. On January 23, 2018, the trial court, *Miller*, *J.*, rendered a judgment of dissolution, which incorporated a January 22, 2018 separation agreement executed by the parties (agreement). At the time of the dissolution, the plaintiff lived in West Hartford, and the defendant lived in Andover, Massachusetts. Pursuant to Section III of the agreement, the parties agreed that the plaintiff would relocate, following the completion of the 2018-2019 academic year, "to a location such that [the plaintiff] is living approximately but not farther than one (1) hour from her place of employment in Hartford, Connecticut and shall include the Greater Worcester Area and suburbs such as Westborough, Massachusetts." The defendant agreed to "make efforts to explore relocation to an area in Massachusetts such that the parties are within thirty (30) minutes of each other." The parties were to "communicate with each other regarding their respective residences by May 1, 2019."

From the date of the dissolution judgment through the contemplated 2019 relocation, the parties agreed that the defendant would have parenting time on certain dates, generally consisting of two or three weekends per month during the school year. For summer, 2018, the parties agreed to shared parenting time according to a two week on/two week off schedule. The parties agreed that, commencing upon the contemplated 2019 relocation, the parties would share a "5, 2, 2, 5" schedule, as follows: "The parties shall share weekday time such that one parent shall have parenting responsibility every Monday and Tuesday, and the other parent shall have parenting responsibility every Wednesday and Thursday, and the parties shall alternate weekend parenting time from after school, or at an agreed upon time, through Monday morning returning to school. The

parties shall cooperate to determine which weekday blocks each parent shall have based on [the plaintiff's] work schedule such that she shall have the weekday blocks wherein she is working remotely, if remote work [is] available to her." For summer, 2019, the parties agreed that the regular access schedule was to prevail, except with respect to vacations, set forth in a separate provision of the agreement. The parties were to make every effort to agree on the location of the minor child's school.[1] If the parties were unable to reach a schooling agreement, a decision was to be made by the court.

In the event that the defendant did not relocate to an area near the plaintiff's relocated residence, the parties agreed that "the parenting plan shall be reviewed to adjust parenting time and the access schedule so as to maintain liberal parenting time for both parents, but to minimize the amount of travel required for the child during the week." The court would "retain jurisdiction to determine an appropriate shared parenting schedule pursuant thereto, in the event the parties are unable to agree." The agreement "contemplated that [the defendant] will exercise more parenting time than [the plaintiff] during non-school periods to make up for less time during school periods." In the event the parties were unable to reach an agreement as to a shared parenting schedule, a decision was to be made by the court.

On April 30, 2019, the plaintiff filed a motion for modification. Therein, she alleged, inter alia, that "[s]ince the entry of judgment, there has been a change in circumstances such that a relocation of the minor child from his current location of residence, school district and community is no longer in his best interests," and

[1] The agreement further provided: "In the event [the defendant] does not relocate to an area near to [the plaintiff] as set forth above, the minor child shall attend school in [the plaintiff's] school district, as determined by her then residence. [The plaintiff] agrees to consider the school district in choosing a location to reside."

that the plaintiff's "employment circumstances have changed such that she will no longer be able to relocate and maintain her employment." The plaintiff requested that she and the minor child be permitted to remain residing in West Hartford and sought a parenting access plan that was in the best interests of the child.

On July 29, 2019, the court held a hearing on the plaintiff's motion for modification along with other motions filed by the parties, including the plaintiff's motion for contempt, and the defendant's motions for order, modification of custody, and contempt. On October 30, 2019, the court issued its memorandum of decision on all pending motions. Foundationally, the court found the plaintiff "more willing to compromise, especially when it relates to their son's well-being," and also made an overall finding that the plaintiff was more credible than the defendant. The court found "that much of the [defendant's] testimony was self-serving and an attempt to obfuscate his manipulation of the [plaintiff] regarding financial matters and the parenting schedule." The court first considered the plaintiff's motion for contempt. The court found the defendant in contempt for violating the provision of the agreement prohibiting demeaning, denigrating, or otherwise maligning language toward the other parent, on the basis of evidence of his verbal abuse toward the plaintiff in the form of tirades in which he referred to her as "trash" and "scumbag trash." The court found that the defendant had "no self-awareness or insight that his behavior toward the plaintiff was uncivil, demeaning, and denigrating."

The court referenced the defendant's "out of line" demands, made during the plaintiff's parenting time, to spend time with the parties' child during her family vacation in Florida. The court found that the defendant made multiple threats to contact the police in the event that the plaintiff failed to respond to him. The court

found that the plaintiff, in an effort to appease the defendant, agreed to permit him to take their child to a zoo, a trip that she had planned to take with her family. The court was concerned by the defendant's "unreasonable demands and anger shown in almost all of his e-mails and texts to the [plaintiff]," and concluded that his "overall lack of civility toward the plaintiff interferes with his coparenting obligations and his ability to act in the best interest of their son." The court also found the defendant in contempt for his failure to contribute $1000 monthly to the mortgage on the former marital home, as required by the agreement.[2] The court found that the defendant was "intentionally keeping the money from the plaintiff," that his actions were "egregious, and [that] he put her in financial peril."[3]

With respect to the plaintiff's motion for modification at issue in this appeal, the court found that "the plaintiff's employment circumstances have changed substantially and she can no longer relocate to Massachusetts and maintain her employment as the parties originally intended." The court credited the plaintiff's testimony

[2] Related to the finding of contempt, the court granted the plaintiff's request for attorney's fees pursuant to General Statutes § 46b-87.

[3] The plaintiff alleged a number of other grounds in her motion for contempt. Although the court declined to find the defendant in contempt on the other grounds alleged, the court exercised its remedial authority to make changes to the agreement with respect to the parties' communication with the child and the pickup time after the defendant's parenting time, and the court reminded the parties of its order that the parties are to communicate using Our Family Wizard.

With respect to the other motions of the parties, the court denied the defendant's motion for order, which sought a court order that the child be enrolled in treatment with a mental health professional. The court also denied the defendant's motion for modification of custody, wherein the defendant had requested sole legal custody of the parties' child. The court denied the defendant's motion for contempt, wherein he alleged that the plaintiff had violated the agreement by failing to sell the former marital home. The court determined that the defendant's motion for contempt alleging that the plaintiff had failed to relocate in accordance with the agreement was moot, on the basis that the court had granted the plaintiff's motion to modify the agreement to vacate the relocation provisions.

regarding her work circumstances, including the promotion she obtained through her employer following the entry of the dissolution judgment. Although she was able to work remotely in her prior position, her new position did not permit remote work on a routine basis.[4] The court found that the plaintiff's new position constituted "a substantial improvement based on her increased salary and potential career growth." The court credited the plaintiff's testimony that "if she looked for work in the health care industry in Massachusetts to be closer to the defendant, she would have to start at the bottom and would not earn enough money to maintain the standard of living that she and her son enjoy in Connecticut." Acknowledging the defendant's argument that accepting the promotion was not mandatory for the plaintiff, the court found the promotion to be a "legitimate stepping stone in the [plaintiff's] career" and "a significant opportunity for her." The court found it to be both in the plaintiff's and the child's best interests for the plaintiff to accept the promotion to be better able to provide financially for her and the minor child.

The court further found that "maintaining [the plaintiff's] financial independence is critical to her financial stability and her stability is in the best interest of the child," and that the defendant had "put the [plaintiff] in a vulnerable financial position" when he wilfully failed to contribute $1000 monthly to the mortgage payment on the former marital home as required by the agreement. The court previously had found that the defendant "intentionally" kept the money from the plaintiff,[5] forcing her to file a motion for contempt to

[4] The court found that, in her new position, the plaintiff was responsible for "supervising a team of eight people, in addition to assisting her employer with the integration of a new acquisition by the company and assisting with the hiring of additional staff."

[5] The court found not credible the defendant's testimony that he had made deposits to a bank account in the parties' joint names, noting that the defendant did not list on his financial affidavit a joint bank account.

address his failure to pay his court-ordered portion of the mortgage. The court found that the defendant's failure to fulfill his fiscal obligation was egregious and put the plaintiff in financial peril.

In addition to the financial considerations set forth by the court, the court found that it was in the child's best interests to continue residing primarily with the plaintiff in the Hartford area. The court credited evidence that the child was doing well under the current parenting plan, and noted that it had heard testimony regarding the child's academic progress, friendships, after-school childcare, sports, and activities in the community.

In granting the plaintiff's motion for modification, the court stated that the relocation provision of the parenting plan would no longer apply, and it vacated the provisions of the parenting plan setting forth the parenting schedule following the relocation, including the summer access schedule for 2019 and the future. The court then stated: "Because the parents will not be moving closer to each other, the '5, 2, 2, 5' parenting plan anticipated in [the agreement] is no longer appropriate. The custody agreement shall be modified so that the [defendant] shall have parenting time with the child every other weekend as well as the division of summer, vacations, and holidays as provided by the agreement prior to relocation." The court applied the agreement's summer, 2018 schedule to future summers. The defendant filed a motion to reargue, which was denied. This appeal followed.

On January 2, 2020, the plaintiff filed a motion for counsel fees to defend the appeal, and the defendant thereafter filed an objection. Following a hearing on February 18, 2020, the court ordered the defendant to pay $7700 of the plaintiff's appellate attorney fees. The defendant then amended his appeal, challenging the award of attorney's fees.

I

The defendant's first claim on appeal is that the court abused its discretion in granting the plaintiff's motion for modification. Specifically, the defendant argues: "The court's finding that the plaintiff obtaining a promotion at work is a substantial change of circumstances to justify a modification is not a proper reading of the [agreement] which anticipated both [the] plaintiff's relocation, maintaining employment, or obtaining a promotion at Hartford Hospital or some other employer. The modification undermines the agreement's premise that the parties relocate to a location in Massachusetts . . . that would permit increase[d] contact for both parents with their child for whom they agreed to have joint custody." We are not persuaded that the court abused its discretion.

We first set forth relevant principles of law and our standard of review. General Statutes § 46b-56 provides trial courts with the statutory authority to modify an order of custody or visitation. General Statutes (Rev. to 2019) § 46b-56 (c) directs the court, when making or modifying any order regarding the custody, care, education, visitation and support of children, to "consider the best interests of the child, and in doing so [the court] may consider, but shall not be limited to, one or more of [sixteen enumerated] factors[6]. . . . The

[6] The statutory factors are as follows: "(1) The temperament and developmental needs of the child; (2) the capacity and the disposition of the parents to understand and meet the needs of the child; (3) any relevant and material information obtained from the child, including the informed preferences of the child; (4) the wishes of the child's parents as to custody; (5) the past and current interaction and relationship of the child with each parent, the child's siblings and any other person who may significantly affect the best interests of the child; (6) the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders; (7) any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents' dispute; (8) the ability of each parent to be actively involved in the life of the child; (9) the child's adjustment to his or her home, school and community environments; (10)

court is not required to assign any weight to any of the factors that it considers . . . .'' (Footnote added.).

''Our standard of review of a trial court's decision regarding custody, visitation and relocation orders is one of abuse of discretion. . . . [I]n a dissolution proceeding the trial court's decision on the matter of custody is committed to the exercise of its sound discretion and its decision cannot be overridden unless an abuse of that discretion is clear. . . . The controlling principle in a determination respecting custody is that the court shall be guided by the best interests of the child. . . . In determining what is in the best interests of the child, the court is vested with a broad discretion.'' (Internal quotation marks omitted.) *M. S.* v. *P. S.*, 203 Conn. App. 377, 397, 248 A.3d 778, cert. denied, 336 Conn. 952, 251 A.3d 992 (2021). ''[T]he authority to exercise the judicial discretion [authorized by § 46b-56] . . . is not conferred [on] this court, but [on] the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one [that] discloses a clear abuse of discretion can warrant our interference.''

the length of time that the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity in such environment, provided the court may consider favorably a parent who voluntarily leaves the child's family home pendente lite in order to alleviate stress in the household; (11) the stability of the child's existing or proposed residences, or both; (12) the mental and physical health of all individuals involved, except that a disability of a proposed custodial parent or other party, in and of itself, shall not be determinative of custody unless the proposed custodial arrangement is not in the best interests of the child; (13) the child's cultural background; (14) the effect on the child of the actions of an abuser, if any domestic violence has occurred between the parents or between a parent and another individual or the child; (15) whether the child or a sibling of the child has been abused or neglected, as defined respectively in section 46b-120; and (16) whether the party satisfactorily completed participation in a parenting education program established pursuant to section 46b-69b.'' General Statutes (Rev. to 2019) § 46b-56 (c).

(Internal quotation marks omitted.) *Zhou* v. *Zhang*, 334 Conn. 601, 632–33, 223 A.3d 775 (2020).

"The trial court has the opportunity to view the parties [firsthand] and is therefore in the best position to assess the circumstances surrounding a dissolution action, in which such personal factors as the demeanor and attitude of the parties are so significant. . . . [E]very reasonable presumption should be given in favor of the correctness of [the trial court's] action. . . . We are limited in our review to determining whether the trial court abused its broad discretion to award custody based upon the best interests of the child as reasonably supported by the evidence." (Internal quotation marks omitted.) *M. S.* v. *P. S.*, supra, 203 Conn. App. 398.

The defendant's primary contention is that "[t]he premise in the modification motion that the plaintiff . . . obtained a promotion . . . and that the seven year old son had increased social connections in the second grade was not a basis for a substantial change of circumstances under the separation agreement because the prospects of the plaintiff . . . for a change of employment or promotion . . . was considered by the parties when they negotiated the separation agreement." We disagree and conclude that the court did not abuse its discretion in finding a substantial change in circumstances on the basis of the plaintiff's promotion and in determining that it was in the best interests of the child to remain residing with the plaintiff in the Hartford area.

The court credited the testimony of the plaintiff regarding her promotion. Specifically, the plaintiff testified that the promotion provided her an increase in her salary, which was necessary given that she was living "paycheck to paycheck" at the time. At the time of the dissolution, the plaintiff was working in a position that permitted her to work remotely on a routine basis, up to two or possibly three days per week. The plaintiff

testified that, following her promotion in October, 2018, she managed a team of eight people and no longer had the ability to work remotely on a routine basis. The court expressly credited the plaintiff's testimony that she had looked into employment elsewhere, but that she would "be starting from the bottom."

On the basis of this testimony, the court found that the plaintiff's promotion was "a substantial improvement based on her increased salary and potential career growth" and that her employment circumstances had changed substantially such that she no longer could relocate to Massachusetts and maintain her employment as the parties originally had intended.[7] On the basis of its factual findings and the substantial evidence to support such findings, the court did not abuse its discretion in determining that the plaintiff's promotion represented a substantial change in circumstances that

[7] The defendant argues in his appellate brief that the trial court should have applied the factors contained in General Statutes § 46b-56d, which applies to postjudgment relocation cases. Section 46b-56d provides: "(a) In any proceeding before the Superior Court arising after the entry of a judgment awarding custody of a minor child and *involving the relocation of either parent with the child*, where such relocation would have a significant impact on an existing parenting plan, the relocating parent shall bear the burden of proving, by a preponderance of the evidence, that (1) the relocation is for a legitimate purpose, (2) the proposed location is reasonable in light of such purpose, and (3) the relocation is in the best interests of the child.

"(b) In determining whether to approve the relocation of the child under subsection (a) of this section, the court shall consider, but such consideration shall not be limited to: (1) Each parent's reasons for seeking or opposing the relocation; (2) the quality of the relationships between the child and each parent; (3) the impact of the relocation on the quantity and the quality of the child's future contact with the nonrelocating parent; (4) the degree to which the relocating parent's and the child's life may be enhanced economically, emotionally and educationally by the relocation; and (5) the feasibility of preserving the relationship between the nonrelocating parent and the child through suitable visitation arrangements." (Emphasis added.)

Because the present case does not involve the "relocation of either parent with the child"; General Statutes § 46b-56d (a); but rather the request of the plaintiff not to relocate, as contemplated at the time of dissolution, the trial court did not err in failing to analyze the motion under § 46b-56d.

warranted modification of the parties' dissolution agreement with respect to parenting access and location.[8]

In addition to the factual findings regarding the plaintiff's promotion, the court also made factual findings that directly address factors related to the best interests of the child. First, the court found that the plaintiff's financial stability was in the best interests of the child. The court found the plaintiff's financial independence to be "critical," given that the defendant's "failure to ensure that [she] had timely access to funds following the divorce put [her] in a vulnerable financial position." Specifically, the court found that the defendant wilfully had failed to contribute $1000 monthly to the plaintiff's mortgage payment as required by the agreement, leaving the plaintiff to make the full mortgage payments without his court-ordered contributions. Thus, the plaintiff's acceptance of the promotion was in the child's best interests because it would allow the plaintiff to better provide financially for her and the parties' child.

Moreover, the court found that it was in the best interests of the child to continue residing primarily with the plaintiff in the Hartford area. The court's findings were supported by the plaintiff's testimony as to the child's academic progress, friendships with children in the neighborhood and at school, relationships with teachers at school and after-school childcare, and involvement in sports.[9] Following its finding that remaining in

[8] We note that we are not presented in this appeal with the issue of whether the trial court was obligated to make a threshold finding of a substantial change in circumstances in resolving the motion the plaintiff presented to the court in this case.

[9] The defendant argues that the court's decision is "in contravention of Connecticut's public policy by rewarding the [plaintiff] in what the record reveals is her vindictive desire to interfere in the relationship between the noncustodial parent and child." We disagree that the record reflects a vindictive desire on behalf of the plaintiff to interfere with the relationship between the defendant and the parties' child. As noted previously, the court credited the plaintiff's testimony and found her "more willing to compromise, especially when it relates to their son's well-being." In contrast, the court found the defendant's testimony "self-serving" and an attempt "to obfuscate his manipulation of the [plaintiff] regarding financial matters and the parent-

the Hartford area was in the best interests of the child, the court, having found that the child was doing well under the current parenting plan, appropriately continued a similar parenting time schedule as had been in place at the entry of the dissolution judgment.[10]

On the basis of the court's factual findings, which find support in the record, the court did not abuse its discretion in granting the plaintiff's motion for modification.

II

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

The following additional procedural history is relevant to this claim. On January 2, 2020, the plaintiff filed a motion for counsel fees to defend the present appeal,

ing schedule." "The trial court has the great advantage of hearing the witnesses and in observing their demeanor and attitude to aid in judging the credibility of testimony. . . . Great weight is given to the conclusions of the trial court which had the opportunity to observe directly the parties and the witnesses." (Internal quotation marks omitted.) *Lopes* v. *Ferrari*, 188 Conn. App. 387, 393, 204 A.3d 1254 (2019).

[10] The defendant argues that, even if a modification was appropriate, the court erred in "remov[ing] one of the three weekends where the [defendant] has custody of his son . . . ." We disagree.

Pursuant to the agreement, the defendant had parenting time with the child on certain specified weekends, either two or three per month. From the date of the dissolution judgment through the end of 2018, not including the summer, the defendant's parenting time included: one weekend each in January and August; two weekends each in May, September, October, and December; and three weekends each in February, March, April, and November. For summer, 2018, the parties rotated parenting time on a two week on/two week off schedule. For 2019, through the end of the school year, the defendant's parenting time included: one weekend in June; two weekends each in January, April, and May; and three weekends each in February and March. In granting the motion for modification, rather than enumerating certain dates on which the defendant would have parenting time, the court appropriately ordered that the defendant would have parenting time with the child "every other weekend." Accordingly, we reject the defendant's contention that the court's order reflects an appreciable diminution in his parenting time, and we conclude that the court's order regarding parenting time was well within its discretion.

arguing that her "ability to fully and fairly advance her interests, and/or prepare for and proceed with defending against the appeal in this matter will be prejudiced without contribution from the defendant to fund her legal representation" and that "not awarding attorney's fees to defend against the defendant's appeal would undermine the court's previous orders and unjustly burden the plaintiff." The defendant filed an objection, arguing that the plaintiff has ample liquid assets and income available to defend the appeal.

On February 18, 2020, the court held a hearing, during which both parties testified and submitted updated financial affidavits. The plaintiff testified that, in order to pay her appellate counsel fees, she had used investment and retirement assets that had been awarded to her in the dissolution. Specifically, she testified that she had obtained funds from her investments and taken a loan on her 401 (k) account. The plaintiff further testified she was living "paycheck to paycheck" and sought $10,000 in counsel fees to defend the appeal.

After closing argument, the court, in an oral ruling, ordered the defendant to pay $7700 of the plaintiff's attorney's fees, on the basis that the failure to award attorney's fees would undermine the court's prior financial orders. The court thereafter issued a written order to the same effect, noting that it had reviewed the criteria of General Statutes §§ 46b-62 and 46b-82, which govern the award of attorney's fees in family court proceedings, and relevant case law.

We first set forth applicable legal principles and our standard of review. "In dissolution and other family court proceedings, pursuant to § 46b-62 (a), the court may order either parent to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the equitable criteria set forth in § 46b-82, the alimony statute. That statute provides that

the court may consider 'the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81' for the assignment of property. General Statutes § 46b-82. Section 46b-62 (a) applies to postdissolution proceedings because the jurisdiction of the court to enforce or to modify its decree is a continuing one and the court has the power, whether inherent or statutory, to make allowance for fees." *Leonova* v. *Leonov*, 201 Conn. App. 285, 326–27, 242 A.3d 713 (2020), cert. denied, 336 Conn. 906, 244 A.3d 146 (2021).

"Courts ordinarily award counsel fees in divorce cases so that a party . . . may not be deprived of [his or] her rights because of lack of funds. . . . Where, because of other orders, both parties are financially able to pay their own counsel fees they should be permitted to do so. . . . An exception to the rule . . . is that an award of attorney's fees is justified even where both parties are financially able to pay their own fees if the failure to make an award would undermine its prior financial orders . . . ." (Internal quotation marks omitted.) *M. S.* v. *P. S.*, supra, 203 Conn. App. 402–403. "[A]n award of attorney's fees in a marital dissolution case is warranted only when at least one of two circumstances is present: (1) one party does not have ample liquid assets to pay for attorney's fees; or (2) the failure to award attorney's fees will undermine the court's other financial orders." *Ramin* v. *Ramin*, 281 Conn. 324, 352, 915 A.2d 790 (2007).

"A trial court is not limited to awarding fees for proceedings at the trial level. Connecticut courts have permitted postjudgment awards of attorney's fees to defend an appeal." *Leonova* v. *Leonov*, supra, 201 Conn.

App. 327. "Whether to allow counsel fees, [under § 46b-62 (a)], and if so in what amount, calls for the exercise of judicial discretion. . . . An abuse of discretion in granting counsel fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did." (Internal quotation marks omitted.) Id.

In the present case, the trial court expressly found that its failure to award attorney's fees would undermine the court's prior financial orders. The court's finding is supported by the record, namely, the plaintiff's testimony that, in order to pay her counsel fees, she had obtained funds from her investments and taken a loan on her 401 (k), the assets that had been awarded to her in the dissolution. Thus, the trial court reasonably determined that the fee award was necessary to avoid undermining the trial court's prior financial orders.

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

The judgment is affirmed.

In this opinion the other judges concurred.

PAUL SITAR ET AL. v. SYFERLOCK TECHNOLOGY CORPORATION (AC 44244)

Moll, Suarez and Lavine, Js.

Syllabus

The plaintiffs, two former employees of the defendant, sought to recover damages from the defendant for, inter alia, breach of their employment contracts and failure to pay wages pursuant to statute (§ 31-72). The trial court rendered judgment in favor of the plaintiffs on their respective claims for breach of written contract and failure to pay wages pursuant to § 31-72, and in favor of the defendant on the plaintiffs' respective claims for breach of oral contract. The court declined to award the

plaintiffs double damages or attorney's fees as provided by § 31-72, reasoning that such an award is appropriate only when the trial court has found that the defendant acted with bad faith, arbitrariness, or unreasonableness, which the trial court concluded was not demonstrated in the present case, and the trial court declined to award prejudgment interest on the amounts awarded to the plaintiffs. On appeal, the plaintiffs claimed that the trial court erred in finding that there was no bad faith, arbitrariness, or unreasonableness on the part of the defendant to support an award of double damages and attorney's fees with respect to the plaintiffs' claims for failure to pay wages pursuant to § 31-72, and that the trial court abused its discretion in not awarding prejudgment interest pursuant to statute (§ 37-3a (a)). *Held* that this court declined to address the merits of the plaintiffs' claims, the plaintiffs having failed to provide this court with an adequate record: pursuant to the applicable rule of practice (§ 61-10 (a)), the plaintiffs, as the appellants in the present case, bore the burden of providing this court with an adequate record for review; moreover, although the trial occurred over three days, the plaintiffs failed to provide this court with any transcripts and, in the absence of such transcripts, this court could not evaluate the plaintiffs' arguments under the applicable standards of review without resorting to speculation; accordingly, the judgment of the trial court was affirmed.

Argued November 29, 2021—officially released March 29, 2022

Procedural History

Action to recover damages for, inter alia, unpaid wages, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford and tried to the court, *Pierson, J.*; judgment in part for the defendant, from which the plaintiffs appealed to this court. *Affirmed.*

Ryan P. Driscoll, for the appellants (plaintiffs).

Colin B. Connor, for the appellee (defendant).

Opinion

MOLL, J. The plaintiffs, Paul Sitar and Joseph Stage, appeal from the judgment of the trial court, following a court trial, insofar as the court concluded that they were not entitled to double damages and attorney's fees and declined to award prejudgment interest on the amounts awarded to them. On appeal, the plaintiffs claim that the trial court (1) erred in finding that there

was no bad faith, arbitrariness, or unreasonableness on the part of the defendant, Syferlock Technology Corporation, to support an award of double damages and attorney's fees with respect to the plaintiffs' claims for failure to pay wages pursuant to General Statutes § 31-72,[1] and (2) abused its discretion in not awarding prejudgment interest pursuant to General Statutes § 37-3a (a).[2] We conclude that the record is inadequate for our review, and, accordingly, we decline to review the plaintiffs' claims and, thus, affirm the judgment of the trial court.

The following facts, as found by the trial court in its memorandum of decision and/or as stipulated by the parties,[3] and procedural history are relevant to our resolution of this appeal. In January, 2005, Sitar left his prior employment to work full-time for Grid Data Security, Inc. (GDS), a business entity formed to develop one-time password generation technology. Sitar worked at GDS from January, 2005, until late August, 2007. Stage began working at GDS in May, 2007, as its senior vice

[1] General Statutes § 31-72 provides in relevant part: "When any employer fails to pay an employee wages in accordance with the provisions of sections 31-71a to 31-71i, inclusive, or fails to compensate an employee in accordance with section 31-76k or where an employee or a labor organization representing an employee institutes an action to enforce an arbitration award which requires an employer to make an employee whole or to make payments to an employee welfare fund, such employee or labor organization shall recover, in a civil action, (1) twice the full amount of such wages, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) if the employer establishes that the employer had a good faith belief that the underpayment of wages was in compliance with law, the full amount of such wages or compensation, with costs and such reasonable attorney's fees as may be allowed by the court. Any agreement between an employee and his or her employer for payment of wages other than as specified in said sections shall be no defense to such action. . . ."

[2] General Statutes § 37-3a (a) provides in relevant part: "[I]nterest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions or arbitration proceedings under chapter 909 . . . as damages for the detention of money after it becomes payable. . . ."

[3] On the day of trial, the plaintiffs submitted a stipulation of facts.

president of corporate development and worked there until approximately September 1, 2007. In August, 2007, Robert D. Russo, the president and treasurer of GDS, as well as an investor therein, called the loans that he had made to GDS, and, upon accepting GDS' patents as settlement of his loans, transferred the patents and goodwill to the defendant.

On September 1, 2007, Sitar began working as the defendant's chief executive officer (CEO) and remained in that role until September, 2010. In September, 2010, the defendant hired Christopher Cardell as its new CEO and changed Sitar's title to founder and president. Sitar's change in title did not alter his daily duties or the terms of his compensation, and he continued as founder and president until September, 2011.

The defendant had no "[human resources] person" during Cardell's employment as CEO, and Cardell performed human resources functions such as managing employees, maintaining employment agreements, and assuming responsibility for employee benefits administration. When Cardell became CEO, he did not determine whether the defendant had any signed employment agreements for its employees, and he did not determine whether Sitar had an executed employment agreement with the defendant until the present case was initiated. From the defendant's files, Cardell ultimately produced a copy of Sitar's employment agreement, which was signed by Sitar but not by the defendant. The agreement was titled "Agreement Regarding Certain Conditions of Employment" dated September 1, 2007 (Sitar contract). The Sitar contract contained the defendant's offer for the position of "Chief Executive Officer" with terms including an "[a]nnual base salary of $12,500 per month," specifically, a "base salary [of] $150,000 per annum or such rate as the Board of Directors shall designate from time to time . . . which salary shall be payable in regular installments and as agreed and

referenced in the September 1, 2007 offer letter and in accordance with the [defendant's] general payroll practices and shall be subject to customary withholding." The Sitar contract provided that it contained the entire understanding of the parties, it superseded "any prior agreements" between Sitar and the defendant, any amendments thereto required the prior written consent of the defendant and the "Executive" (an undefined term), and Sitar would serve as CEO "under the supervision and direction of the Board of Directors." The defendant provided Sitar with a healthcare plan, reimbursed him for documented company-related expenses, and issued to him, for each tax year from 2007 through 2011, W-2 forms, which reflected the amounts that he earned as its employee.

Stage entered into a written contract with the defendant dated September 1, 2007 (Stage contract). Both Stage and the defendant signed the Stage contract, and it contained many provisions that are similar or identical to the provisions in the Sitar contract, including the integration and amendment clauses. The Stage contract set forth, however, the following term: "Annual base salary of $12,500 per month to be paid on the last day of each month. Paid as follows: September 1, 2007, forward: $6,250 paid; $6,250 accrued," "Full monthly pay upon reaching adequate sales/cash flow or upon adequate financing (subject to financing terms)," and "Accrual amounts back-paid upon reaching adequate sales/cash flow or upon adequate financing (subject to financing terms)."

Stage left his employment with the defendant in March, 2011. Sitar resigned from his positions with the defendant on September 2, 2011.

On July 5, 2016, the plaintiffs commenced this action asserting that the defendant owed them unpaid wages. On March 9, 2020, the plaintiffs filed their second

amended complaint (i.e., the operative complaint), which asserted the following counts: (1) on behalf of Sitar, breach of written contract (count one), breach of oral contract (count two), and failure to pay wages pursuant to § 31-72 (count three); and (2) on behalf of Stage, breach of written contract (count four), breach of oral contract (count five), and failure to pay wages pursuant to § 31-72 (count six).

In count one, Sitar alleged that the defendant owed him $157,245 in accrued unpaid salary pursuant to the Sitar contract. In count two, Sitar alleged that Russo had promised to pay him certain moneys carried over from GDS, that such promise constituted a verbal contract, and that the defendant was bound thereby and owed him $280,250 in connection therewith. In count three, Sitar alleged that the defendant had "arbitrarily, unreasonably, and in bad faith" failed to pay him the foregoing wages, thus entitling him to double damages and attorney's fees pursuant to § 31-72. In count four, Stage alleged that the defendant owed him $114,244.60 in accrued unpaid salary pursuant to the Stage contract. In count five, Stage alleged that Russo had promised to pay him certain moneys carried over from GDS, that such promise constituted a verbal contract, and that the defendant was bound thereby and owed him $43,750 in connection therewith. In count six, Stage alleged that the defendant had "arbitrarily, unreasonably, and in bad faith" failed to pay him the foregoing wages, thus entitling him to double damages and attorney's fees pursuant to § 31-72. On March 10, 2020, the defendant filed an amended answer and special defenses.

The matter was tried to the trial court, *Pierson*, *J.*, on February 25, 26, and 27, 2020. On July 24, 2020, the court rendered judgment (1) in favor of Sitar on his claims for breach of written contract (count one) and failure to pay wages pursuant to § 31-72 (count three), (2) in favor of Stage on his claims for breach of written

contract (count four) and failure to pay wages pursuant to § 31-72 (count six), and (3) in favor of the defendant on the plaintiffs' respective claims for breach of oral contract (counts two and five).[4]

As to Sitar, with respect to count one, the court concluded that Sitar had proven the formation of the Sitar contract and the defendant's breach thereof by virtue of its failure to pay Sitar the amount of $157,245 for work he performed while in the defendant's employ. In this connection, the court expressly rejected the defendant's first special defense that no agreement existed between it and Sitar because the Sitar contract was not signed by Russo on its behalf. With respect to count three, the court concluded: "While the defendant's breach of contract in failing to pay [Sitar] accrued wages violated § 31-72, this failure was not arbitrary or unreasonable and did not constitute bad faith. Although the defendant did not prevail on its defense of the claim brought under the Sitar contract, it had good faith reasons to believe that it did not owe Sitar amounts under that document, including without limitation the fact that its designated representative did not sign the Sitar contract. '[It] is well established . . . that it is appropriate for a plaintiff to recover attorney's fees, and double damages under [§ 31-72], only when the trial court has found that the defendant acted with bad faith, arbitrariness or unreasonableness.' . . . *Ravetto* v. *Triton Thalassic Technologies, Inc.*, 285 Conn. 716, 724, 941 A.2d 309 (2008). Bad faith, unreasonableness, or arbitrariness has not been demonstrated here; to the contrary, the defendant has shown good faith reasons—albeit reasons rejected by the court—for failing to pay

[4] With respect to counts two and five, the court concluded that the plaintiffs' respective claims for breach of oral contract were barred by the parol evidence rule and that the plaintiffs had failed to prove the existence of a verbal promise in any event. The plaintiffs do not challenge these conclusions on appeal.

Sitar accrued salary. As a result, the court declines to award Sitar double damages or attorney's fees as provided by § 31-72."

As to Stage, with respect to count four, the court concluded that, because "the record demonstrates that the defendant had 'adequate' sales and cash flow to pay Stage accrued salary," the defendant breached the Stage contract (the existence of which was undisputed) by failing to pay him accrued salary in the amount of $114,244.60. With respect to count six, the court concluded that, although the defendant's foregoing breach of the Stage contract constituted a violation of § 31-72, "it has not been shown that the defendant acted in bad faith, unreasonably, or arbitrarily in failing to pay Stage his accrued salary to date. The defendant demonstrated good faith reasons for failing to do so, including without limitation based on a colorable interpretation of the words 'adequate [sales]/cash flow,' as set forth in the Stage contract. Although the court disagrees with the defendant's interpretation of this language, given the state of its financial affairs and the governing language of the Stage contract, it was not arbitrary or unreasonable for the defendant to have failed to pay Stage accrued salary, nor did that failure constitute an act of bad faith. As a result, the court also declines to award Stage double damages or attorney's fees as provided by § 31-72."

Whereupon, the court awarded Sitar $157,245 on each of counts one and three and awarded Stage $114,244.60 on each of counts four and six. The court declined to award prejudgment interest on the amounts awarded. Thereafter, the plaintiffs filed a motion for reconsideration and/or reargument, which was denied by the court on August 17, 2020. This appeal followed.

On appeal, the plaintiffs claim that the trial court (1) erred in finding that there was no bad faith, arbitrariness, or unreasonableness on the part of the defendant

to support an award of double damages and attorney's fees with respect to the plaintiffs' claims for failure to pay wages pursuant to § 31-72, and (2) abused its discretion in not awarding prejudgment interest pursuant to § 37-3a (a). We decline to address the merits of these claims because the plaintiffs have failed to provide this court with an adequate record.

To put into its proper context the lack of an adequate record for review of this appeal, we briefly recite the standards of review applicable to each of the plaintiffs' claims. First, to the extent that the plaintiffs claim that they are entitled to double damages and attorney's fees under § 31-72 as a matter of law, our review is plenary. See *Ravetto* v. *Triton Thalassic Technologies, Inc.*, supra, 285 Conn. 725. Second, to the extent that the plaintiffs challenge the trial court's factual findings in connection with its determination that bad faith, unreasonableness, or arbitrariness on the part of the defendant had not been proven, such findings are subject to the clearly erroneous standard of review.[5] See id., 727. Finally, "[t]he decision of whether to grant interest under § 37-3a is primarily an equitable determination and a matter lying within the discretion of the trial court. . . . Under

[5] Although the plaintiffs assert that they "are not challenging the factual findings of the court [with regard to bad faith, and are instead] contesting the court's application of the law to those facts," they explicitly challenge certain of the trial court's factual findings regarding bad faith in their principal appellate brief. By way of example, with regard to Sitar, the plaintiffs argue that "[t]he trial court's premise that there existed no bad faith, arbitrariness or unreasonableness because [the defendant] believed there was no employment agreement is faulty. The evidence produced at trial confirms that [the defendant] knew Sitar had an employment agreement and, at a minimum, treated him as an employee. . . . The trial court could not have reasonably found that [the defendant's] defense (i.e., that Sitar had no employment agreement) was reasonable, in good faith, and not arbitrary." Moreover, with regard to Stage, the plaintiffs contend that the trial court "somehow found that [the defendant's] 'colorable interpretation' of the words of Stage's contract meant there was no arbitrariness, bad faith or unreasonableness," and that this finding constituted "error."

the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion." (Internal quotation marks omitted.) *Aurora Loan Services, LLC* v. *Hirsch*, 170 Conn. App. 439, 458, 154 A.3d 1009 (2017).

Practice Book § 61-10 (a) provides: "It is the responsibility of the appellant to provide an adequate record for review. The appellant shall determine whether the entire record is complete, correct and otherwise perfected for presentation on appeal." "The general purpose of [the relevant] rules of practice . . . [requiring the appellant to provide a sufficient record] is to ensure that there is a trial court record that is adequate for an informed appellate review of the various claims presented by the parties." (Internal quotation marks omitted.) *R & P Realty Co.* v. *Peerless Indemnity Ins. Co.*, 193 Conn. App. 374, 379, 219 A.3d 429 (2019).

In the present case, in claiming that the trial court erred in (1) failing to find bad faith, unreasonableness, or arbitrariness on the part of the defendant and (2) declining to award prejudgment interest, the plaintiffs have presented fact-intensive claims that, as presented, require us to have a complete and accurate picture of the evidence presented at trial. The plaintiffs have not provided this court, however, with any transcripts of the three day trial. In the absence of such transcripts, we would have to resort to speculation in order to evaluate the plaintiffs' claims under the applicable standards of review, which we decline to do. See id., 380 (this court declined to review appellate claim where plaintiffs provided only partial trial transcript); *Buehler* v. *Buehler*, 175 Conn. App. 375, 382, 167 A.3d 1108 (2017) (this court declined to review appellate claim because defendant failed to provide complete transcript of relevant hearing); *Calo-Turner* v. *Turner*, 83 Conn. App. 53, 56–57, 847 A.2d 1085 (2004) (this court declined

to review appellate claim where defendant failed to provide complete transcript of trial proceedings). Accordingly, we decline to review the plaintiffs' claims.

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN GLEASON *v.* MARCELLA DURDEN ET AL.
(AC 43738)

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

Syllabus

The plaintiff sought to recover damages from the defendants, his siblings, M, H and C, and his brother-in-law A, for, inter alia, unjust enrichment and breach of contract. The plaintiff alleged that the parties entered into a family cooperative agreement following the death of his mother in 1973. Under that agreement, the plaintiff would use his discretion over the assets that he and C had inherited from their mother to cooperate with M and H, who had been disinherited, in order to bring the family closer together. The assets included properties located at Haverhill Road and Partridge Lane in Trumbull. After their mother's death, M and A moved into Haverhill Road with C, who could not live alone, while the plaintiff went away to college. Over the course of several decades, the parties continued to assist each other financially and otherwise. In 2005, the plaintiff sold Haverhill Road to M and A for $183,100, which was $250,000 less than the fair market value of the property, to help finance a project at Partridge Lane. The parties allegedly had decided to build a house on the Partridge Lane property as the first step in their overall family plan to develop their various properties. In his second amended complaint, the plaintiff alleged, inter alia, that M and A owed him the $250,000 difference between the sale price and the fair market value of Haverhill Road, on the basis of the family cooperative agreement, under the theories of breach of contract and unjust enrichment. The trial court rejected the plaintiff's breach of contract claim, concluding that the plaintiff had failed to prove the existence of the family cooperative agreement. The court found for the plaintiff and C on the plaintiff's unjust enrichment claim against M and A, concluding that the sale of Haverhill Road for less than fair market value was part of a separate family agreement to develop property in Newtown that the parties had inherited from an uncle. The court concluded that the $250,000 that the plaintiff and C had lost on the sale of Haverhill Road had unjustly enriched M and A. The trial court rejected the plaintiff's remaining

claims. Thereafter, M and A appealed to this court and the plaintiff cross appealed from the trial court's judgment. *Held*:

1. The trial court erred in rendering judgment for the plaintiff and C on the plaintiff's unjust enrichment claim, the court's conclusion having been based on a wholly unalleged agreement between the parties: although the trial court concluded that the plaintiff was entitled to recover on his unjust enrichment claim because the transfer of the Haverhill Road property was part of a separate family agreement to develop and sell the Newtown property, the plaintiff's complaint never mentioned any agreement linking the sale of Haverhill Road to the development of the Newtown property, and, in fact, it did not contain a single reference to the Newtown property; moreover, the manner in which the plaintiff pursued his unjust enrichment claim at trial and the evidence he presented in support of that claim did not overcome the deficiency in his pleading to provide M and A with sufficient notice of the basis of the court's award, as the plaintiff presented no evidence that he, M, and A had a separate understanding or expectation regarding Haverhill Road and the Newtown property that was not a part of the overall family cooperative agreement that the court found had not been proved; furthermore, this court's review of the plaintiff's posttrial briefs filed with the trial court reflect that the plaintiff never relied on a separate Haverhill Road/Newtown property agreement or understanding in support of his unjust enrichment claim and, instead, argued that any agreement regarding the Newtown property was part and parcel of the family cooperative agreement; accordingly, there was no basis to conclude that the 2005 contract regarding the sale of Haverhill Road did not fully address the transfer of that property to M and A.
2. The plaintiff's claim that the trial court erred in not finding that a confidential relationship existed between the parties, and that the defendants breached their obligations created by that relationship, was not reviewable, the plaintiff having failed to brief the claim adequately: the plaintiff's brief before this court was confusing, repetitive, and disorganized, and provided minimal relevant citation to the record, almost no citation to applicable legal authorities, and no meaningful analysis for his claim.

Argued October 20, 2021—officially released March 29, 2022

Procedural History

Action to recover damages for, inter alia, unjust enrichment, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Hon. Michael Hartmere*, judge trial referee; judgment in part for the plaintiff, from which the defendants appealed and the plaintiff cross appealed. *Reversed in part*; *judgment directed.*

Sabato P. Fiano, with whom was *Marisa R. Pulla*, for the appellants-cross appellees (defendant Marcella Durden et al.).

John Gleason, self-represented, the appellee-cross appellant (plaintiff).

Opinion

BRIGHT, C. J. This case arises out of a dispute between siblings over the disposition of various parcels of real property they acquired from their mother and an uncle. The defendants, Marcella Durden and her husband, Andrew Durden, appeal from the judgment of the trial court finding in favor of the plaintiff, John Gleason, Marcella's brother, on his unjust enrichment claim as to a property the defendants acquired from the plaintiff and another brother, Charles Gleason.[1] Specifically, the defendants claim that the court erred in rendering judgment for the plaintiff on his unjust enrichment claim because (1) the claim was time barred, (2) the court expressly found that the defendants never engaged in unjust or inequitable conduct, and (3) the agreement upon which the court based its judgment was not sufficiently definitive to support a claim of unjust enrichment and was never alleged in the plaintiff's complaint as a basis for recovery. The defendants further claim that the court erred in rendering judgment for Charles on the plaintiff's unjust enrichment claim because Charles was never an adverse party to the defendants and never asserted such a claim against them. With respect to the defendants' appeal, we reverse the judgment of the court.

The plaintiff cross appeals from the judgment of the court rendered in favor of the defendants on the plaintiff's remaining claims. Although the plaintiff's claim on

[1] Two other parties, Charles Gleason and Howard Gleason, were named as defendants in the plaintiff's second amended complaint. Neither Charles nor Howard, however, participated in this appeal. Accordingly, hereinafter, all references to the defendants are to Marcella Durden and Andrew Durden.

his cross appeal is not entirely clear, he essentially argues that the court should have found that the defendants breached their obligations created by a "confidential relationship" that existed between the parties, awarded him additional damages arising from that breach, and ordered an accounting between the parties. As to the plaintiff's cross appeal, we affirm the court's judgment.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. Stephanie Gleason was the mother of the plaintiff, Charles Gleason, Marcella Durden, and Howard Gleason. During her lifetime, Stephanie owned six parcels of real estate: (1) 22 Haverhill Road in Trumbull (Haverhill Road), (2) 21 Reading Road in Trumbull (Reading Road), (3) 52 Partridge Lane in Trumbull (Partridge Lane), (4) 15 Clifton Place in Bridgeport, (5) 15 Dayton Road in Bridgeport, and (6) 7000 Bear Claw Loop in New Port Richey, Florida.[2] From 1971 until her death, Stephanie resided with the plaintiff and Charles at Haverhill Road.[3] On March 14, 1973, Stephanie passed away. Prior to her death, Stephanie quitclaimed all of her properties, except Partridge Lane, to the plaintiff and Charles in equal shares. After her death, the Partridge Lane property was administered through her estate and transferred to the plaintiff, Howard, and Charles, pursuant to the terms of her will. Stephanie entirely disinherited Marcella from her estate. Nevertheless, her children had always had a close relationship and, following Stephanie's death, helped each other with a variety of personal and financial matters although "there was no written or oral agreement among them as to how all of the benefits received and advances made to each other were to be reconciled."

[2] Of these six properties, only Haverhill Road and Bear Claw Loop had dwellings. The other properties were all vacant lots.

[3] Howard and Marcella also previously lived with their mother at Haverhill Road, but moved into their own homes in 1970 and 1971, respectively.

Shortly after Stephanie died, the plaintiff moved out of Haverhill Road to attend college at the University of Connecticut in Storrs. Consequently, the defendants moved into Haverhill Road with Charles.[4] From 1973 until 1985, the defendants and their children resided at Haverhill Road with Charles. In 1985, Charles, finding Haverhill Road too crowded and noisy, moved to a nearby apartment where he lived with a roommate before later moving into a condominium with his partner. The defendants and their children continued living at Haverhill Road. From April, 1973, to June, 2005, although the defendants were not the owners of Haverhill Road, they did not pay rent to the plaintiff and Charles for the use of the property. They did, however, pay the outstanding mortgage until it was paid in full in 1992, and paid all real estate taxes, insurance, and maintenance costs associated with the property. The defendants' occupancy of Haverhill Road also benefitted Marcella's siblings because they lived for a time with Charles, who could not live alone.

In 1988, the plaintiff facilitated the purchase of a condominium for Charles and made all mortgage, real estate tax, insurance and condominium association payments related to the condominium from August, 1989, to November, 2017. Marcella contributed $18,000 toward the purchase of the condominium and made credit card payments for Charles and paid for his health insurance from 1990 to 1993 after Charles was laid off from his job.

In 1989, an uncle of the four siblings passed away, leaving the plaintiff, Marcella, Charles, Howard, and one cousin property at 10 and 15 Old Town Road in Newtown (Newtown property). That property consisted of approximately thirty-five to forty acres with two rental units that the defendants agreed to manage. After inheriting the Newtown property, members of the family met

[4] As all the parties so testified, Charles suffers from certain significant mental and/or physical conditions and is unable to live on his own.

with attorneys, engineers, surveyors, and consultants to discuss how they could further develop the property. As of 2016, however, almost nothing had been done to develop it.

From 1973 to 2007, the plaintiff mostly remained out of state, first in Boston and then in Rome, New York. In the mid-2000s, the plaintiff, the defendants, and Howard decided to build a house on the Partridge Lane property "as the first step in a family plan to develop the Newtown property." The plan was that the defendants' son, Daniel, would design and customize the house and eventually purchase it. Although the house was built to Daniel's specifications, he did not purchase it. Instead, the plaintiff and his wife moved into the new residence at Partridge Lane and lived there from January, 2007, to January, 2016.

To help finance the Partridge Lane project, the plaintiff offered to sell Haverhill Road to the defendants for $183,100. That sale price was $250,000 less than the fair market value of the property, which had been appraised for $433,100 in 2005. At trial, the plaintiff testified that he came up with the $183,100 sale price entirely on his own and that the price was "a back of the envelope calculation" as to how much the defendants could afford. It was uncontested by the parties that the defendants did not request, negotiate, or induce that sale price. In 2005, the parties finalized the transfer of Haverhill Road for the agreed upon price of $183,100.[5]

[5] According to Marcella's testimony, the $250,000 difference between the fair market value and the sale price was a gift from the plaintiff. The plaintiff, however, testified that under the terms of a family cooperative agreement that dated back to Stephanie's death, the defendants were required to pay the remaining $250,000 after the Newtown property had been developed. It appears that the court did not credit the testimony of either the plaintiff or Marcella. The court found that the $250,000 that the plaintiff and Charles "lost" on the sale of Haverhill Road to the defendants "was not a gift." The court also found that the plaintiff had failed to prove that there was a separate "overall 'family cooperative agreement' which encompassed all of the family transactions or interactions, e.g., rent or equivalent value to be

In 2011, while residing at Partridge Lane, the plaintiff ran into financial difficulties, and the defendants began loaning him money. In November, 2012, the defendants requested an acknowledgement of the total amount that the plaintiff had received from them. The plaintiff provided a signed debt acknowledgement form in the amount of $126,000, payable on demand. The plaintiff also promised to repay the defendants in full after he sold Partridge Lane. Thereafter, the defendants continued loaning the plaintiff money, eventually providing him with a total sum of $202,690. Partridge Lane sold in January, 2016, but the plaintiff did not repay the defendants at that time.

On January 20, 2016, a family meeting took place. At the meeting, the defendants demanded that the plaintiff repay the $202,690 they had loaned him. Howard, who also had loaned the plaintiff money for the Partridge Lane project, also demanded that his loan be repaid. The plaintiff responded to the defendants' request by demanding that the defendants pay him the $250,000 that they still purportedly owed from their purchase of Haverhill Road. The plaintiff responded to Howard's request by demanding that Howard repay him for the fair market value of Reading Road, which the plaintiff had transferred to Howard decades earlier. The defendants and Howard refused to make any payments to the plaintiff, and then commenced separate legal actions against him.

On February 2, 2017, the defendants instituted a lawsuit by way of a six count complaint against the plaintiff and his wife, alleging breach of contract, unjust enrichment, tortious interference, and three counts of fraudulent transfer. Howard, also on February 2, 2017, similarly seeking repayment of amounts he claimed were

paid at some future time by [the defendants] for living at 22 [Haverhill] Road with Charles . . . ."

owed to him, instituted a separate lawsuit against the plaintiff and his wife, alleging the same claims. The plaintiff filed separate answers and special defenses in both actions.

On July 13, 2017, the plaintiff commenced the underlying action against the defendants and Howard, and later cited in Charles as an additional party. The operative second amended complaint included ten counts: (1) breach of contract, (2) unjust enrichment, (3) constructive trust/confidential relationship, (4) breach of fiduciary duty, (5) fraudulent misrepresentation, (6) constructive trust/fraud, (7) promissory estoppel, (8) conversion, (9) equitable accounting, and (10) negligent infliction of emotional distress. Counts one through eight and count ten of the second amended complaint were directed at the defendants and Howard, whereas count nine sought an "equitable accounting of all accounts between the parties," presumably including Charles. Furthermore, the counts of the plaintiff's complaint directed at the defendants and Howard also alleged that they breached various duties and obligations to Charles, even though Charles had been named only as a defendant in the action and the plaintiff's prayer for relief did not seek any relief on behalf of Charles. Central to all of the plaintiff's claims against the defendants and Howard were the following allegations:

(1) following Stephanie's death, the plaintiff called a family meeting at which he told the defendants and Howard that, although almost all of Stephanie's assets had been bequeathed to him and Charles, "he would use some discretion over use of the assets . . . provided that everyone follows [Stephanie's] ultimate instruction which was that the assets would provide [the plaintiff] and Charles with lifelong financial stability and support, thereby creating by oral agreement a confidential fiduciary relationship on the defendants [and Howard] to [the plaintiff] and Charles";

(2) during the family meeting, the plaintiff stated that he was willing to use his discretion over the assets to bring the family closer together "with the express understanding and agreement" that any cooperative use of the assets "was subject to [the plaintiff] and Charles' paramount right to assets as they deemed necessary to ensure for their lifelong financial stability and support";

(3) in reliance on this understanding, the plaintiff and Charles transferred, for less than fair market value, Haverhill Road to the defendants and Reading Road to Howard; and

(4) despite accepting these properties pursuant to the understanding that they were required to participate in other family transactions as requested by the plaintiff, the defendants and Howard failed to meet their obligations, including returning to the plaintiff and Charles Haverhill Road and Reading Road or failing to pay the full value for said properties when demanded to do so.

The defendants and Howard filed answers denying these allegations and asserting several special defenses.[6] All three lawsuits were consolidated for trial. During October and November, 2018, the trial court held a six day bench trial. Thereafter, the court issued its memorandum of decision. In the defendants' action against the plaintiff, the court rendered judgment for the defendants in the amount of $202,690 on their breach of contract claim, after finding that the plaintiff violated his agreement to repay the money that the defendants had loaned him. The court found for the plaintiff on the remaining five counts of the defendants' complaint. In Howard's action, the court rendered judgment for

[6] Prior to the start of the trial, Charles had not filed an appearance or an answer. Accordingly, the plaintiff moved that a default judgment be entered against Charles, and the court granted that motion. Subsequently, after trial had commenced, he belatedly filed an appearance and an answer. It appears, however, that the court never vacated the default judgment against Charles.

the plaintiff on all counts. Finally, in the plaintiff's action against the defendants, Howard, and Charles, the court rendered judgment for the plaintiff and Charles in the amount of $250,000 on the plaintiff's unjust enrichment claim against the defendants. Specifically, the court found that the plaintiff and Charles had "conferred a benefit of $250,000 on [the defendants] by the sale of their Haverhill Road property for far less than the market value to their detriment." The court further found that the sale of Haverhill Road to the defendants "was part of the family agreement to develop the Newtown property . . . ."

As to its judgment in favor of Charles and against the defendants, despite the fact that he had asserted no claims against the defendants, the court explained:

"Charles Gleason was made a party defendant to this action by [the plaintiff] pursuant to [General Statutes §§] 52-101 and 52-102, so that his rights could be adjudicated. After he failed to appear and failed to plead to the complaint, a motion for default as to Charles was granted. After the trial had begun [however], Charles did file an appearance and an answer to the complaint with the help of Daniel Durden, [the defendants'] son. Also, Charles was called as a witness and testified during the trial. Unjust enrichment means that it is contrary to equity and good conscience for the defendants to retain a benefit that has come to them at the expense of the plaintiff. Unjust enrichment, consistent with the principles of equity, is a broad and flexible remedy. . . . This court will determine the rights of Charles in this matter.

"When a court has assumed equitable jurisdiction over a matter, the doctrine of retaining jurisdiction in order to completely adjust the controversy extends to the granting of relief to a defendant or between codefendants. On this ground [a] defendant may have relief to

which he shows himself entitled against [a] plaintiff, although he does not ask for it, and even in some cases where [a] plaintiff has failed to make out his own case. . . . This court does have jurisdiction in this equitable matter to grant relief to Charles . . . .'' (Citations omitted; internal quotation marks omitted.)

As to the remaining nine counts, the court rendered judgment for the defendants. The court also rendered judgment for Howard on all ten counts of the plaintiff's complaint.

The defendants appealed. Thereafter, the plaintiff filed a cross appeal.[7] Additional facts and procedural history will be set forth below as necessary.

I

The defendants claim that the court improperly concluded that the plaintiff and Charles were entitled to unjust enrichment damages from the defendants with respect to their purchase of Haverhill Road because (1) the plaintiff's unjust enrichment action was untimely, (2) although the defendants were enriched by the purchase, the enrichment was not unjust, (3) the agreement upon which the court based its judgment was not a definitive agreement and was never alleged in the plaintiff's complaint as a basis for recovery, and (4) with respect to Charles, that he was never an adverse party to the defendants, had asserted no claims against the defendants, and thus could not be awarded damages

[7] The only judgment on appeal before this court is the judgment in the plaintiff's action against the defendants. Howard appealed from the judgment in his case against the plaintiff, but that appeal was dismissed by this court for lack of a final judgment. The defendants also appealed from the judgments rendered for the plaintiff in their action against the plaintiff, and the plaintiff cross appealed from the judgment against him in that action, but we also dismissed both the appeal and the cross appeal in that matter for lack of a final judgment. Last, the plaintiff appealed from the judgment rendered for the defendants in their action against him, but we dismissed that appeal after the plaintiff failed to timely file the required documents.

by the court. We conclude that the defendants' third claim is dispositive and are persuaded that the court erred when it rendered judgment for the plaintiff and Charles on the unjust enrichment claim.[8]

We first set forth the standard of review and applicable law. Determining whether the equitable doctrine of unjust enrichment applies in a given case "requires a factual examination of the particular circumstances and conduct of the parties. . . . The factual findings of a trial court must stand, therefore, unless they are clearly erroneous or involve an abuse of discretion. . . . When a trial court's legal conclusions are challenged, however, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Citations omitted; internal quotation marks omitted.) *David M. Somers & Associates, P.C.* v. *Busch*, 283 Conn. 396, 407, 927 A.2d 832 (2007).

The doctrine of unjust enrichment "is based upon the principle that one should not be permitted unjustly to enrich himself at the expense of another but should be required to make restitution of or for property received, retained or appropriated." (Internal quotation marks omitted.) *Gibson* v. *Jefferson Woods Community, Inc.*, 206 Conn. App. 303, 314, 260 A.3d 1244, cert. denied, 339 Conn. 911, 261 A.3d 747 (2021). "A right of recovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another. . . . With no other test than what, under a given set of circumstances, is just or unjust, equitable or inequitable, conscionable or unconscionable, it becomes necessary in any case where the benefit of the doctrine

[8] Because we agree with the defendants' third claim and resolve this appeal on those grounds, we need not reach their other claims.

is claimed, to examine the circumstances and the conduct of the parties and apply this standard. . . . Unjust enrichment is, consistent with the principles of equity, a broad and flexible remedy." (Internal quotation marks omitted.) *Hospital of Central Connecticut* v. *Neurosurgical Associates, P.C.*, 139 Conn. App. 778, 784, 57 A.3d 794 (2012).

Unjust enrichment is a "*noncontractual* means of recovery in restitution." (Emphasis added; internal quotation marks omitted.) *Professional Electrical Contractors of Connecticut, Inc.* v. *Stamford Hospital*, 196 Conn. App. 430, 438, 230 A.3d 773 (2020); see also *Hospital of Central Connecticut* v. *Neurosurgical Associates, P.C.*, supra, 139 Conn. App. 784 ("[u]njust enrichment applies wherever justice requires compensation to be given for property or services rendered . . . and *no remedy is available by an action on the contract*" (emphasis added)). In other words, unjust enrichment is not available as a remedy when there is a valid contract between the parties and that contract addresses the matter at issue in the unjust enrichment action. See *Connecticut Light & Power Co.* v. *Proctor*, 158 Conn. App. 248, 251 n.7, 118 A.3d 702 (2015) ("[a] court . . . cannot grant relief on a theory of unjust enrichment unless the court first finds that there was no contract between the parties"), aff'd, 324 Conn. 245, 152 A.3d 470 (2016). "Nevertheless, when an express contract *does not fully address a subject*, a court of equity may impose a remedy to further the ends of justice." (Emphasis added; internal quotation marks omitted.) *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 433, 455, 970 A.2d 592 (2009).

The plaintiff's unjust enrichment claim against the defendants concerns solely the sale of Haverhill Road. It is undisputed, however, that the plaintiff and the defendants had a valid oral agreement as to the transfer of that property. Consistent with their testimony at trial,

both parties acknowledged during oral argument before this court that they had agreed that the plaintiff would sell the property to the defendants for $183,100, even though its fair market value was $433,100. The parties' agreement to transfer Haverhill Road was, undeniably, a contract; see *Boland* v. *Catalano*, 202 Conn. 333, 338–39, 521 A.2d 142 (1987) ("[a] contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty" (internal quotation marks omitted)); and that contract addressed the obligations of the parties with regard to the sale. Accordingly, because there was a contract between the plaintiff and the defendants regarding the sale of Haverhill Road, the doctrine of unjust enrichment does not apply unless the contract did not fully address the subject at issue. See *New Hartford* v. *Connecticut Resources Recovery Authority*, supra, 291 Conn. 455–56.

On appeal, the plaintiff does not claim that there was not a valid agreement as to the sale of Haverhill Road. Instead, the plaintiff argues that the agreement for the sale of Haverhill Road for $183,100 did not fully address the subject at issue because there was a collateral agreement in place that further addressed the defendants' payment obligations for the property. According to the plaintiff, the parties had a separate agreement concerning the development of the Newtown property and, under that agreement, the defendants were required to pay the $250,000 difference between the sale price and the fair market value of Haverhill Road after the Newtown property had been developed and sold. The court found that this separate agreement existed, and, on that basis, concluded that the sale of Haverhill Road was part of the family agreement to develop the Newtown property and, as such, that the $250,000 that the plaintiff and Charles had lost on the sale of Haverhill Road had unjustly enriched the defendants.

The defendants claim that, in relying on the purported separate agreement regarding Haverhill Road and the Newtown property, the court "adopted an unalleged, narrower subsection of [the family cooperative agreement] which was no more definitive in its essential terms than the alleged 'family cooperative agreement' that the trial court rejected." They note that "***[c]onspicuously absent from all three [versions of the plaintiff's] complaints is any mention whatsoever of the Newtown property.***" (Emphasis in original.) The defendants further argue that the plaintiff presented no evidence as to the terms of this separate agreement or that the defendants in any way breached it. In sum, the defendants claim that the court improperly based its unjust enrichment judgment in favor of the plaintiff and Charles on an unpleaded and unproven agreement. We agree.

"It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of [his] complaint." (Internal quotation marks omitted.) *Cellu Tissue Corp.* v. *Blake Equipment Co.*, 41 Conn. App. 413, 417, 676 A.2d 405 (1996). "The purpose of the complaint is to limit the issues to be decided at the trial of a case and is calculated to prevent surprise. . . . A complaint should fairly put the defendant on notice of the claims against him. . . . Thus, a plaintiff during trial cannot vary the factual aspect of his case in such a way that it alters the basic nature of the cause of action alleged in his complaint. . . . In other words, [a] plaintiff may not allege one cause of action and recover upon another . . . .

"The modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . Although essential allegations may not be supplied by conjecture or remote implication . . . the complaint must be read in its entirety in such a way as to give effect to the pleading

with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the complaint is insufficient to allow recovery. . . . Whether a complaint gives sufficient notice is determined in each case with reference to the character of the wrong complained of and the underlying purpose of the rule which is to prevent surprise upon the defendant." (Citations omitted; internal quotation marks omitted.) *Oxford House at Yale* v. *Gilligan*, 125 Conn. App. 464, 469–70, 10 A.3d 52 (2010). "The interpretation of pleadings presents a question of law over which our review is plenary." *Landry* v. *Spitz*, 102 Conn. App. 34, 41, 925 A.2d 334 (2007).

In addition, "in the context of a postjudgment appeal, if a review of the record demonstrates that an unpleaded cause of action actually was litigated at trial without objection such that the opposing party cannot claim surprise or prejudice, the judgment will not be disturbed on the basis of a pleading irregularity. . . . In that circumstance, provided the plaintiff has produced sufficient evidence to prove the elements of his unpleaded claim, the defendant will be deemed to have waived any defects in notice." (Citation omitted.) Id., 43–44. Put another way, a court may not render a judgment for a plaintiff on a theory that is neither pleaded nor pursued by the plaintiff at trial.

In determining whether the court's unjust enrichment judgment was based on a claim that the plaintiff did not plead or pursue at trial, we begin with the allegations of the operative complaint. Count two of the plaintiff's second amended complaint, which sets forth the plaintiff's unjust enrichment claim, incorporates by reference paragraphs 1 through 22 of count one, which sets

forth the plaintiff's breach of contract claim. Relevant to his unjust enrichment claim, the plaintiff alleged:

"10. On March 17, 1973, the day of his mother's funeral, [the plaintiff] called a family meeting (the 'Family Meeting') attended by Charles and the defendants at which time [the plaintiff] confirmed what everyone at the meeting had been told numerous times by [Stephanie]: that due to the animosity between [Stephanie] and the defendants that they had been disinherited from [Stephanie's] estate and that [the plaintiff] and . . . Charles were the sole beneficiaries.

"11. During the aforementioned Family Meeting, [the plaintiff] further advised that [Stephanie] had instructed him on numerous occasions prior to her death that the assets of her estate which would be bequeathed to him and Charles were to be utilized to provide for their lifelong financial stability and support, and [the plaintiff] agreed to comply with her wishes.

"12. During the aforementioned Family Meeting, [the plaintiff] further advised that he would use some discretion over use of the assets of [Stephanie's] estate; provided that everyone follow her ultimate instruction which was that the assets would provide [the plaintiff] and Charles with lifelong financial stability and support, thereby creating by oral agreement a confidential fiduciary relationship on the defendants to [the plaintiff] and Charles.

"13. During the aforementioned Family Meeting, [the plaintiff] indicated that he was willing to use discretion to cooperate with his disinherited siblings in order to bring the family closer together and with the express understanding and agreement by and between [the plaintiff] and Charles and the defendants that any such cooperative arrangements would at all times be subject to [the plaintiff] and Charles' paramount right to assets as they deemed necessary to ensure for their lifelong

financial stability and support (hereinafter referred to as the 'Family Cooperative Agreement').

"14. Among the assets of [Stephanie's] estate were real property located at . . . Reading Road . . . and . . . Haverhill Road . . . ."

The incorporated paragraphs of count one also alleged that, "[i]n reliance on the Family Cooperative Agreement," the plaintiff and Charles were, in relevant part, induced by the defendants to engage in two transactions, which the complaint describes as part of the "Family Cooperative Transactions": (1) granting the defendants "the right to occupy Haverhill Road for minimal and inadequate consideration in light of the fair market value of said right" and (2) conveying Haverhill Road to the defendants again for minimal and inadequate consideration in light of the property's fair market value. Further, the complaint alleged that despite these transactions, the defendants had failed to pay (1) the fair market value of their occupancy of Haverhill Road prior to the conveyance of that property to them and (2) the fair market value of the Haverhill Road property. Other than incorporating the allegations from count one, in count two the plaintiff alleged only that he and Charles "conferred significant benefits upon the defendants pursuant to the Family Cooperative Transactions," the defendants did not pay for those benefits and were unjustly enriched to the detriment of the plaintiff and Charles, and the plaintiff claimed money damages.

The court, in rejecting the plaintiff's breach of contract claim in count one, concluded that the plaintiff had failed to prove the existence of the Family Cooperative Agreement on which both that claim and the unjust enrichment claim were based. In particular, the court held that "the alleged 'family cooperative agreement' which frequently was characterized by 'we'll figure it

out later' was not definite and certain as to its essential terms and requirements of the parties. Although both Marcella and [the plaintiff] kept fairly extensive records, the plaintiff did not prove that there was one overall 'family cooperative agreement' which encompassed all of the family transactions or interactions, e.g., rent or equivalent value to be paid at some future time by Marcella and Andrew for living at 22 [Haverhill] Road with Charles, or fair market value for occupancy rights to be paid by Howard for living at Reading Road."

Nevertheless, as noted previously in this opinion, the court, in rendering judgment on count two, concluded that the plaintiff and Charles were entitled to recover on the unjust enrichment claim because the transfer of Haverhill Road was part of a separate family agreement to develop and sell the Newtown property. The problem with such a conclusion is that the complaint never mentioned any agreement linking the sale of Haverhill Road to the defendants to the development of the Newtown property. In fact, the complaint does not contain a single reference to the Newtown property. Consequently, on the basis of our thorough review of the operative complaint, we agree with the defendants that the court's judgment in favor of the plaintiff on count two was based on a wholly unalleged agreement.

We next turn to the manner in which the plaintiff pursued his unjust enrichment claim at trial and the evidence he presented in support of that claim to determine whether the defendants had sufficient notice of the basis of the court's award and whether the plaintiff, through his presentation of his unjust enrichment claim, overcame the deficiency in his pleading. Although the plaintiff testified at trial that the $250,000 difference between what the defendants paid for Haverhill Road and its fair market value "was to be resolved once the development of Newtown took place," he repeatedly

testified that this anticipated reckoning was part of the overall family agreement "to figure it out later."

Furthermore, the plaintiff testified that the development of the Newtown property would trigger a reconciliation of all obligations the siblings had to each other in what he described as "the grand accounting of who owes who for what that we had established since the beginning," including his claim that Howard owed him money from the transfer of Reading Road, his claim that the defendants owed him and Charles rent for Haverhill Road, and the defendants' claim that the plaintiff owed them money. He also testified that the agreement that is the basis for his claim had been in place between the parties for at least forty-five years, which would predate by thirty years the defendants' purchase of Haverhill Road. Consequently, the plaintiff's testimony could be referring only to the alleged Family Cooperative Agreement and not a separate Haverhill Road/Newtown property agreement or understanding. Overall, the plaintiff presented no evidence that he and the defendants had a separate understanding or expectation regarding Haverhill Road and the Newtown property that was not part of the overall "we'll figure it out later" Family Cooperative Agreement that the court found had not been proved.

In addition, we agree with the defendants that the plaintiff failed to present evidence of the specific terms of any such agreement. In particular, he provided no evidence of any understanding among the parties of what would constitute the completion of the development of the Newtown property necessary to trigger "the grand accounting." Nor did the plaintiff present any evidence of how the defendants acted inconsistently with any plan to develop the Newtown property, which is still to be developed.

Finally, our review of the plaintiff's posttrial briefs filed in the court reflect that the plaintiff never relied on a separate Haverhill Road/Newtown property agree-

ment or understanding in support of his unjust enrichment claim. In his initial posttrial brief, the plaintiff based his unjust enrichment claim on the "long-term family agreement." Consistent with his testimony, the plaintiff argued that this family agreement was entered into shortly after Stephanie's death in 1973. Other than arguing that, as part of the long-term family agreement, the plaintiff sold Haverhill Road to the defendants and Reading Road to Howard for less than their fair market values to raise money to develop Partridge Lane, which was to be sold to develop the Newtown property, the plaintiff's initial posttrial brief makes little or no reference to the Newtown property. It does not suggest that there was a separate understanding that the defendants would pay the plaintiff and Charles an additional $250,000 upon the development of the Newtown property, describe what constituted completion of such development, or claim that the defendants have refused to participate in such development.

Similarly, in his posttrial reply brief, the plaintiff argued that his unjust enrichment claim was based on the family's decades old agreement to "figure it out later." The plaintiff also argued that the development of the Newtown property was part of this decades old agreement and the "overall family plan to develop properties." The brief does not discuss a separate Haverhill Road/Newtown property agreement as found by the court. Instead, the plaintiff argued: "The second amended complaint discusses the transactions of the family as a whole, not exclusively in regards to the properties inherited by [the plaintiff] and Charles from their mother Stephanie. All parties since 1970 were well aware of their likely inheritance of the Newtown property. At the time of discovery, and in depositions, and throughout these proceedings, the Newtown [property was] exhaustively discussed and vast evidence has been accepted by the court as to this issue."

Thus, the plaintiff argued that any agreement regarding the Newtown property was part and parcel of the agreement alleged in count one of his complaint, which the court found had not been proven. The plaintiff simply never pleaded, presented evidence of, or argued to the court that he was entitled to succeed on his unjust enrichment claim based on a separate amorphous agreement or understanding linking payment of additional money to him and Charles for the purchase of Haverhill Road to the undefined "development" of the Newtown property.

Given how the plaintiff pleaded and litigated his claims, we conclude that it was improper for the court to hold that the plaintiff had failed to prove the agreement that was the basis of his unjust enrichment claim and then rely on a purported separate agreement that was never alleged, never proven, and never argued when it rendered judgment for the plaintiff. Without the purported agreement regarding the Newtown property, and the court having rejected the plaintiff's claim of a family cooperative agreement to "figure it out later," there is no basis to conclude that the 2005 agreement regarding the sale of Haverhill Road did not fully address the transfer of that property to the defendants. Consequently, the plaintiff cannot prevail on his unjust enrichment claim and the court erred when it rendered judgment for the plaintiff on the second count of his second amended complaint.[9]

[9] As noted previously in this opinion, the court also rendered judgment for Charles on count two of the plaintiff's second amended complaint. Our conclusion that the plaintiff cannot succeed on his unjust enrichment claim, applies with equal, if not more, force to the court's judgment in favor of Charles. Charles made no claim based on the purported agreement regarding Haverhill Road and the Newtown property. Thus, the deficiencies that undermine the court's judgment in favor of the plaintiff also undermine the court's judgment as to Charles. Furthermore, Charles was not an adverse party to the defendants, given that he never made any claims against or requested any relief from the defendants. A court cannot award damages to someone who is not seeking them. We recognize that in *Giulietti* v. *Giulietti*, 65 Conn. App. 813, 784 A.2d 905, cert. denied, 258 Conn. 946, 788 A.2d 95 (2001), and cert. denied, 258 Conn. 947, 788 A.2d 95 (2001), and cert. denied

II

As best we can divine, after a thorough review of the cross appeal, it appears that the plaintiff raises a single claim: that the court erred in not finding that a confidential relationship existed between the parties. As part of that overarching claim, the plaintiff also argues that the court erred in rendering judgment for Howard[10] and in not ordering an equitable accounting. We conclude that this claim is inadequately briefed and, thus, decline to address it.[11]

sub nom. *Vernon Village, Inc.* v. *Giulietti*, 258 Conn. 947, 788 A.2d 97 (2001), and cert. denied sub nom. *Giulietti* v. *Vernon Village, Inc.*, 258 Conn. 947, 788 A.2d 96 (2001), on which the trial court relied, this court held that, under the doctrine of retaining jurisdiction, "[a] defendant may have relief to which he shows himself entitled against [a] plaintiff, although he does not ask for it, and even in some cases where [a] plaintiff has failed to make out his own case." (Internal quotation marks omitted.) Id., 858. In *Giulietti*, the named defendant who was granted relief by the court "made it clear that although she was named as a defendant, her interests in the matter were aligned with those of the plaintiffs," not the defendants. Id., 857–58. In the present case, Charles never said that he was seeking relief at all or that his interests in the action were more aligned with the interests of the plaintiff. To the contrary, Charles largely declined to participate in the underlying litigation at all. Accordingly, there was no actual controversy to adjudicate between Charles and the defendants, and the court thus erred in awarding Charles damages on the plaintiff's unjust enrichment claim for that reason as well. See *Board of Education* v. *Naugatuck*, 257 Conn. 409, 416, 778 A.2d 862 (2001) (actual controversy must exist at all times for justiciability of claim).

[10] The defendants contend that the plaintiff should not be allowed to assert claims of error against Howard in his cross appeal because Howard did not participate in this appeal. We disagree. In *Wickes Mfg. Co.* v. *Currier Electric Co.*, 25 Conn. App. 751, 754 n.3, 596 A.2d 1331 (1991), this court held that a plaintiff may properly cross appeal as to a defendant who did not appeal: "Where only one judgment exists from which an appeal could be taken, a cross appeal may properly be filed by an aggrieved appellee. This rationale also applies when a defendant appeals and a plaintiff cross appeals as to defendants who did not appeal . . . ." Accordingly, the plaintiff is permitted to challenge through his cross appeal the judgment rendered in favor of Howard, even though Howard did not participate in the appeal. That being said, for reasons explained herein, we decline to reach the merits of the plaintiff's argument that the trial court erred in rendering judgment for Howard.

[11] The plaintiff also argues in his cross appeal that the defendants failed to comply with Practice Book § 62-7 (b) (1) because they never certified

"We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned. . . . For a reviewing court to judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . In addition, briefing is inadequate when it is not only short, but confusing, repetitive, and disorganized. . . .

"We are mindful that [i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice

that a copy of their briefs and other appellate papers were delivered to Charles. We conclude that this issue is moot and, thus, unreviewable. On May 10, 2021, the plaintiff filed a motion for sanctions before this court, arguing that the defendants had repeatedly failed to certify delivery of their briefs and appellate filings to Charles. This court denied that motion, but ordered the defendants to certify that "a copy of the defendants' briefs and other appellate papers have been delivered to" Charles. On June 17, 2021, in accordance with that order, the defendants' counsel certified that the required documents had been delivered to Charles. The defendants' counsel also provided this court with a FedEx proof of delivery record for the delivery of those documents. Accordingly, this issue has been resolved and is thus moot. See *Curley* v. *Kaiser*, 112 Conn. App. 213, 229, 962 A.2d 167 (2009) (claim is moot when issue before court has been resolved).

We further note that, to the extent the plaintiff, as a self-represented party, seeks to represent Charles in his cross appeal, such representation is not allowed. Because the plaintiff is not an attorney, he cannot appear on behalf of Charles. See *Collard & Roe, P.C.* v. *Klein*, 87 Conn. App. 337, 343–44 n.3, 865 A.2d 500 ("[a] pro se party may not appear on behalf of another pro se party"), cert. denied, 274 Conn. 904, 876 A.2d 13 (2005). Moreover, contrary to the plaintiff's argument, this court's precedent in *Giulietti* v. *Giulietti*, 65 Conn. App. 813, 784 A.2d 905, cert. denied, 258 Conn. 946, 788 A.2d 95 (2001), and cert. denied, 258 Conn. 947, 788 A.2d 95 (2001), and cert. denied sub nom. *Vernon Village, Inc.* v. *Giulietti*, 258 Conn. 947, 788 A.2d 97 (2001), and cert. denied sub nom. *Giulietti* v. *Vernon*

liberally in favor of the [self-represented] party. . . . Nonetheless, [a]lthough we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Citations omitted; internal quotation marks omitted.) *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 803–804, 256 A.3d 655 (2021).

For his single claim on his cross appeal, the plaintiff provides minimal relevant citation to the record and almost no citation to applicable legal authorities. See id., 804 (brief containing only minimal citation to record was inadequate); see also *Mattie & O'Brien Contracting Co.* v. *Rizzo Construction Pool Co.*, 128 Conn. App. 537, 544, 17 A.3d 1083 (brief containing minimal citation to legal authority was inadequate), cert. denied, 302 Conn. 906, 23 A.3d 1247 (2011). Further, the plaintiff provides no meaningful analysis for his claim. See *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 748, 183 A.3d 611 (2018) (actual analysis, not just mere abstract assertions, is required for briefing to be adequate). Last, the plaintiff's briefing is confusing, repetitive, and disorganized. See *State* v. *Buhl*, 321 Conn. 688, 722–23, 138 A.3d 868 (2016) (no abuse of discretion in declining to review defendant's claims when briefing was repetitive and confusing). Accordingly, his claim is inadequately briefed, and we decline to review it.

The judgment is reversed with respect to the unjust enrichment claim in count two rendered in favor of the plaintiff and Charles Gleason, and the case is remanded with direction to render judgment for the defendants on that count; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

Village, Inc., 258 Conn. 947, 788 A.2d 96 (2001), does not give the plaintiff a right to assert Charles' legal rights in this action. Thus, the claims pertaining to Charles that were raised by the plaintiff on appeal are unreviewable by this court.

PEERLESS REALTY, INC. *v.* CITY OF STAMFORD ET AL.
(AC 43448)

Alvord, Cradle and Flynn, Js.

Syllabus

The plaintiff property owner sought reimbursement from the defendants, the city and its tax assessor, for certain real property taxes paid to the city. In 2017, the plaintiff discovered that the city's tax assessment records listed its property as being comprised of 1.15 acres, rather than the 0.89 acres that the plaintiff's appraiser had determined in 1995 or the 0.88 acres that it had been surveyed at in 2008. The plaintiff contacted the tax assessor, who confirmed that the discrepancy was the result of an error and indicated that it likely had occurred when the city converted its records to an electronic system in 1993. The tax assessor corrected the error, credited the plaintiff for the excess amount it had paid in 2016, the then current tax year, informed the plaintiff that, pursuant to the applicable statutes (§§ 12-60 and 12-129), the city could only refund the plaintiff for excess payments made during the prior three years, and sent the plaintiff an application for reimbursement for the excess amounts paid for the 2014 and 2015 tax years. Instead of completing the application, the plaintiff sent a letter to the defendants demanding a refund of all excess taxes paid since 1993. The defendants' response reiterated that any claim for a refund going back more than three years was time barred by the applicable statutes. The plaintiff filed its complaint, and, in response, the defendants asserted six special defenses, including that the statute of limitations set forth in §§ 12-60 and 12-129 precluded the plaintiff from bringing a claim arising from a clerical mistake in the assessment of taxes on the property more than three years after the applicable due date and that the plaintiff's failure to take advantage of the statutory remedies available to it precluded it from recovering pursuant to a claim for unjust enrichment. The defendants then filed a motion for summary judgment. The plaintiff opposed the motion, claiming that its complaint set forth common-law restitution and unjust enrichment claims, rather than claims pursuant to §§ 12-60 and 12-129, that the defendants had the burden of proof on the issue of the applicability of §§ 12-60 and 12-129 because they raised such claim in their special defenses, and that the defendants failed to sustain that burden because they failed to prove that the assessment error was clerical. The trial court granted the defendants' motion and the plaintiff appealed to this court. *Held* that the defendants were entitled to judgment as a matter of law and the trial court did not err in rendering summary judgment in their favor: the plaintiff was precluded from asserting a common-law claim for unjust enrichment because, contrary

to its assertions, the applicable statutes were sufficient to redress the plaintiff's grievances regardless of how the property assessment error occurred, as §§ 12-60 and 12-129 apply to errors that are clerical in nature and certain other applicable statutes (§§ 12-117a and 12-119), raised at the hearing on the motion for summary judgment, apply to errors that are nonclerical; moreover, the fact that the plaintiff failed to take advantage of the statutory remedies available to it within the applicable statutes of limitations did not render the statutory scheme inadequate or allow the plaintiff to circumvent the state taxation scheme by way of the common law; furthermore, because the statutory scheme was adequate regardless of the cause of error, the cause of error was not a genuine issue of material fact.

Argued January 13—officially released March 29, 2022

Procedural History

Action for reimbursement of real property taxes paid, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hernandez, J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Glen A. Canner, for the appellant (plaintiff).

Barbara L. Coughlan, assistant corporation counsel, for the appellees (defendants).

Opinion

ALVORD, J. This case involves a dispute over the remedies available to a taxpayer for reimbursement of property taxes levied on an apartment building following the tax assessor's erroneous recordation, dating back to 1993, of the property's acreage. The plaintiff property owner, Peerless Realty, Inc., appeals from the judgment of the trial court rendered following the granting of the motion for summary judgment filed by the defendants, the city of Stamford (city) and the Stamford tax assessor, Gregory Stackpole.[1] On appeal, the plaintiff claims that the court erred in rendering summary

[1] Hereinafter, we refer to the city of Stamford and the Stamford tax assessor, Gregory Stackpole, collectively, as the defendants, and individually by name where appropriate.

judgment because genuine issues of material fact exist and because the defendants were not entitled to judgment as a matter of law. We affirm the judgment of the trial court.

The record before the trial court, viewed in the light most favorable to the plaintiff as the nonmoving party, reveals the following facts and procedural history. The property at issue, 3 Hackett Circle West, Stamford (property), is a three-story converted mansion that contains thirteen rental units. In 1976, Edward Jordan, along with his brother and another investor, purchased the property. In July, 1981, the three individuals transferred their interests in the property to the plaintiff corporation. The two brothers shared ownership of the corporation until 1995, when Jordan bought out his brother's interest in the plaintiff corporation, becoming the sole owner. As part of the process of purchasing his brother's ownership interest, Jordan and his brother each hired an appraiser to value the property; both appraisers stated that the property was 0.89 acres. Further, in April, 2008, Jordan hired a professional land surveyor to survey the property. The surveyor determined that the property was 0.88 acres in size.

As president of the corporation, Jordan paid the property taxes on this parcel as billed by the city.[2] In or around July, 2017, Jordan hired a tax review service "to try to reduce [his] taxes . . . ." During the course of that engagement, Jordan was shown a printout from the city's tax assessment records that listed the property as being comprised of 1.15 acres rather than 0.89 or 0.88 acres. Jordan, realizing that the property's acreage must have been recorded incorrectly, brought the error to the attention of Stackpole, who determined that there was indeed an error and told Jordan that he "didn't

[2] These bills did not list the property acreage on record with the office of the tax assessor.

know how it actually happened" but thought that "[the error] occurred when the city converted its manual field cards to the electronic Computer Assisted Mass Appraisal . . . system" in 1993. Stackpole also informed Jordan that he would be permitted to refund only the excess payments for the previous three years, as "the city only goes [back] three years" because "a statute . . . dictated how far back he could go." Stackpole promised to fix the error in the city's records, and the property has been taxed as 0.89 acres since the 2017 tax year.

After this meeting, Stackpole sent the plaintiff an application for refund/transfer of property taxes specific to tax years 2014 and 2015, with a total refund amount listed as $12,609.66 and marked as relating to General Statutes § 12-129,[3] a request for a refund of "duplicate/excess payment(s)." Jordan did not fill out this application because he "wasn't accepting that" and did not want to jeopardize his right to claim a refund in connection with other years. He did accept a credit of $6577.56 for 2016, the then current tax year.

On October 24, 2017, instead of filing the application for a refund, the plaintiff's attorney sent a letter to the

[3] General Statutes § 12-129 provides in relevant part: "Any person, firm or corporation . . . who, by reason of a clerical error on the part of the assessor or board of assessment appeals, pays a tax in excess of that which should have been assessed against his property, or who is entitled to a refund because of the issuance of a certificate of correction, may make application in writing to the collector of taxes for the refund of such amount. Such application shall be delivered or postmarked by the later of (1) three years from the date such tax was due, (2) such extended deadline as the municipality may, by ordinance, establish, or (3) ninety days after the deletion of any item of tax assessment by a final court order or pursuant to subdivision (3) of subsection (c) of section 12-53 or section 12-113. Such application shall contain a recital of the facts and shall state the amount of the refund requested. The collector shall, after examination of such application, refer the same, with his recommendations thereon, to the board of selectmen in a town or to the corresponding authority in any other municipality, and shall certify to the amount of refund, if any, to which the applicant is entitled. . . . Any payment for which no timely application is made or granted under this section shall permanently remain the property of the municipality. . . ."

defendants demanding a refund of all of the excess taxes the plaintiff had paid since 1993. The city's assistant corporation counsel responded on November 1, 2017, writing that "any claim for a refund going back more than three years from the tax due date is time barred under General Statutes § 12-60."[4]

On December 28, 2017, the plaintiff commenced this action by way of a two count complaint,[5] in which it alleged that it had been "overcharged . . . more than

[4] General Statutes § 12-60 provides in relevant part: "Any clerical omission or mistake in the assessment of taxes may be corrected according to the fact by the assessors or board of assessment appeals, not later than three years following the tax due date relative to which such omission or mistake occurred, and the tax shall be levied and collected according to such corrected assessment. . . . Any person claiming to be aggrieved by the action of the assessor under this section may appeal the doings of the assessor to the board of assessment appeals as otherwise provided in this chapter, provided such appeal shall be extended in time to the next succeeding board of assessment appeals if the meetings of such board for the grand list have passed. . . ."

[5] Count one of the complaint alleged:

"1. The plaintiff Peerless Realty, Inc., owns 3 Hackett Circle West, Stamford, CT.

"2. 3 Hackett Circle West is a three-story converted mansion apartment building containing thirteen rental units situated on 0.88 of an acre.

"3. For the past twenty-five years—since 1993—the defendants city of Stamford and Stamford tax assessor have been taxing 3 Hackett Circle West as if it consisted of 1.15 acres.

"4. This has resulted in substantial overcharging of the plaintiff for taxes.

"5. For instance—for October 1, 2016 Grand List taxes, the defendants billed the plaintiff $42,211.12 for taxes when the correct amount was $35,605.56—a difference of $6605.56.

"6. This has been going on for twenty-five years.

"7. From 1993 to present—the defendants city of Stamford and Stamford tax assessor have overcharged the plaintiff more than $150,000 in taxes.

"8. Under date of October 24, 2017, the plaintiff made a demand for a refund of excess taxes collected.

"9. The defendants denied the plaintiff's request.

"10. As a result of the defendants' action, the plaintiff has suffered and continues to suffer damages."

The second count of the complaint alleged:

"1–9. Paragraphs 1 through 9, inclusive of the first count are hereby made paragraphs 1 through 9 inclusive of the second count.

"10. The defendants have been unjustly enriched.

$150,000 in taxes" since 1993, and that, "[a]s a result of the defendants' action [it had] suffered and continue[d] to suffer damages." The plaintiff further alleged that the defendants had been unjustly enriched as a result of the overpaid taxes. The plaintiff sought compensatory damages, interest, attorney's fees, and costs. On February 13, 2018, the defendants filed an answer and asserted the following six special defenses: (1) "[*t*]*he plaintiff failed to take advantage of the statutory remedy available to it for a refund of taxes in a timely manner precluding the remedy of unjust enrichment*"; (2) "[t]he statute of limitations set out in . . . [§§] 12-60 and 12-129 precludes the bringing of a claim arising from a clerical mistake in the assessment of taxes more than three years from the date the tax was due"; (3) "[t]ax payments made for which no timely application for refund was made under [§] 12-129 . . . permanently remain the property of the city"; (4) "[*t*]*he plaintiff has failed to follow the procedure set out in . . . [§] 12-60 . . . and is, therefore, precluded from bringing this action*"; (5) "[t]he first count fails to set out a valid cause of action"; and (6) "[t]he second count fails to set out a valid cause of action." (Emphasis added.) The plaintiff denied the allegations of the special defenses.

On February 28, 2019, the defendants filed a motion for summary judgment and, later, a memorandum of law in support of that motion. In their memorandum, the defendants noted that they "presum[ed]" that the first count of the complaint was brought pursuant to §§ 12-60 and 12-129. The defendants then asserted that "the plaintiff is precluded from bringing a claim arising from a clerical mistake in the assessment of taxes more than three years from the date the tax was due"; "tax payments made for which no timely application for a refund was made under [§] 12-129 . . . permanently

"11. As a result of the defendants' action, the plaintiff has suffered and continues to suffer damages."

remain the property of the city"; and "the plaintiff's failure to take advantage of the statutory remedy available to it for a refund of taxes in a timely manner precludes it from recovering under the remedy of unjust enrichment." The defendants also asserted that "the plaintiff's failure to follow the procedure set out in [§] 12-60 . . . precludes it from bringing the claims asserted . . . ."[6]

On April 22, 2019, the day on which the defendants' motion for summary judgment was to be argued, the plaintiff filed a memorandum in opposition to the motion for summary judgment. The plaintiff first represented that the first count of its complaint "sets forth a restitution claim seeking reimbursement of excess real estate taxes . . . ." The plaintiff then argued that, because the defendants raised §§ 12-60 and 12-129 in their special defenses, they "ha[d] the burden of proof on that issue." The plaintiff further argued that the defendants failed to sustain that burden because both statutes apply only to " 'clerical' errors" and the defendants "have not sustained their burden of proof that the mistake herein was 'clerical.' " In arguing that the defendants did "not [sustain] their burden" to show that the error was clerical, the plaintiff relied on the fact that Stackpole did not know exactly how the error occurred and " 'surmise[d]' " that it occurred when the records were digitized. The plaintiff then relied on *National CSS, Inc.* v. *Stamford*, 195 Conn. 587, 597, 489 A.2d 1034 (1985), for the proposition that "[c]ommon-law rights may be resorted to where statutory procedures are inadequate." Finally, the plaintiff argued

[6] In their memorandum in support of summary judgment, the defendants additionally argued that, because the plaintiff "failed to alert the city to the actual square footage of the lot when [Jordan] completed a data mailer in 2008," it was negligent and could not recover the excess taxes it paid. The defendants referred to a "Data Verification Report" that the city's assessor mailed to the plaintiff in 2008. It indicated that the property was 50,000 square feet in size, which, as noted by the trial court, is equivalent to 1.15 acres. The plaintiff received the report, corrected other information on the report, and returned it to the assessor as instructed.

that "[t]here are genuine issues as to material fact including but not limited to how and when the plaintiff's property . . . came to be stated on the tax assessor's records as 1.15 acres as opposed to 0.88 acres."

Also on April 22, 2019, the court, *Hernandez*, *J.*, heard oral argument on the motion for summary judgment, during which the defendants argued, inter alia, that the plaintiff's claims were "precluded because there's a statutory scheme." At the outset, the defendants' counsel noted her surprise at the plaintiff's representation that count one of the complaint was not intended to be a claim pursuant to §§ 12-60 and 12-129 and its suggestion that the error was anything other than clerical. In light of the plaintiff's new representations, the defendants' counsel referred the court to other provisions of title 12 of the General Statutes, namely General Statutes §§ 12-117a[7] and 12-

[7] General Statutes § 12-117a provides in relevant part: "Any person . . . claiming to be aggrieved by the action of the board of tax review or the board of assessment appeals, as the case may be, in any town or city may, within two months from the date of the mailing of notice of such action, make application, in the nature of an appeal therefrom . . . to the superior court for the judicial district in which such town or city is situated, which shall be accompanied by a citation to such town or city to appear before said court. Such citation shall be signed by the same authority and such appeal shall be returnable at the same time and served and returned in the same manner as is required in case of a summons in a civil action. The authority issuing the citation shall take from the applicant a bond or recognizance to such town or city, with surety, to prosecute the application to effect and to comply with and conform to the orders and decrees of the court in the premises. Any such application shall be a preferred case, to be heard, unless good cause appears to the contrary, at the first session, by the court or by a committee appointed by the court. . . . If the assessment made by the board of tax review or board of assessment appeals, as the case may be, is reduced by said court, the applicant shall be reimbursed by the town or city for any overpayment of taxes, together with interest and any costs awarded by the court, or, at the applicant's option, shall be granted a tax credit for such overpayment, interest and any costs awarded by the court. Upon motion, said court shall, in event of such overpayment, enter judgment in favor of such applicant and against such city or town for the whole amount of such overpayment, less any lien recording fees incurred under sections 7-34a and 12-176, together with interest and any costs

119[8] and argued: "If you don't like how your property is assessed, you have the right under [§] 12-117[a] . . . to appeal to the Board of Assessment Appeals"; "you can [also] file a claim under [§] 12-119, asserting that [the assessment] was manifestly unjust or for some other reason wrongful"; and, finally, "if there's a clerical error . . . [the tax assessor] can make a change to the grand list going back three years. That's [§§] 12-60 [and] 12-129." The defendants relied on *National CSS, Inc.* v. *Stamford*, supra, 195 Conn. 587, for their proposition that, where "[t]here's a statutory scheme in play, you can follow the statutory scheme. If you don't, you're out of luck. You can't go and claim unjust enrichment. You can't claim another common-law remedy, an equitable remedy." The defendants continued: "A taxpayer who has not sought redress in an appropriate manner is foreclosed from continuing litigation outside these statutes." In response, the plaintiff maintained its position that the defendants had the burden to show that

awarded by the court. The amount to which the assessment is so reduced shall be the assessed value of such property on the grand lists for succeeding years until the tax assessor finds that the value of the applicant's property has increased or decreased."

[8] General Statutes § 12-119 provides in relevant part: "When it is claimed . . . that a tax laid on property was computed on an assessment which, under all the circumstances, was manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of such property, the owner thereof . . . prior to the payment of such tax, may, in addition to the other remedies provided by law, make application for relief to the superior court for the judicial district in which such town or city is situated. Such application may be made within one year from the date as of which the property was last evaluated for purposes of taxation and shall be served and returned in the same manner as is required in the case of a summons in a civil action, and the pendency of such application shall not suspend action upon the tax against the applicant. In all such actions, the Superior Court shall have power to grant such relief upon such terms and in such manner and form as to justice and equity appertains, and costs may be taxed at the discretion of the court. If such assessment is reduced by said court, the applicant shall be reimbursed by the town or city for any overpayment of taxes in accordance with the judgment of said court."

the error at issue was clerical. The plaintiff's counsel did not address the defendants' arguments with respect to the relief available under §§ 12-117a and 12-119 and further argued that, because §§ 12-60 and 12-129 were not applicable, as there was no proof of clerical error, the plaintiff could "pursue [its] common-law rights."

On August 20, 2019, the court granted the defendants' motion for summary judgment but failed to state the factual or legal basis for its decision. On September 30, 2019, the plaintiff appealed from the court's grant of summary judgment and also filed a motion, captioned "plaintiff's motion to reargue and/or for clarification/articulation of court decision," in which it argued that, "[i]n order to prosecute [its] appeal [it] need[ed] to know the grounds upon which the court granted the defendants' motion for summary judgment . . . ." The court summarily denied the motion.

On March 24, 2020, the plaintiff filed a motion for articulation, and the defendants thereafter filed a responsive memorandum of law. On August 10, 2020, the court summarily denied the motion for articulation, stating, "For the reasons set forth in the memorandum of the defendant-appellee ([docket entry] #137.00), the city of Stamford, the plaintiff-appellant's motion for articulation is denied."

On August 20, 2020, the plaintiff filed with this court a motion for review of the denial of its motion for articulation. This court granted the motion and ordered the trial court to articulate the factual and legal basis for its ruling granting the defendants' motion for summary judgment. Thereafter, on December 7, 2020, the court issued a memorandum of decision explaining its grant of the defendants' motion for summary judgment.

In its memorandum of decision, the court treated the first count of the complaint as a claim pursuant to §§ 12-60 and 12-129 and determined, after considering the

time limitations contained in §§ 12-60 and 12-129, that "the plaintiff cannot recover a refund of any excess taxes paid more than three years after the taxes were due."[9] In addition, the court determined that, because the plaintiff "failed to follow the procedures prescribed by . . . § 12-60 in a timely manner . . . [it] is precluded from pursuing a claim of unjust enrichment."[10]

On appeal, the plaintiff claims that there "are genuine issues as to material fact . . . concerning [its] claims that [the property] has been assessed as if it were 1.15 acres as opposed to 0.88 acres and as a result the plaintiff has suffered damage." According to the plaintiff, the cause of the assessment error is disputed, rendering §§ 12-60 and 12-129 inapplicable to its case. The plaintiff argues that the court erred in concluding that its claims were foreclosed because it maintains that the current statutory scheme is inadequate, thereby allowing it to assert a common-law claim for unjust enrichment. We disagree and affirm the judgment of the trial court, albeit on different grounds.[11]

[9] Although the plaintiff makes passing reference in its appellate brief to the first count of its complaint as "set[ting] forth a restitution claim," the plaintiff fails to raise or brief a claim on appeal that the trial court erred in treating the first count of the complaint as a claim pursuant to §§ 12-60 and 12-129. We note that the defendants likewise understood the claim as brought pursuant to those statutes, and the plaintiff previously referred to the case only as "claiming damages and unjust enrichment."

[10] In addition to its determination that the plaintiff could not pursue a claim for unjust enrichment, the court also determined that there was no genuine issue of material fact that the plaintiff was "negligent in failing to address the discrepancy in a timely manner," referring to the plaintiff's failure to act on the acreage/square foot error apparent in the 2008 "Data Verification Report" that the tax assessor sent to the plaintiff. See footnote 6 of this opinion. The court concluded that the report put the plaintiff on notice of the error and its claim for unjust enrichment was therefore precluded.

[11] "In ruling on a motion for summary judgment, the court is not to decide issues of fact; its function is to determine whether there are genuine issues of material fact. . . . In opposing a motion for summary judgment, a party is not required to present evidence necessary to prevail at trial, only evidence sufficient to raise issues of fact. We may affirm the judgment of the court

We first set forth our well established standard of review on appeal following a trial court's granting of a motion for summary judgment. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. As an appellate tribunal, [w]e must decide whether the trial court erred in determining that there was no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The test is whether a party would be entitled to a directed verdict on the same facts. . . . A material fact is a fact which will make a difference in the result of the case. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . .

"The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Citation omitted; internal quotation marks omitted.) *Mariano* v.

on different grounds." (Citation omitted.) *Vaillancourt* v. *Latifi*, 81 Conn. App. 541, 544 n.4, 840 A.2d 1209 (2004).

Hartland Building & Restoration Co., 168 Conn. App. 768, 776–77, 148 A.3d 229 (2016).

We next set forth the applicable principles of a claim sounding in unjust enrichment. "The right of recovery for unjust enrichment is equitable, its basis being that in a given situation it is contrary to equity and good conscience for the defendant to retain a benefit which has come to him at the expense of the plaintiff. . . . Where, however, a statutory scheme exists for the recovery of a benefit that is also recoverable at common law, the common law right may be resorted to only where the statutory procedures are inadequate." (Citation omitted; internal quotation marks omitted.) *National CSS, Inc.* v. *Stamford*, supra, 195 Conn. 597. Therefore, we must address application of the relevant statutory scheme.

The plaintiff argues that §§ 12-60 and 12-129 provide an inadequate procedure for a taxpayer to obtain relief because it disputes that the tax assessment error was a "clerical omission or mistake . . . ." General Statutes § 12-60. Thus, in the plaintiff's view, no statutory scheme exists for recovery of the overpaid taxes. Therefore, the plaintiff asserts that its claim for unjust enrichment cannot be barred as a matter of law and it is permitted to seek a refund of all excess taxes paid in a claim for unjust enrichment.

In response, the defendants direct this court to the statutory relief found in §§ 12-117a and 12-119. It is the defendants' position that §§ 12-117a and 12-119 set forth a procedure for an assessment error that is not clerical in nature and, therefore, the label put on the error is irrelevant, as the statutory scheme provides redress for clerical and nonclerical errors alike. Thus, even if the error is nonclerical, as asserted by the plaintiff, companion provisions in title 12 provide redress for the taxpayer. We agree with the defendants that the statutory

scheme precludes this common-law claim for unjust enrichment.[12]

Section 12-60 provides the procedure for the correction of a clerical omission or mistake in the assessment

[12] In its principal appellate brief, the plaintiff notes that the defendants did not expressly rely on §§ 12-117a and 12-119 until oral argument on their motion for summary judgment. For the reasons that follow, we conclude that we properly may address the applicability of §§ 12-117a and 12-119 to this case.

First, we note that the complaint does not allege any intentional conduct on the part of the defendants in the assessment error. Second, the defendants asserted special defenses, two of which are particularly relevant. Specifically, the defendants asserted that "[t]he plaintiff failed to take advantage of the statutory remedy available to it for a refund of taxes in a timely manner precluding the remedy of unjust enrichment" and "[t]he plaintiff has failed to follow the procedure[s] set out in . . . [§] 12-60 . . . and is, therefore, precluded from bringing this action." When asserting these special defenses, and in filing their motion for summary judgment, the defendants were responding to the complaint understood to be (1) a claim pursuant to §§ 12-60 and 12-129 in count one and (2) presenting no dispute that the error was clerical. As soon as the defendants became aware of the plaintiff's characterization of count one as distinct from a claim under §§ 12-60 and 12-129, and the plaintiff's dispute over the nature of the error, they appropriately directed the trial court to consider §§ 12-117a and 12-119. The plaintiff had ample opportunity during argument to respond to the authority cited by the defendants but failed to take advantage of that opportunity. Further, at the conclusion of oral argument, the court offered the plaintiff the opportunity to file additional briefing, which the plaintiff ultimately declined. Thus, when the defendants asserted their reliance on these provisions of title 12 at oral argument on summary judgment, they were not raising a new claim but rather were expounding on the defense that they had consistently put forth since the inception of litigation, which is that a claim for unjust enrichment is precluded when there is an adequate statutory scheme.

In addition, even if we were to conclude that the defendants' reliance on §§ 12-117a and 12-119 was not properly raised in the trial court proceedings, our consideration of these statutes remains appropriate. "[O]rdinarily, we will decline to address only a *claim* that is raised for the first time on appeal. . . . [A] claim is an entirely new legal issue, whereas, [g]enerally speaking, an argument is a point or line of reasoning made in support of or in opposition to a particular claim. . . . Because [o]ur rules of preservation apply to claims . . . [and not] to legal arguments . . . [w]e may . . . review legal arguments that differ from those raised below if they are subsumed within or intertwined with arguments related to the legal claim before the court." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Markley* v. *State Elections Enforcement Commission*, 339 Conn. 96, 104–105 n.9, 259 A.3d 1064 (2021).

We further note that the defendants fully briefed the applicability of §§ 12-117a and 12-119 in their appellate brief, and the plaintiff failed to offer any response in its reply brief, beyond again noting that the defendants did not

of taxes. A request for correction must be made "not later than three years following the tax due date relative to which such omission or mistake occurred . . . ." General Statutes § 12-60.

Section 12-129 provides the taxpayer with a procedure to follow in order to obtain a refund of taxes paid in excess due to "a clerical error on the part of the assessor or board of assessment appeals . . . ." As in § 12-60, an application for a refund must be made "three years from the date such tax was due . . . ." General Statutes § 12-129. Further, § 12-129 specifically provides in relevant part that "[a]ny payment for which no timely application is made or granted under this section shall permanently remain the property of the municipality. . . ."

Section 12-117a sets forth the process for those "claiming to be aggrieved by the action of the board of tax review or the board of assessment appeals . . . ." An application must be made "within two months from the date of the mailing of notice of [the board's] action . . . ." General Statutes § 12-117a. The section "provide[s] a method by which an owner of property may directly call in question the valuation placed by assessors upon his property . . . ." (Internal quotation marks omitted.) *Konover* v. *West Hartford*, 242 Conn. 727, 734, 699 A.2d 158 (1997).

Section 12-119 addresses the procedure applicable when, inter alia, "a tax . . . was computed on an assessment which, under all the circumstances, was manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of such property . . . ." Pursuant to § 12-119, application for relief must be made to the Superior Court "prior to the payment of such tax" and "within one year from the date as of which

expressly rely on §§ 12-117a and 12-119 until oral argument on their motion for summary judgment.

the property was last evaluated for purposes of taxation . . . ."

We next set forth the legal principles that guide our review of the applicable statutory scheme. In *National CSS, Inc.*, our Supreme Court determined that "the procedure available [in § 12-60] was more than sufficient in providing the plaintiff [taxpayer] a method by which a refund could be obtained," and, therefore, a claim for unjust enrichment was not available to the taxpayer who erroneously paid duplicative taxes. *National CSS, Inc.* v. *Stamford*, supra, 195 Conn. 596–97. In so holding, the court relied on the following principle: "Public policy requires . . . that this court not permit taxes collected or paid to be the subject of perpetual litigation, at any time, to suit the convenience of the taxpayer." Id., 597–98; see also *Danbury* v. *Dana Investment Corp.*, 249 Conn. 1, 15, 730 A.2d 1128 (1999) ("The rationale for this rule is the need on the part of the government for fiscal certainty. A municipality, like any governmental entity, needs to know with reasonable certainty what its tax base is for each fiscal year, so that it responsibly can prepare a budget for that year."). Furthermore, "[a] taxpayer who has not sought redress in an appropriate manner is foreclosed from continuing litigation outside [of title 12]." *National CSS, Inc.* v. *Stamford*, supra, 598.

Keeping these principles in mind, we are satisfied that the provisions of §§ 12-60, 12-117a, 12-119, and 12-129 together create a statutory scheme that is sufficient to redress the plaintiff's grievances, regardless of how the error occurred. See id., 597. Specifically, because the provisions of title 12 provide sufficient procedures in cases in which excess taxes are paid due to clerical errors, improper property valuation, and "manifestly excessive" assessments; General Statutes §§ 12-60, 12-117a, 12-119, and 12-129; the cause of the current error is irrelevant: no matter how the error occurred, the provisions of title 12 provide a process through which

the plaintiff could have sought relief. See *Mariano* v. *Hartland Building & Restoration Co.*, supra, 168 Conn. App. 777. As the defendants aptly point out, "[i]f it was a clerical error, the plaintiff [could] request a refund going back three years; if it was not, the plaintiff [was] limited to pursuing its remedies under [§] 12-117a or [§] 12-119, which limit recovery even more than . . . § 12-60 and/or § 12-129."

Our conclusion is particularly appropriate given that the defendants concede the applicability of §§ 12-60 and 12-129 to the present facts and admit that there was a clerical error. Indeed, when the error was discovered, Stackpole made clear that, on application, the plaintiff would receive a refund pursuant to those statutes for the preceding three tax years. Furthermore, the plaintiff has failed to provide us with any reason as to why the statutory scheme should be held insufficient. Finally, the fact that the plaintiff failed to take advantage of the statutory remedies does not render the statutory scheme inadequate nor does it allow the plaintiff to "circumvent the state taxation scheme by way of the common law." *National CSS, Inc.* v. *Stamford*, supra, 195 Conn. 597. Therefore, we conclude that the plaintiff is precluded from asserting a claim for unjust enrichment. See id.

Thus, contrary to the plaintiff's claim, the cause of the error cannot be material to the issue presented in this case. Because the statutory scheme is adequate regardless of the cause of the error, a determination as to how the error occurred could not change the result of the case, and, therefore, the cause of the error cannot be a genuine issue of material fact.[13] See *Mariano* v.

[13] The plaintiff also asserts on appeal that when the error occurred, whether the error was the result of clerical error or deliberate action, and "what statutory procedures and/or common-law rights/remedies . . . the plaintiff ha[s] available to recover overpayment of property taxes" are genuine issues of material fact that preclude the entry of summary judgment. We disagree.

With respect to the first of these additional assertions, the parties agree that the error occurred in 1993, and, therefore, when the error occurred is

Hartland Building & Restoration Co., supra, 168 Conn. App. 777. As a result, the defendants were entitled to judgment as a matter of law and the court correctly rendered summary judgment.[14]

The judgment is affirmed.

In this opinion the other judges concurred.

GAIL PIZZOFERRATO *v.* COMMUNITY RENEWAL TEAM, INC.
(AC 43956)

Prescott, Moll and Pellegrino, Js.

Syllabus

The plaintiff sought to recover damages for personal injuries that she allegedly sustained as a result of the defendant's negligence. The court referred the case to arbitration pursuant to statute (§ 52-549u). Following a hearing, the arbitrator issued a decision in favor of the defendant. Electronic notice of the decision was provided to the parties' counsel on that same day. Neither party filed a demand for a trial de novo within twenty days of when electronic notice was sent. Because a demand for a trial de novo was not filed within twenty days, the trial court rendered judgment in accordance with the arbitrator's decision. Thereafter, the court denied the plaintiff's motion to open and vacate the judgment,

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not at issue. Furthermore, as with the cause of the error, the timing of the error has no impact on our conclusion that the plaintiff is foreclosed from asserting a claim for unjust enrichment and, therefore, cannot be material. The second of the plaintiff's assertions is simply a restatement of the plaintiff's argument that the cause of the error is a genuine issue of material fact, which is resolved in the body of this opinion. The third of the plaintiff's assertions, as the defendants note, is an issue of law and not one of fact and, therefore, cannot be a genuine issue of material fact that precludes the entry of summary judgment.

[14] The plaintiff also claims that the court erred in imposing on it the burden of proof with respect to the defendants' special defenses. According to the plaintiff, because the defendants asserted §§ 12-60 and 12-129 in their special defenses, they had the burden of proof with respect to the applicability of those statutes. Therefore, the plaintiff asserts that, when the court stated in its memorandum of decision that "[the plaintiff] has presented no evidence that someone intentionally put down the wrong acreage for the property," it "imposed on the plaintiff the burden to prove the defendants' special defenses." Because we have determined that the cause of the error is irrelevant, we need not address the plaintiff's claim with respect to the burden of proof on that issue.

and the plaintiff appealed to this court, claiming that the court improperly denied her motion because the language of the applicable statute (§ 52-549z) and rule of practice (§ 23-66) require that notice of an arbitrator's decision be sent both electronically and by mail before it can become a judgment of the court, and notice was not sent by mail in the present case. *Held* that the trial court did not abuse its discretion in denying the plaintiff's motion to open and vacate the judgment: § 52-549z does not provide that notice of an arbitrator's decision must be sent both electronically and by mail in order for the statutory twenty day period to commence, § 52-549z was amended after the judicial branch gave notice of its practice of sending only electronic notice of an arbitrator's decision unless counsel obtain an exclusion from the electronic services requirement, and Practice Book § 23-66 does not preclude electronic service of an arbitrator's decision; moreover, it was undisputed that both the plaintiff's and the defendant's counsel received electronic notice of the decision, neither counsel obtained an exclusion from the electronic services requirement, the plaintiff's counsel never argued that he was unaware of the court's practice of sending only electronic notice of the decision, and the case did not involve self-represented parties; accordingly, notice did not need to be provided by mail.

Argued January 6—officially released March 29, 2022

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford and referred to *Jeffrey V. Phelan*, arbitrator, who issued a decision for the defendant; thereafter, the court, *Sheridan, J.*, rendered judgment in favor of the defendant in accordance with the arbitrator's decision; subsequently, the court, *Sheridan, J.*, denied the plaintiff's motion to open and vacate the judgment, and the plaintiff appealed to this court. *Affirmed.*

Steven J. Errante, with whom, on the brief, was *Garrett A. Denniston*, for the appellant (plaintiff).

Meredith Ashley Hill, for the appellee (defendant).

Opinion

PELLEGRINO, J. The plaintiff, Gail Pizzoferrato, appeals from the judgment of the trial court denying

her motion to open and vacate the judgment of the court rendered in favor of the defendant, Community Renewal Team, Inc., in accordance with a decision of an arbitrator that resulted from court-annexed arbitration. On appeal, the plaintiff claims that the court improperly denied her motion because the language of both General Statutes § 52-549z[1] and Practice Book § 23-66[2] require that a decision of an arbitrator be sent to the parties both electronically and by mail before it can become a judgment of the court. Because notice of the arbitrator's decision was never sent to the parties or their counsel by mail in the present case, the plaintiff argues that the judgment of the court, rendered on the basis of the arbitrator's decision, should be vacated. We disagree and affirm the judgment of the court.

The following facts and procedural history are relevant to our resolution of the plaintiff's appeal. On November 29, 2016, the plaintiff allegedly fell and suffered several injuries while walking on a sidewalk owned and controlled by the defendant. The plaintiff instituted a negligence action against the defendant, which the court referred to arbitration pursuant to General Statutes § 52-549u. Following a hearing before the arbitrator, on October 29, 2019, the arbitrator issued a decision

[1] General Statutes § 52-549z provides in relevant part: "(a) A decision of the arbitrator shall become a judgment of the court if no appeal from the arbitrator's decision by way of a demand for a trial de novo is filed . . . .

(d) An appeal by way of a demand for a trial de novo shall be filed with the court clerk not later than twenty days after the date on which (1) notice of the arbitrator's decision is sent electronically to the parties or their counsel, or (2) the arbitrator's decision is deposited in the United States mail, whichever is later, and shall include a certification that a copy thereof has been served on each party or counsel of record, to be accomplished in accordance with the rules of the court. . . ."

[2] Practice Book § 23-66 provides in relevant part: "(a) A decision of the arbitrator shall become a judgment of the court if no claim for a trial de novo is filed . . . .

(c) A claim for a trial de novo must be filed with the court clerk within twenty days after the deposit of the arbitrator's decision in the United States mail, as evidenced by the postmark. . . ."

in favor of the defendant. Electronic notice of the arbitrator's decision was provided to the parties' counsel that same day. The electronic notice stated that the arbitrator's decision had been filed and informed the parties that it could be viewed in the case's electronic file. It also stated that "[s]elf-represented parties and attorneys who have an exemption from [the electronic services requirement] will continue to receive a copy of the decision, findings, or report by mail." Neither party filed a demand for a trial de novo within twenty days of when the electronic notice was sent. On December 19, 2019, because a demand for a trial de novo was not filed within twenty days, the trial court rendered judgment in accordance with the decision of the arbitrator.

On January 13, 2020, the plaintiff filed a motion to open and vacate the judgment of the court, claiming that she had failed to make a claim for a trial de novo, pursuant to § 52-549z and Practice Book § 23-66, because she had never received a copy of the arbitrator's decision by mail and, thus, "was not aware of the arbitrator's [decision] . . . ." The court denied the plaintiff's motion to open and vacate because "[t]he record clearly demonstrated that electronic notice of the filing of the arbitrator's decision was provided to the parties on October 29, 2019." This appeal followed.

On appeal, the plaintiff first claims that § 52-549z provides that a demand for a trial de novo must be filed no later than twenty days after notice of the decision of an arbitrator has been sent to the parties electronically or deposited in the United States mail, *whichever is later*, meaning that notice must be sent both electronically and by mail before the twenty day period for filing a demand for a trial de novo begins. The plaintiff further argues that her interpretation of § 52-549z is "bolstered by the inclusion [in the statute] of the phrase *in accor-*

dance with the rules of [*the*] *court*" (emphasis in original); see General Statutes § 52-549z (d); which she contends refers to Practice Book § 23-66, under which she argues notice must be sent by mail. We do not agree that notice of the arbitrator's decision must be sent both electronically and by mail in order for the twenty day period to commence.

We begin by setting forth the applicable standard of review. "[B]ecause this case presents an issue of statutory construction . . . [w]ell settled principles of statutory interpretation govern our review. . . . Because statutory interpretation is a question of law, our review is de novo. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Planning & Zoning Commission* v. *Freedom of Information Commission*, 316 Conn. 1, 9, 110 A.3d 419 (2015).

We turn now to the relevant language of § 52-549z: "(a) A decision of the arbitrator shall become a judgment of the court if no appeal from the arbitrator's decision by way of a demand for a trial de novo is filed . . . (d) . . . with the court clerk not later than twenty days after the date on which (1) notice of the arbitrator's decision is sent electronically to the parties or their counsel, *or* (2) the arbitrator's decision is deposited in the United States mail, whichever is later, and shall

include a certification that a copy thereof has been served on each party or counsel of record, to be accomplished in accordance with the rules of the court. . . .'' (Emphasis added.) According to the plaintiff, § 52-549z requires that notice of an arbitrator's decision be sent both electronically and by mail. We disagree because there is no language in § 52-549z that dictates that notice must be sent both electronically and by mail. Section 52-549z merely recognizes that notice may be sent by two possible methods and then dictates how the twenty day period is to be calculated with respect to each method. The phrase ''whichever is later,'' on which the plaintiff's argument hinges, is applicable only in circumstances in which notice is sent both electronically and by mail—something that did not occur in the present case. In the present case, electronic notice was sent to the plaintiff's counsel on October 29, 2019. Because notice was sent electronically and not by mail, the twenty day period for filing a demand for a trial de novo began on October 29, 2019.

This interpretation of § 52-549z is further supported by the fact that § 52-549z was amended in July, 2019; see Public Acts 2019, No. 19-64; after the Judicial Branch, in 2018, gave notice of the new Superior Court practice of sending only electronic notice of an arbitrator's decision to counsel of record unless counsel has obtained an exclusion from the electronic services requirement. See Connecticut Judicial Branch, Superior Court Notices, June 6, 2018, available at https://jud.ct.gov/superiorcourt (last visited March 18, 2022). Thus, as a practical matter, there may be cases involving a self-represented party or an attorney who has obtained an obtained an exclusion from the electronic services requirement in which notice of the arbitrator's decision is sent both electronically and by mail.

Practice Book § 23-66, on which the plaintiff relies, has not been updated since 2003. Although § 23-66 dis-

cusses instances in which notice of the arbitrator's decision has been mailed, it does not preclude electronic service of the arbitrator's decision or govern the calculation of the twenty day period when notice has been given electronically or in cases involving both methods of giving notice. In the present case, it is undisputed that (1) both the plaintiff's and the defendant's counsel received notice electronically, (2) neither counsel had obtained an exclusion from the electronic services requirement, and (3) the case did not involve any self-represented parties. Thus, notice of the arbitrator's decision did not need to be provided by mail under the circumstances of this case.[3]

Having determined that notice was properly provided to the parties, we now turn to the plaintiff's claim that the court abused its discretion by denying her motion to open and vacate the judgment rendered in accordance with the decision of the arbitrator. We first set forth our applicable standard of review. It is well established that "[t]he denial of a motion to open is an appealable final judgment." (Internal quotation marks omitted.) *Worth* v. *Korta*, 132 Conn. App. 154, 158, 31 A.3d 804 (2011), cert. denied, 304 Conn. 905, 38 A.3d 1201 (2012). This court does not "undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. . . . In an appeal from a denial of a motion to open a judgment, our review is limited to the issue of whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not

[3] We encourage the Rules Committee of the Superior Court to consider amending the language of Practice Book § 23-66 to correspond to both the amendments made to § 52-594z in 2019 and the current practice of giving notice under the now existing electronic services program.

be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Veneziano* v. *Veneziano*, 205 Conn. App. 718, 732, 259 A.3d 28 (2021).

In the present case, it is undisputed that the plaintiff's counsel received electronic notice of the arbitrator's decision on October 29, 2019. Furthermore, the plaintiff's counsel never argued that he was unaware of the Superior Court's practice, effective June 1, 2018, of sending only electronic notice of an arbitrator's decision to counsel of record. Notwithstanding these undisputed facts, the plaintiff failed to file a demand for a trial de novo within the twenty day period set forth by § 52-549z. We conclude, therefore, that the trial court did not abuse its discretion by denying the plaintiff's motion to open and vacate the judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JASON GOODE
(AC 43765)

Cradle, Alexander and Eveleigh, Js.

Syllabus

Convicted, after a jury trial, of the crime of assault of public safety personnel, the defendant appealed to this court. The defendant was incarcerated at the time of trial, serving a sentence for a previous conviction of murder. While incarcerated, the defendant was also convicted of various assault charges on three separate occasions. On the day jury selection commenced in his trial, the defendant, who was represented by B, a special public defender who had been assigned as counsel, requested to the trial court that he be appointed new counsel. The court denied that request. The court also denied the defendant's request to have his restraints removed during trial, noting the defendant's extensive criminal history and disciplinary record. *Held*:

1. The trial court did not abuse its discretion in denying the defendant's request for new counsel: although B had represented the defendant for more than one year and the defendant did not make his request until

the first day of jury selection, the court thoroughly considered the defendant's complaints against B and explained that B had notified the defendant of his trial date as soon as he had received notice from the court, that B, as an attorney with twenty to thirty years of experience, was well suited to pursue the most effective defense strategy, and B's lack of communication of that strategy with the defendant was due to the defendant's refusal to see or speak to B, and that the defendant would have ample opportunity to discuss his case with B throughout the proceedings; moreover, the defendant indicated that he was willing to commence jury selection with B's counsel, and he did not renew his request for new counsel.

2. The trial court did not abuse its discretion in denying the defendant's request to have his restraints removed and in requiring him to be restrained during trial: the court afforded great consideration to the defendant's right to remain free from restraints during the trial proceedings and implemented the least onerous means of restraining the defendant possible in light of his extensive violent criminal record and disciplinary history, which included 231 disciplinary tickets while incarcerated, and the defendant's threats of assault against his counsel in a prior matter, the court properly having weighed safety concerns against the defendant's rights in employing an intermediate system of restraints; moreover, the court, noting that jurors would already know that the defendant was incarcerated due to the nature of the charge against him and likely would expect him to be restrained, expressly instructed the jury that the use of restraints was routine for inmates while in court; furthermore, neither party objected to the court's proposal of a curative instruction making the jury aware of the restraints, and the jury never heard of the defendant's history that created the security risk.

3. The defendant's claim that the trial court should have inquired further into a potential conflict of interest with B when B indicated to the court that he would not feel comfortable trying the case if the defendant were not shackled was without merit; immediately prior to addressing the shackles issue, the court asked B if he would zealously represent the defendant and B replied that he would, and, although B's safety concerns on the basis of the defendant's violent history were understandable, B did not express that those concerns prevented him from representing the defendant or posed a conflict of interest requiring his removal from the case.

Argued January 26—officially released March 29, 2022

Procedural History

Amended information charging the defendant with the crime of assault of public safety personnel, brought to the Superior Court in the judicial district of Hartford, geographical area number fourteen, where the court,

Gold, *J.*, denied the defendant's requests for new counsel and to have his restraints removed during trial; thereafter, the matter was tried to the jury before *Gold*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed*.

Tamar Rebecca Birckhead, assigned counsel, for the appellant (defendant).

Meryl R. Gersz, deputy assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Christopher Parkilas*, supervisory assistant state's attorney, for the appellee (state).

Opinion

CRADLE, J. The defendant, Jason Goode, appeals from the judgment of conviction, rendered after a jury trial, of assault of public safety personnel in violation of General Statutes § 53a-167c (a) (1). On appeal, the defendant claims that the court erred by (1) denying his request for new counsel, (2) requiring him to remain shackled in the courtroom during his trial, and (3) not inquiring into a potential conflict of interest with his counsel. We affirm the judgment of the trial court.

On May 29, 2018, the defendant was charged with the assault of an employee of the Department of Correction in violation of § 53a-167c (a) (1) in connection with an incident that occurred on January 5, 2018, while the defendant was incarcerated at the MacDougal-Walker Correctional Facility (MacDougal). By way of an amended information filed on July 29, 2019, the state alleged: "[O]n or about January 5, 2018, at approximately 2:55 p.m. in the professional visitation room area of . . . MacDougal . . . [the defendant], with the intent to prevent Matthew Mann, an identifiable employee of the State of Connecticut Department of Correction, from performing his duties as a Department

of Correction Officer and while acting in the performance of such duties, caused physical injury to . . . Mann by swinging his right fist and striking . . . Mann on the right side of his face and neck, thereby causing physical injury . . . .'' The defendant pleaded not guilty and elected a jury trial. Following that trial, the jury found the defendant guilty as charged, and the defendant thereafter was sentenced to ten years of incarceration, to run consecutively to the sentence he was then serving.[1] This appeal followed.

On appeal, the defendant claims that the court erred by (1) denying his request for new counsel, (2) requiring him to remain shackled during his trial, and (3) not inquiring into a potential conflict of interest with his counsel. We address each claim in turn.

I

The defendant first claims that the court abused its discretion in denying his request for new counsel.[2] We are not persuaded.

The following procedural history is relevant to our analysis of this claim. On June 14, 2018, the defendant was arraigned on the aforementioned charge and the Office of the Public Defender was appointed to represent him. Attorney J. Patten Brown was thereafter appointed as a special public defender to represent the defendant, and he filed his appearance on behalf of the defendant on July 3, 2018.

On July 29, 2019, the defendant and Brown appeared before the court to commence jury selection for the defendant's trial. At the outset of that proceeding, the

[1] In 1995, the defendant was convicted of murder in violation of General Statutes § 53a-54a and was sentenced to a thirty-five year term of incarceration. As discussed herein, the defendant was subsequently sentenced for additional offenses that he committed while he was incarcerated.

[2] The defendant also claims that the denial of his request for new counsel violated his rights to counsel and due process under the state and federal constitutions. Because we conclude that the court did not abuse its discretion in so ruling, we do not reach the defendant's constitutional claims.

court noted that the defendant was represented by Brown, and the defendant interjected and stated, "That's incorrect, Your Honor." Brown then explained to the court that the defendant had informed him that he was fired but that he told the defendant that he needed to address the court because the court had appointed him to represent the defendant. Brown told the court that the defendant had expressed a desire for different counsel to represent him.

The court then asked the defendant to explain his position. The defendant told the court that Brown did not give him timely notice of his trial date and, therefore, that he had not been afforded an opportunity to prepare for trial. The defendant further complained that Brown had not "erected" a defense to the charge for which he was being tried. The defendant told the court, "I told Brown on June 24, the last time we were in Enfield Superior Court, that I needed to have the criminal investigator come up to corroborate or verify these witnesses' statements against me. No investigator popped up. He hasn't even appeared to the jail to visit me to discuss this case or any other pretrial motions that the state may have against me or any evidence like this, unprepared. This is unprepared, man."

In response to the defendant, the court explained that it would address his complaints in order, beginning with his complaint that he learned of his trial date only a few days earlier. The court explained to the defendant that his case had been pending since June, 2018, and, because it was on the trial list, it was subject to being "called in for immediate trial at any point given that the pretrial discussions about the case weren't able to work it out." The court informed the defendant that Brown had been contacted by the clerk's office and notified of the upcoming trial date just the previous week, and Brown, in turn, immediately notified the defendant.

The court then turned to the defendant's complaint that Brown had not sufficiently investigated the charge against him. Brown explained that, because the defendant had informed him that he no longer wished to speak to him or wanted his representation, he had opted not to waste time driving to the correctional facility. Brown told the court, however, that his investigators had met with the defendant at the prison. When pressed by the court, the defendant admitted that Brown had retained "a number of investigators" and that one had visited him at the correctional facility at least two times and reviewed "some insignificant video footage" with him. The defendant described another investigator who met with him at the correctional facility and discussed potential plea negotiations but never shared with him any details regarding a potential defense strategy. Brown assured the court that he had conducted an appropriate investigation so that he could zealously represent the defendant. Brown informed the court that he had identified three potential witnesses that may be helpful to his defense but, because those witnesses were employees of the Department of Correction, he could not compel them to speak to him prior to trial.

The court explained to the defendant that Brown, as an attorney with twenty to thirty years of experience, would understand the strengths and weaknesses of the state's case and would identify the best manner to represent the defendant and cross-examine the state's witnesses. Although the defendant sought to have Brown explain his defense strategy on the record, the court declined to compel Brown to do so "because if he says it to me on the record, then the prosecutor gets a sneak preview of what the defense is going to be."

The court told the defendant that there was no reason to remove Brown from representing him and asked the defendant if he could afford to hire his own lawyer who would be ready to represent him at trial the next week.

The defendant indicated that he could not and that he was unable to represent himself because he was in long-term solitary confinement at the prison with no access to the legal resource center. When the defendant persisted with his complaint that Brown had not adequately communicated or discussed his case with him, the court again advised the defendant of his right to represent himself and offered to appoint Brown as standby counsel. The court explained that it was not, however, advising the defendant to represent himself. It explained the advantages of having an attorney to represent him and asked the defendant about his history with Brown. The defendant informed the court that Brown had been representing him for approximately one and one-half years and that either Brown or one of the other attorneys in his firm had met with him on each of the numerous times that he previously had been brought to the courthouse. The court again explained to the defendant that Brown had investigated his case, reviewed witness statements, and identified potential defenses. The defendant again expressed his frustration that Brown had not shared his trial strategy with him, but, when the court asked the defendant if he was going to allow Brown to represent him at trial, the defendant responded, "I might take him for now but, you know, in the midst of the trial he may be gone." The defendant suggested to the court that either Brown or one of the attorneys in his firm should have prepared him and explained the jury selection process to him. The court asked Brown, and Brown agreed, to use considerable efforts to keep the defendant apprised of the proceedings as the trial proceeded. The court told the defendant that Brown was willing to work with him, that Brown had already done a lot of work on his case, and that the defendant had to be willing to work together as well. The defendant again asked to see Brown's work, arguing that none of it had been shared with him. The

court reiterated that it would not be wise to "tip off" the state as to Brown's defense strategy and then asked the defendant if he was willing to commence the proceedings that day with Brown representing him. The defendant responded, "We can get going today, but this is what I'm saying. If at any point during the trial or the proceedings something doesn't go to my liking and stuff like that, he's got to go . . . ." The court warned the defendant that he would not be allowed to simply dismiss Brown in the middle of trial, explained that the court would make that decision, and again asked the defendant if he was ready to proceed with Brown representing him. The defendant reiterated, "We can get it going, but like I said I want things as far as I expressed to you." The court agreed that the defendant would have opportunities to speak to Brown throughout the proceedings. On the basis of the foregoing, Brown continued to represent the defendant through his trial, and the defendant did not renew his request for new counsel at any point thereafter.

The following legal principles guide our analysis of the defendant's claim that the court erred in denying his request for new counsel. "It is well established that [a] defendant is not entitled to the appointment of a different public defender to represent him without a valid and sufficient reason. . . . Nor can a defendant compel the state to engage counsel of his own choice by arbitrarily refusing the services of a qualified public defender. . . . When reviewing the adequacy of a trial court's inquiries into a defendant's request for new counsel, an appellate court may reverse the trial court only for an abuse of discretion. . . . [Of course, a] trial court has a responsibility to inquire into and to evaluate carefully all substantial complaints concerning court-appointed counsel . . . . The extent of that inquiry, however, lies within the discretion of the trial court.

. . . When a defendant's assertions fall short of a seemingly substantial complaint, we have held that the trial court need not inquire into the reasons underlying the defendant's dissatisfaction with his attorney." (Citations omitted; internal quotation marks omitted.) *State* v. *Davis*, 338 Conn. 458, 466–67, 258 A.3d 633 (2021).

"[An appellate court] must distinguish between a substantial and timely request for new counsel pursued in good faith, and one made for insufficient cause on the eve or in the middle of trial. . . . In evaluating whether the trial court abused its discretion in denying [the] defendant's motion for substitution of counsel, [an appellate court] should consider the following factors: [t]he timeliness of the motion; adequacy of the court's inquiry into the defendant's complaint; and whether the attorney/client conflict was so great that it had resulted in total lack of communication preventing an adequate defense." (Internal quotation marks omitted.) *State* v. *Wood*, 159 Conn. App. 424, 432, 123 A.3d 111 (2015).

In the present case, although Brown had represented the defendant for more than one year, the defendant did not ask the court to appoint new counsel until the first day of jury selection. Despite this untimely request, the record reflects that the court allowed the defendant to fully express his complaints concerning Brown's representation of him. As previously indicated, the defendant raised two principal complaints that he claimed justified his request for new counsel—that Brown had given him short notice of his trial date and that Brown had never visited him at the correctional facility to discuss his defense strategy with him. The court thoroughly considered both of those complaints.

As to the defendant's first complaint, the court explained to the defendant that, because his case was on the trial list, it was subject to being called in for trial at any time and that Brown notified him of his

trial date immediately after he received notice from the court. As to his second complaint, the court explained to the defendant that a lot of work that an attorney performs to prepare a case for trial occurs behind the scenes, at the attorney's office, and not necessarily with the client. Brown explained to the court that he had identified three witnesses who may be helpful to his defense but that he could not compel them to speak with him prior to trial because they were employees of the Department of Correction. The court assured the defendant that Brown, who had between twenty and thirty years of experience, was well suited to identify the strengths and weaknesses of the state's case and to pursue the most effective defense strategy. Although Brown had not yet discussed that strategy with the defendant, that lack of communication was borne of the defendant's statement that he did not wish to see or speak to Brown. The court assured the defendant that he would have ample opportunity to discuss his case with Brown throughout the proceedings.

After the court addressed the defendant's complaints at length, the defendant, albeit reluctantly, indicated that he was willing to commence jury selection with Brown's counsel, and he did not thereafter renew his request for new counsel. On that basis, it reasonably may be inferred that the court's inquiry assuaged the defendant's concerns with Brown. Accordingly, we cannot conclude that the court abused its discretion in denying the defendant's request for new counsel.

II

The defendant next claims that the court abused its discretion when it denied his request to have his shackles removed and violated his constitutional right to due process by requiring him to be shackled during his trial. We disagree.

After denying the defendant's request for new counsel, the court addressed the issue of the defendant's

shackles. The defendant argued that he would be prejudiced if he were required to wear them throughout his trial. In response, the state recounted the defendant's criminal history and disciplinary record. The state represented that the defendant had been charged with murder in 1995 and, pursuant to a plea agreement, had been sentenced to thirty-five years of incarceration. While he was incarcerated, the defendant was convicted of assault in the third degree in 2009, assault in the third degree in 2014, and assault of a correction officer in 2016. The state also told the court that the defendant had an extensive disciplinary record. Upon reviewing the defendant's disciplinary record, the court noted that the document presented by the state consisted of six pages, which reflected approximately thirty-five disciplinary tickets but only dated back to 2015, despite the fact that the defendant had been incarcerated since 1994. The defendant, who had been disciplined numerous times for interfering with safety security, threatening and assault, acknowledged that his disciplinary record dating back to 1994 would be "a lot longer than six pages."

When asked by the court for his position as to whether the defendant should be restrained throughout the trial, Brown responded, "I have never taken this position in the past, but I don't feel comfortable trying the case with [the defendant] if he's not shackled." The defendant argued that he had been in court numerous times, without restraints and without incident.

The court told the defendant that the leg shackles would remain on him and next addressed the issue of the defendant's handcuffs. The defendant told the court that he had no objection to being handcuffed but requested the removal of the belly chain and the black box that connected all of his shackles and restricted the movement of his hands.[3] The court compromised

[3] The court explained: "That black box was part of a restraint device which in corrections is known as a full set up and it essentially tethered

on an "intermediate restriction which is something less than the full set up . . . that still involved the use of a tether chain which restricted [the defendant's] ability to move his arms far from his belly but would give him sufficient leeway to be able to write should he wish to do so during his proceedings. But his ability to move his hands is restrained sufficiently so that it would require quite an effort for him to get anywhere close to Brown, who is seated next to him, and the correction guards are seated in such a way as to make that course of action unlikely and will protect Brown's safety as we move forward. I had determined based on my more careful review . . . that these significant security measures must be put in place as we move forward." The court noted that it could have Brown sit further away from the defendant but thought that might be prejudicial in giving the jury the sense that Brown does not feel safe near the defendant. The court explained that the tether chain was necessary to ensure the safety of court personnel. The court noted that, in another case that had been pending in Norwich, the defendant previously had stated in open court that he intended to assault his counsel and that the defendant either had taken a swing at him or threatened to do so. The court indicated that it had further reviewed the defendant's disciplinary record, and, in fact, the defendant had received 231 disciplinary tickets, that he had to be transported to court separately via special transport due to the security risks he presents, and that he had assaulted a correction employee as recently as June 24, 2019. The court further noted that the defendant was then incarcerated at Northern Correctional Institute, the state's maximum security facility and, due to his disciplinary history, was in solitary confinement. On those bases, the court

[the defendant's] hands to the black box, which was part of a belly chain and prevented [the defendant] from moving his hands away from his belly at all."

opined that the defendant was "one of the most carefully guarded defendants in the state of Connecticut right now and certainly his disciplinary record leaves me [with] significant concern that he will maintain appropriate . . . decorum during the course of the proceedings." The court directed that correction officers would remain in the courtroom to assist the marshals in case the defendant did not "maintain appropriate decorum."

The court summarized the rationale for its decision as follows: "I think that any prejudice that would arise from either the restraints themselves or from the correction officers' presence here in the courtroom is significantly minimized given the fact that the jury will know from the very start when I recite the charges that this is an assault of a correction officer so they will know that the defendant is incarcerated. The fact that there are [correction officers] in the courtroom and that the defendant is restrained seems to me [that] it's very likely [to] be something that jurors would have expected to be the case. I don't think that a layperson would assume that an individual who is serving a prison sentence would be allowed to be free of restraints while he is seated in a courtroom any more than he is not restrained in a broader sense while he is in the correction institute itself.

"Now I have chosen, based on the options available to me, what I think is a middle ground of security by using the tether without the black box and I have done so for the reasons that I've stated." The court observed that, as long as the defendant kept his chair close to the table, the jury would not be able to see any of the restraints. The court indicated that it would instruct the potential jurors at the outset that it was routine for correction officers to remain present in court with an inmate and for the inmate to remain shackled. Brown

agreed with the court's proposal. Accordingly, the court so instructed the jurors.[4]

We begin by setting forth the legal principles that govern our analysis of this claim, including the applicable standard of review. "[I]n reviewing a shackling claim, our task is to determine whether the court's decision to employ restraints constituted a clear abuse of discretion. . . .

"Central to the right to a fair trial, guaranteed by the [s]ixth and [f]ourteenth [a]mendments [to the United States constitution], is the principle that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. . . . [C]ourts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. . . . Thus, [i]n order for a criminal defendant to enjoy the maximum benefit of the presumption of innocence, our courts should make every reasonable effort to present

[4] The court instructed the jurors, inter alia: "Now the charge, as you know, is the charge as I just told you, assault of an employee of the Department of Correction. You will [learn] during this trial that the defendant is incarcerated and was at the time of the alleged offense. It is for that reason that you'll see in the courtroom, and this is done as a routine practice, seated behind [the defendant] are two members of the Department of Correction. And they are joined also by members of our courthouse security, and they are called marshals. That is routine practice. You may also during the course of the trial come to learn that the defendant is restrained in certain ways; that is also a matter of routine. It is not something that is done specifically in this case, but, as I say, it's a matter of routine. The fact that there are correction officers in the courtroom along with our marshals, the fact that the defendant may be, you may come to notice, subject to some restraint, those factors are not in any way relevant or material to the decision that you're going to be asked to make in this case."

the defendant before the jury in a manner that does not suggest, expressly or impliedly, that he or she is a dangerous character whose guilt is a foregone conclusion. . . .

"Accordingly, [i]t is well established that, [a]s a general proposition, a criminal defendant has the right to appear in court free from physical restraints. . . . Grounded in the common law, this right evolved in order to preserve the presumption favoring a criminal defendant's innocence, while eliminating any detrimental effects to the defendant that could result if he were physically restrained in the courtroom. . . . The presumption of innocence, although not articulated in the [c]onstitution, is a basic component of a fair trial under our system of criminal justice. . . . [C]ourts and commentators share close to a consensus that, during the guilt phase of a trial, a criminal defendant has a right to remain free of physical restraints that are visible to the jury; [and] that the right has a constitutional dimension . . . .

"Nonetheless, a defendant's right to appear before the jury unfettered is not absolute. . . . A trial court may employ a reasonable means of restraint [on] a defendant if, exercising its broad discretion in such matters, the court finds that restraints are reasonably necessary under the circumstances. . . . For example, a defendant's right to remain free of physical restraints that are visible to the jury . . . may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum. . . . Because [a] trial judge has a duty to do what may be necessary to prevent escape, to minimize danger of harm to those attending trial as well as to the general public, and to maintain decent order in the courtroom . . . [s]hackles may properly be employed in order to ensure the safe, reasonable and orderly progress of trial. . . .

"Despite the breadth of [the court's] discretion, however, [t]he law has long forbidden routine use of visible shackles during the guilt phase . . . . [T]he [f]ifth and [f]ourteenth [a]mendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial. . . .

"Practice Book § 42-46 mandates in relevant part: In ordering the use of restraints or denying a request to remove them, the judicial authority shall detail its reasons on the record outside the presence of the jury. The nature and duration of the restraints employed shall be those reasonably necessary under the circumstances. . . . Although a trial court is not mandated to conduct an evidentiary hearing concerning the necessity for restraints, our appellate review is greatly aided when a court develops the record by conducting [such] an evidentiary hearing . . . ." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *McCarthy*, 210 Conn. App. 1, 39–43, 268 A.3d 91 (2022).

Here, the record reflects that the court afforded great consideration to the defendant's right to be free from restraints throughout his trial proceedings. After thorough consideration, the court implemented the least onerous means of restraining the defendant possible in light of his extensive violent criminal record and disciplinary history. Although the restraints may have been visible to the jury, it cannot reasonably be argued that the defendant's history did not justify the court's safety concerns and the employment of restraints. Despite the defendant's history of violence, the court considered the potential prejudice to the defendant that might be caused by the shackles, in addition to the defendant's right to participate in his defense. In employing an intermediate system of restraining the

defendant, the court properly exercised its discretion by carefully weighing the safety concerns and the rights of the defendant.

Moreover, the court aptly noted that, because the defendant was being tried for assaulting a correction officer, the jury would already know that the defendant was incarcerated and likely would expect him to be restrained due to that incarceration. See *State* v. *Taylor*, 63 Conn. App. 386, 395–96, 776 A.2d 1154 (prejudicial effects of shackling were negligible where defendant was being tried for offenses such as escape from prison or assault of prison guard because nature of charges and evidence presented would inevitably convey to jury that defendant already was convict and prisoner), cert. denied, 257 Conn. 907, 777 A.2d 687, cert. denied, 534 U.S. 978, 122 S. Ct. 406, 151 L. Ed. 2d. 308 (2001). Indeed, the court expressly instructed the jury that the use of restraints was routine because the defendant was incarcerated. Therefore, not only was there a sound and logical explanation for the use of restraints that was wholly unconnected to any potential risk of violence by the defendant, but the court's curative instruction underscored the logic of that explanation by telling the jury that it was routine for inmates to remain restrained while in court.

The defendant also argues that the court erred by sua sponte making the jury aware of the shackles and that its instructions to the jury were insufficient to cure the prejudice to the defendant. Although the court did make the initial proposal of a curative instruction, it afforded the parties an opportunity to be heard on that instruction, and neither party objected. As noted, the restraints ordered by the court were necessary for security purposes due to the defendant's history. The jury appropriately never heard about that history, and, instead, was instructed that the use of restraints was

routine, rather than a necessary safeguard to the potential threat posed by the defendant. Accordingly, we conclude that the defendant's claim is unavailing.

III

The defendant finally claims that the court "failed to uphold its affirmative duty to inquire with respect to a conflict of interest by [Brown] when [Brown] expressed fear of the defendant, stating to the court that he did not feel 'comfortable' trying the case if the defendant were not shackled, thereby violating the defendant's [rights under the state and federal constitutions]." The defendant claims that Brown's conflict became evident when Brown failed to argue for less restrictive restraints to be placed on the defendant or that "it would be less prejudicial for no restraints to be visible to the jury, rather than drawing attention to the restraints and relying on a curative instruction." We are not persuaded.

"It is axiomatic that a criminal defendant's sixth amendment right to the effective assistance of counsel includes the right to counsel that is free from conflicts of interest. . . . It is a fundamental principle . . . that an attorney owes an overarching duty of undivided loyalty to his [or her] client. At the core of the sixth amendment guarantee of effective assistance of counsel is loyalty, perhaps the most basic of counsel's duties. . . . Loyalty of a lawyer to his [or her] client's cause is the sine qua non of the [s]ixth [a]mendment's guarantee that an accused is entitled to effective assistance of counsel. . . . That guarantee affords a defendant the right to counsel's undivided loyalty. . . .

"In cases involving potential conflicts of interest, this court has held that [t]here are two circumstances under which a trial court has a duty to inquire . . . (1) when there has been a timely conflict objection at trial . . . or (2) when the trial court knows or reasonably should

know that a particular conflict exists . . . . To safeguard a criminal defendant's right to the effective assistance of counsel, a trial court has an affirmative obligation to explore the possibility of conflict when such conflict is brought to the attention of the trial judge in a timely manner. . . .

"In such circumstances, [t]he court must investigate the facts and details of the attorney's interests to determine whether the attorney in fact suffers from an actual conflict, a potential conflict, or no genuine conflict at all. . . . We review the defendant's claim that the trial court failed to inquire into a possible conflict of interest as a question of law, and, as such, it is subject to plenary review." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Davis*, supra, 338 Conn. 469–71.

The defendant argues that Brown's statement to the court that he would not feel comfortable representing the defendant if the defendant were not restrained demonstrated a conflict of interest.[5] Based on the defendant's violent history, including his assault of a correction officer just one month earlier and his previous in-court threat against his prior attorney, Brown's safety concerns were understandable. Despite Brown's well-founded safety concerns, he did not, at any point, express that those concerns prevented him from representing the defendant or posed a conflict of interest requiring his removal from the case. In fact, immediately prior to addressing the shackles issue, the court considered the defendant's request for new counsel, during which, as iterated herein, the court asked Brown if he would zealously represent the defendant, and Brown assured the court that he would. We therefore conclude that the defendant's claim that the court should have

[5] After Brown expressed that concern, the defendant noted, inter alia, "[T]his is not starting off well as he's telling me he doesn't feel comfortable, because I never did nothing to this man."

inquired further into a potential conflict of interest is without merit.

The judgment is affirmed.

In this opinion the other judges concurred.

CHRISTINA INGRAM *v.* BRIAN J. INGRAM
(AC 44392)

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

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court granting the plaintiff's motion for modification of custody, seeking to relocate with the parties' minor child to Poughkeepsie, New York. *Held* that the trial court properly granted the plaintiff's motion for modification of custody: contrary to the defendant's contention that the trial court ignored the parties' informal agreement for alternating weekly parenting time with the child for the seven to eight months leading up to the hearing on the plaintiff's motion, that court heard extensive testimony from both parties as to that schedule, which the parties had in place during the unique circumstances of the child's remote learning during the COVID-19 pandemic, and, now that in-person schooling had resumed, neither party sought a continuation of that schedule, the court's previous ex parte order recognized that alternating weekly parenting schedule, and the court's statement that it was in the child's best interests to maintain the continuity of living with his mother and his brother found support in the record as it reasonably could be construed as a reference to the parties' former parenting time schedule; moreover, the court's finding that the plaintiff had a more active role in the child's life was not clearly erroneous, as there was evidence in the record to support that finding, including the plaintiff's testimony that she primarily cared for the child from his birth and throughout his childhood, and the defendant's testimony that he had, at times, missed the child's doctor's appointments and parent-teacher conferences due to his work schedule; furthermore, the defendant did not point to any evidence to support his argument that the court prejudged the motion on the basis that the plaintiff already had moved to Poughkeepsie, and, to the contrary, the court applied the criteria set forth in the applicable statute (§ 46b-56d) to the evidence presented at the hearing in reaching its determination, and there was sufficient evidence presented for the court's consideration of the educational component listed in § 46b-56d (b), as the plaintiff

provided testimony as to the educational plan for the child following relocation.

Argued February 2—officially released March 29, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the court, *Eschuk*, *J.*, rendered judgment dissolving the marriage and granted certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Truglia*, *J.*, granted the plaintiff's postjudgment motion for modification of custody, and the defendant appealed to this court. *Affirmed.*

Matthew D. Popilowski, for the appellant (defendant).

Lita M. Ward, for the appellee (plaintiff).

Opinion

ALVORD, J. The defendant, Brian J. Ingram, appeals from the judgment of the trial court granting the postdissolution motion filed by the plaintiff, Christina Ingram, for modification of custody, seeking to relocate the parties' minor child to Poughkeepsie, New York. On appeal, the defendant claims that the court erred in granting the plaintiff's motion. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to the defendant's appeal. The parties were married in 2012 and have one minor child together, who was born in 2013. In 2017, the plaintiff commenced a dissolution action against the defendant. On December 19, 2017, the court, *Eschuk*, *J.*, rendered a judgment of dissolution, which incorporated a November 14, 2017 separation agreement executed by the parties (agreement). Both parties were self-represented at the time

of the dissolution. The agreement provided that the parties would share joint legal custody of their child and that the child's primary residence would be with the plaintiff. The plaintiff also lives with her older son, who was sixteen years old at the time of the hearing on the motion for modification, and the two children have a close relationship. At the time of the dissolution, the plaintiff relocated to Brookfield, and the defendant lived in Bethel. The agreement also provided "[a]s to visitation": "[s]hared visitation and will be mutually agreed upon if any changes need to be made due to work schedule change. Currently: with Mom Monday–Thurs, with Dad Thurs evening until Sun." The agreement provided that pick up and drop off would be "shared 50/50," and that the holiday and school vacation schedule would be an "[a]lternating schedule." The agreement is silent as to possible relocation by either party.

On February 13, 2020, the plaintiff filed a motion for modification in which she represented that she was engaged, was moving to Poughkeepsie, and wished to change the child's school district.[1] She requested that the court order parenting time as follows: "Sun night–Friday with mother. Fri eve–Sun night with father. Alternate weekends with parents."[2] The court scheduled a hearing on the plaintiff's motion for March 23, 2020, but the hearing did not proceed because of the public health emergency declaration regarding the COVID-19 pandemic. In April, 2020, the plaintiff began living with her fiancé in his home in Poughkeepsie.

[1] Although the plaintiff requested sole legal custody in her motion for modification, she withdrew that request during the hearing on the motion for modification and requested that the court make no change to the joint legal custody in effect.

[2] In her motion for modification, the plaintiff also requested that the court order child support. She maintained in her motion that the agreement's language that the defendant would "fully financially support [the child]" was vague and needed clarification.

After learning of the plaintiff's move, the defendant filed, on August 13, 2020, an application for an emergency ex parte order of custody, in which he sought temporary custody of the child on the basis that the plaintiff had moved to Poughkeepsie and the parties did not have a "clear plan . . . for the start of the school year . . . ." On the same day, he filed a motion for modification of custody, in which he requested primary physical custody of the child and appropriate visitation with the plaintiff.

On August 27, 2020, the court, *Truglia*, *J.*, entered orders with respect to the defendant's application for emergency ex parte order of custody. The court ordered the parties to register the child in school "in the Bethel Public School District for the 2020-2021 school year, and until further order of the court." The court further ordered: "If the Bethel Public School District is utilizing all-remote instruction, then the parties will continue the alternating weekly parenting schedule in effect since the start of remote learning. If the school district utilizes a partial in-person instruction model, or a hybrid model consisting of some in-person and some remote learning on back-to-back week days, the parties will continue the alternating weekly schedule. If the school district only offers a staggered weekly schedule, then the defendant will provide the child with his primary residence during the week and the plaintiff will have the child from Friday afternoon through Monday morning."

On October 5, 2020, the court held a hearing on both parties' motions for modification. Both parties testified, along with the plaintiff's fiancé and the defendant's father. On October 7, 2020, the court issued an order granting the plaintiff's motion for modification, in which it made the following findings of fact. The plaintiff currently is employed as an emergency room technician at Danbury Hospital and takes undergraduate courses toward a degree in nursing. Although she previously

had a fixed work schedule, she now has a more flexible schedule. In December, 2019, the plaintiff became engaged to Michael Mancari, a professional firefighter employed by the city of Poughkeepsie. Because of his employment, he is required to live in or near Poughkeepsie.[3] Mancari owns a home, where the plaintiff lives, and the two had planned to marry on October 10, 2020. The defendant works full-time, beginning his shift at 4 a.m., at Costco in Norwalk. The defendant had lived in his father's house in Bethel since the dissolution but recently had purchased a home in Bethel, where he planned to live with his girlfriend.

In deciding the plaintiff's motion, the court first set forth General Statutes § 46b-56d, governing postjudgment relocation, which provides: "(a) In any proceeding before the Superior Court arising after the entry of a judgment awarding custody of a minor child and involving the relocation of either parent with the child, where such relocation would have a significant impact on an existing parenting plan, the relocating parent shall bear the burden of proving, by a preponderance of the evidence, that (1) the relocation is for a legitimate purpose, (2) the proposed location is reasonable in light of such purpose, and (3) the relocation is in the best interests of the child.

"(b) In determining whether to approve the relocation of the child under subsection (a) of this section, the court shall consider, but such consideration shall not be limited to: (1) Each parent's reasons for seeking or opposing the relocation; (2) the quality of the relationships between the child and each parent; (3) the impact of the relocation on the quantity and the quality of the child's future contact with the nonrelocating parent; (4) the degree to which the relocating parent's and the

[3] Mancari also had other business interests in the Poughkeepsie area, including multifamily rental homes.

child's life may be enhanced economically, emotionally and educationally by the relocation; and (5) the feasibility of preserving the relationship between the nonrelocating parent and the child through suitable visitation arrangements."

The court found that the plaintiff's relocation was for a legitimate purpose and that the proposed location was reasonable, on the basis that she is getting married and her future husband is required to live in the town in which he works. The court stated that there was "no basis in the evidence for [it] to find that the plaintiff's decision to remarry and move an hour away was intended to limit the defendant's parenting time with his son or damage the relationship in some way." The court found that both parties "always had their son's best interests at heart and continue to do so," and "overall, that the child's life will be enhanced by the move."

The court further found that the plaintiff "has been the child's primary caregiver for most of his life. The court does not by this statement imply that the defendant has not been actively involved in the child's life at every step. The evidence indicates that the defendant has been as caring, loving and devoted to the child as the plaintiff. However, the court finds that the plaintiff has had a more active role than the defendant. The court also finds that it is in the child's best interest[s] to maintain the continuity of living with his mother, [brother], and pets, as much as possible. The strong relationship between the child and his father can be preserved and possibly strengthened, by giving the father additional weekend quality time with the child."

The court ordered that the parties retain joint legal custody of the child, with joint decision-making authority for all major decisions. The court issued the following orders: "Commencing November 1, 2020, the plaintiff will provide the child with his primary residence.

The child will reside with the plaintiff each week from Monday through Friday. The child will attend school in the Arlington School District for the 2020-2021 school year and thereafter, until further order of the court. The defendant will have parenting time with the child three weekends per month, starting Fridays after school until Sunday afternoon at 6:00 p.m. (or Monday afternoon at 6:00 [p.m.] if Monday is a legal holiday and there is no school). Each parent will be responsible for picking the child up at the start of his or her parenting time. The parties will continue to alternate or share holidays, birthdays, school vacations, and other special occasions as before. Each party will have four uninterrupted weeks of vacation each summer, two of which will be consecutive."[4]

The defendant thereafter filed motions: to reargue; for the appointment of a guardian ad litem; for referral to family relations; to open, set aside, or vacate the judgment; and for stay. The plaintiff filed an objection to the defendant's motion to open, set aside, or vacate the judgment. After oral argument on November 4, 2020, the court denied the defendant's motions. This appeal followed.

On appeal, the defendant claims that the court erred in granting the plaintiff's motion for modification and permitting her to relocate to Poughkeepsie. "Our standard of review of a trial court's decision regarding . . . relocation orders is one of abuse of discretion. . . . It is within the province of the trial court to find facts and draw proper inferences from the evidence presented. . . . Further, [t]he trial court has the opportunity to view the parties first hand and is therefore in the

[4] The court also ordered the defendant to pay "weekly child support in the amount of $209, which is the presumptive weekly amount pursuant to the child support guidelines . . . . The parties will share the cost of the child's unreimbursed medical expenses and work-related child care expenses 57% by the defendant and 43% by the plaintiff." (Citation omitted.) See footnote 2 of this opinion.

best position to assess the circumstances surrounding a dissolution action, in which such personal factors as the demeanor and attitude of the parties are so significant." (Internal quotation marks omitted.) *Tow* v. *Tow*, 142 Conn. App. 45, 52, 64 A.3d 128 (2013).

"Similarly, in a postjudgment relocation case following a dissolution of marriage action, the court is privy to the history of the case, the parties' respective situations and how the parties interact with one another. Therefore, [w]hen reviewing a decision for an abuse of discretion, every reasonable presumption should be given in favor of its correctness." (Internal quotation marks omitted.) *Taylor* v. *Taylor*, 119 Conn. App. 817, 821, 990 A.2d 882 (2010).

Moreover, "[a]ppellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's findings are binding on this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence in the record to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Emrich* v. *Emrich*, 127 Conn. App. 691, 700–701, 15 A.3d 1104 (2011).

The defendant first argues that the court failed to "start from the correct reference point" in that it failed to consider the parties' informal agreement for alternating weekly parenting time with the child for seven to eight months leading up to the hearing on the plaintiff's motion. He argues that the court's determination that it was in the best interests of the child to maintain the continuity of living with his mother and brother ignores

the fact that the parties were equally sharing parenting time at the time of the hearing.[5]

We disagree that the court ignored the parties' informal agreement as to parenting time. Less than two months earlier, the court had entered an ex parte order that recognized the parties' "alternating weekly parenting schedule in effect since the start of remote learning." Moreover, the court, during the hearing on the motions for modification, heard extensive testimony from both parties as to the informal alternating weekly parenting schedule the parties had in place during the unique circumstances of remote learning. It is not surprising that the court did not discuss that schedule in its order granting the motion for modification, as neither party sought a continuation of the schedule, now that in-person schooling had resumed. Both parties testified that, prior to March, 2020, the defendant had parenting time Tuesday overnight and alternating weekends, with

[5] The defendant additionally challenges the court's finding that "[t]he strong relationship between the child and his father can be preserved and possibly strengthened, by giving the father additional weekend quality time with the child." The defendant argues that "[t]his finding of fact cannot be sustained where the defendant at that time was enjoying spending two weeks a month with his son." He further emphasizes that he works from 4 a.m. to 1 p.m. on Sundays, and therefore the court's conclusion that its awarding parenting time from Friday after school until Sunday at 6 p.m. on three weekends per month constituted "additional weekend quality time" "has no basis in fact." We disagree.

The parties have cooperated in establishing various parenting schedules since the entry of the dissolution judgment. The alternating weekly parenting schedule that the parties informally agreed to in March, 2020, was feasible because of the remote schooling as a result of the COVID-19 pandemic. Prior to that point, as both parties acknowledged, the informal parenting schedule between the parties was such that the defendant had parenting time Tuesday nights overnight and alternating weekends, with the plaintiff having parenting time the remainder of the time. When in-person school resumed, the alternative weekly parenting schedule was no longer possible. Thus, the court's finding that the defendant was provided "additional weekend quality time," made in the context of its awarding the defendant parenting time on three weekends per month, was not clearly erroneous, in light of the parties' testimony that prior to March, 2020, the defendant had weekend parenting time on every other weekend.

the plaintiff having parenting time the rest of the time. Thus, the court's statement that it was in the child's best interests to maintain the "continuity of living with his mother," brother, and pets, finds support in the record, in that it reasonably can be construed as a reference to the parties' parenting time schedule in place prior to March, 2020.

The defendant also argues that the court's determination that the plaintiff had a more active role in the child's life "has no reasonable basis in the facts at the time of the hearing." He argues that he "was the one who had taken steps prior to the start of the 2020-2021 school year to get the court to act so that the parties could enroll their son in a school." We conclude that the court's finding was not clearly erroneous.

The plaintiff testified that she primarily cared for the parties' child from his birth and throughout his childhood. Specifically, she testified: "I'm the one that takes him to the doctor and makes those appointments for well and sick visits. I'm the one that even knows he needs to make his every six months dentist appointment and I take him to the dentist. I take him to get all his haircuts." She testified that she has volunteered in the child's school. She testified that she primarily has attended parent-teacher conferences and that she did not see the defendant in attendance at the virtual open house for the child's new school.[6]

The defendant testified, with respect to his participation in the child's medical care, that "depending on our work schedules, you know, if I was working mornings and she was at work and I was able to take [the child] or [his older brother] to the doctor's, I would take either one as needed. When I was working nights there was a couple times that I couldn't leave early or I couldn't get the day off and she would have to assist with that."

[6] The defendant testified that he was not able to participate in the virtual open house because he was having issues with the Zoom platform.

He explained that the plaintiff would schedule parent-teacher conferences when he was at work, or at times they were in the evening and he would stay home with the children so that the plaintiff could attend. On the basis of this evidence, the court found that "the defendant has been as caring, loving and devoted to the child as the plaintiff," but also found that "the plaintiff has had a more active role than the defendant." On appeal, "we do not retry the facts or evaluate the credibility of witnesses." (Internal quotation marks omitted.) *Taylor* v. *Taylor*, supra, 119 Conn. App. 825. Because there is evidence in the record to support the court's finding, we conclude that the court's finding was not clearly erroneous.

The defendant also argues that the court's granting of the plaintiff's motion "acted as a ratification of the plaintiff's prior unauthorized relocation." We disagree. Although the court heard evidence that the plaintiff, during the pendency of her motion for modification, had moved to live with her fiancé in his home in Poughkeepsie, the defendant has not pointed to any evidence that the court prejudged the motion on that basis. To the contrary, the court applied the statutory criteria to the evidence presented at the hearing in reaching its determination.[7]

Lastly, the defendant contends that the plaintiff failed to provide evidence as to the educational component of one of the factors for the court's consideration listed in § 46b-56d (b), namely, "the degree to which the relocating parent's and the child's life may be enhanced economically, emotionally and educationally by the relocation . . . ." We disagree.[8]

[7] To the extent that the defendant seeks to argue that the plaintiff's move to Poughkeepsie was unauthorized, he points to no court order that he alleges her to have breached.

[8] The defendant relies on *Havis-Carbone* v. *Carbone*, 155 Conn. App. 848, 869, 112 A.3d 779 (2015), a case in which the plaintiff seeking to relocate with the parties' child to Texas provided no evidence regarding the child's potential education there, and the court stated on the record that it was "not making

Although the plaintiff recognizes that "there was no indication or evidence . . . educationally that it was better or worse being in the Arlington Central School District than the Bethel School District," the plaintiff did provide testimony as to the educational plan for the child following relocation. Specifically, she testified that the child would attend Arlington Central School District, which then was operating on a hybrid remote/in-person schedule, and that the school was about five minutes driving distance from the plaintiff's home. She testified that she would drive the child to school and pick him up. After hearing the evidence with respect to the three components listed in this factor, the court found that "overall . . . the child's life will be enhanced by the move." It thereafter ordered the parties to enroll the child in the Arlington Central School District. On this record, we cannot conclude that there was insufficient evidence for the court's consideration of the educational component of the fourth factor listed in § 46b-56d (b).[9]

The judgment is affirmed.

In this opinion the other judges concurred.

this decision based on school . . . ." (Internal quotation marks omitted.) Moreover, the court in that case improperly "granted the plaintiff permission to go to Texas with the child prior to conducting a hearing." Id., 867. Thus, *Havis-Carbone* is distinguishable.

[9] The defendant argues in the alternative that, "[e]ven if the court had considered educational enhancement as required, the evidence would not have supported a finding that their son's education would be enhanced." He points to the evidence regarding the child's "existing education" as demonstrating that "there would be no enhancement." Specifically, he argues that "[t]he evidence before the court was that it had actually ordered the parties to enroll their son in the defendant's school district just one month prior to the decision presently at issue. . . . The evidence was that their son was enrolled in the same school system that he had been already . . . attending in past years. . . . And the defendant's school system had just returned to full-time in-person learning the week prior to the hearing." (Citations omitted.)

The defendant essentially requests that we reweigh the evidence in his favor. As noted previously, "we do not retry the facts or evaluate the credibility of witnesses." (Internal quotation marks omitted.) *Taylor* v. *Taylor*, supra, 119 Conn. App. 825.

STATE OF CONNECTICUT *v.* TONY O.*
(AC 43250)

Moll, Suarez and Sheldon, Js.

Syllabus

Convicted, after a jury trial, of various crimes in connection with an altercation with his wife, W, the defendant appealed to this court. The defendant had gone to the gas station where W was employed to obtain from her the keys to his truck so that he could get tools he needed for work that were stored in the truck. When he walked around the front counter toward W and reached toward her handbag that was on a counter behind her, she pushed him away, and a physical encounter ensued between them during which she sustained injuries and thereafter was treated at a hospital. S, a customer at the store, witnessed part of the altercation and attempted to break it up. W told a police officer, who arrived minutes after the defendant left the gas station, that the defendant had attacked her. At trial, the police officer testified to that statement, and the defendant objected. The trial court overruled the objection and admitted the statement into evidence as a spontaneous utterance under the applicable provision (§ 8-3 (2)) of the Connecticut Code of Evidence. On appeal, the defendant claimed, inter alia, that the evidence was insufficient to support his conviction of the charges of robbery and unlawful restraint, and that the trial court improperly admitted W's statement to the police officer. *Held*:

1. Although the evidence was sufficient to support the defendant's conviction of unlawful restraint in the first degree, there was insufficient evidence to support the jury's necessary finding that he seized W's handbag in the course of committing a larceny, as required to convict him of robbery in the third degree:

   a. The jury had no reasonable basis for finding that the defendant's brief taking of the handbag was accompanied by a felonious intent to steal and deprive W of it permanently: although the jury was entitled to reject the defendant's testimony that his only purpose in seizing the handbag was to search it for the keys to the truck, the jury was not entitled to draw the contrary inference that his intent was to steal the handbag, as the record provided no nonspeculative basis for that inference; moreover, the jury could not infer the defendant's intent because W began to struggle with him as soon as he reached for the handbag, as her strong resistance delayed his seizure of the handbag, which he held on to for only eight

* In accordance with our policy of protecting the privacy interests of the victims of family violence, we decline to identify the complainant or others through whom the complainant's identity may be ascertained. See General Statutes § 54-86e.

seconds before dropping it to the floor, and, although whatever the defendant intended when he first picked up the handbag appeared to change once S struck him in the back and told him that the police were on their way to the station, that inference shed no light on the intent with which he initially took possession of the handbag, as his interest in leaving the scene before the police arrived did not support an inference that he initially took the handbag with the intent to steal it from W; furthermore, the only positive evidence from which the jury might have drawn an inference as to the defendant's intent when he seized the handbag was the video footage of the incident from the station's surveillance cameras, which showed that his actions during the incident were consistent with his testimony that his only purpose in coming to the gas station was to get his truck keys from W.

b. There was more than enough evidence to support the jury's findings beyond a reasonable doubt that the defendant restrained W during their physical altercation and exposed her to a substantial risk of physical injury: W stated to the police officer that the defendant had attacked or assaulted her, she told the staff at the hospital that he had punched her and caused her to fall into a chair, where he kneed her and kicked her in the head, and the video footage from the station's surveillance cameras corroborated S's testimony that, after W was seated in the chair, he continued to lean over her and strike her, which caused her to remain in the chair when she attempted to get up, and it would have been reasonable for the jury to conclude that the defendant engaged in such conduct with the specific intent to interfere substantially with W's liberty; moreover, notwithstanding the defendant's suggestion that W restrained him as much as he restrained her, the jury reasonably could have concluded that she was restricted in her movements in a manner that interfered with her liberty, and the defendant's admission that he assaulted her during the incident overrode his suggestion that any restraint he might have applied was not applied so as to expose her to a substantial risk of physical injury, as the state presented evidence that included the hospital record documenting her injuries, the video footage showing the defendant's physical struggle, and S's account of the several times he kneed W while she was forced to remain sitting in the chair.

2. The defendant could not prevail on his claim that the trial court improperly admitted the police officer's testimony about the initial oral statement made to him by W:

a. The record clearly supported the trial court's finding that the statement by W to the police officer was admissible as a spontaneous utterance: W was in distress and very emotional when she first spoke with the officer, as she appeared to be crying, her breathing was heavy, and she had red marks on her neck and face, she made her initial statement to the officer roughly three minutes after the defendant released her from his grasp and drove away, and the fact that she gave a fuller, more detailed statement at the hospital showed that her initial statement to

the officer was spontaneous, unreflective and made under such circumstances as to indicate the absence of an opportunity for contrivance and misrepresentation; moreover, on the basis of the defendant's unqualified admission of the assault and the overwhelming evidence that confirmed that admission, any error by the trial court in admitting W's statement as a spontaneous utterance was clearly harmless, the defendant having failed to demonstrate that its admission substantially affected the verdict. b. The defendant's unpreserved claim that his right to confrontation was violated because he never was afforded the opportunity to cross-examine W about her statement to the police officer was unavailing: evidence of the video footage of the altercation, the hospital records that documented W's physical injuries, S's description of the assault and identification of the defendant as the perpetrator, and the defendant's admission of the assault overwhelmingly supported the state's claim that he assaulted W during their physical altercation; moreover, W's statement was cumulative of and corroborated by that evidence, and it was not an integral portion of the state's case, as it was never mentioned during the state's closing argument to the jury.

Argued September 8, 2021—officially released March 29, 2022

Procedural History

Two part substitute information charging the defendant, in the first part, with the crimes of attempt to commit larceny in the second degree, robbery in the third degree, unlawful restraint in the first degree, assault in the third degree and attempt to commit larceny in the sixth degree, and, in the second part, with being a persistent serious felony offender and a persistent offender, brought to the Superior Court in the judicial district of Windham, geographical area number eleven, and tried to the jury before *Chaplin*, *J.*; verdict and judgment of guilty of robbery in the third degree, unlawful restraint in the first degree and assault in the third degree, and sentence enhanced for being a persistent serious felony offender and a persistent offender, from which the defendant appealed to this court. *Reversed in part*; *judgment directed.*

James B. Streeto, senior assistant public defender, with whom, on the brief, was *Jane L. Stream*, certified legal intern, for the appellant (defendant).

Jonathan M. Sousa, deputy assistant state's attorney, with whom, on the brief, were *Anne Mahoney*, state's attorney, and *Mark Stabile*, former supervisory assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Tony O., appeals from the judgment of conviction, rendered against him after a bifurcated jury trial on charges arising from a physical altercation between himself and his wife (complainant) at her place of work in Willimantic, on April 6, 2017. In the first part of the trial, the jury found the defendant guilty on three counts of a long form information charging him, respectively, with robbery in the third degree in violation of General Statutes § 53a-136, unlawful restraint in the first degree in violation of General Statutes § 53a-95, and assault in the third degree in violation of General Statutes § 53a-61. The jury found the defendant not guilty, however, on two other counts of the information charging him, respectively, with attempt to commit larceny in the second degree in violation of General Statutes §§ 53a-49 and 53a-123 (a) (2), and attempt to commit larceny in the sixth degree in violation of General Statutes §§ 53a-49 and 53a-125b. In the second part of the trial, the same jury found the defendant guilty on both counts of a part B information charging him, respectively, with being a serious persistent felony offender in violation of General Statutes § 53a-40 (c), as a basis for enhancing his impending sentence on the charge of unlawful restraint in the first degree, and being a persistent offender of crimes involving assault, stalking, threatening, harassment, and criminal violation of a protective order in violation of General Statutes § 53a-40d, as a basis for enhancing his impending sentence on the charge of assault in the third degree. The trial court, *Chaplin*, *J.*, ultimately sentenced the defendant to a total effective term of six years of impris-

onment followed by four years of special parole.[1] This appeal followed.

On appeal, the defendant claims that the trial court erred in (1) failing to enter a judgment of acquittal on the charge of robbery in the third degree because, inter alia, there was insufficient evidence to support the jury's necessary finding beyond a reasonable doubt that he seized the complainant's handbag in the course of their altercation with the intent to deprive her of it permanently, as the state sought to prove in order to establish that he committed robbery by using physical force on her in the course of committing a larceny with respect to the handbag, (2) failing to enter a judgment of acquittal on the charge of unlawful restraint in the first degree because there was insufficient evidence to support the jury's necessary findings beyond a reasonable doubt that he restrained the complainant in the course of the altercation and did so under circumstances that exposed her to a substantial risk of physical injury, (3) admitting as a spontaneous utterance, over his timely hearsay objection, evidence of the nontestifying complainant's initial oral statement to the police accusing him of attacking her, and (4) admitting that same initial oral statement by the complainant to the police through the testimony of the police officer to whom she made the statement, without affording him the opportunity to cross-examine the complainant, in violation of his sixth and fourteenth amendment rights to confront the witnesses against him. We agree with the defendant that the evidence was insufficient to support his conviction of robbery in the third degree, and

[1] The defendant's separate concurrent sentences on the three underlying charges of which the jury found him guilty, as enhanced, where appropriate, by the jury's guilty verdict on the part B information, were as follows: on the charge of robbery in the third degree, a term of three years of imprisonment; on the charge of unlawful restraint in the first degree, a term of six years of imprisonment followed by four years of special parole; and on the charge of assault in the third degree, a term of three years of imprisonment.

thus we reverse the judgment of conviction on that charge and remand this case to the trial court with direction to enter a judgment of acquittal thereon. We disagree with the defendant, however, as to his other claims of error, and thus affirm the judgment in all other respects.

The jury was presented with the following evidence on which to base its verdict in the first part of the defendant's trial. On the afternoon of April 6, 2017, Officer Nicholas Sullivan of the Willimantic Police Department was dispatched to the Valero gas station on West Main Street in Willimantic to investigate the report of an armed robbery at that location. Sullivan testified that, upon arriving at the gas station at or about 3:36 p.m., he saw no evidence of an ongoing robbery but found three women waiting for him in the convenience store section of the station. One of the women, the complainant, an employee of the gas station, initially told Sullivan, who testified about her statement over the defendant's hearsay objection, that while she was working at the station that afternoon, "her husband, [the defendant], came into the store and attacked her."[2] Sullivan testified that, when the complainant made that initial statement to him, she was emotional and appeared to be in distress. He recalled, more particularly, that, when they first spoke, she appeared to be crying, her breathing was heavy, her hair was a mess, and she had red marks on her neck and face. The second woman was identified only as the complainant's daughter, whom other evidence would show was in the store when a physical altercation began between her mother and the defendant and remained in the store for a short time thereafter before walking outside to call the police.[3]

[2] The defendant objected to the admission of this statement on the grounds that it was hearsay and lacked foundation. The state argued that the complainant's statement to Sullivan was a spontaneous utterance, and the court overruled the defendant's objection.

[3] As the complainant and the defendant are married, the complainant's daughter is also the defendant's stepdaughter.

The third woman was identified as Chrimson Strede, a regular customer of the store, who told Sullivan and later testified that she had witnessed part of the altercation between the complainant and the defendant and ultimately attempted to break it up. Strede was the only person with whom Sullivan spoke at the gas station on the day of the incident who later testified at trial.

Sullivan testified that, in light of the complainant's injuries, she was initially transported to Windham Hospital, where he photographed the injuries, and she received treatment by hospital staff. The state further documented the complainant's injuries by introducing the hospital records of her treatment on the afternoon of the incident, in which the hospital staff described the injuries, much as Sullivan had observed them, as a small bruise and swelling to the left side of her eye and a subtle abrasion on the left side of her neck. The hospital records identified the cause of the injuries, as the complainant had reported it to hospital staff, as an "assault" on her by the defendant, who allegedly "came to her job and got physical [with her]." The complainant told the hospital staff, more specifically, that the defendant had "punched [her] in the face," causing her to "[fall] back into a chair," and then "kick[ed] and knee[d] [her] in the head."

Sullivan next testified about the video surveillance system at the gas station, which continuously recorded video footage of activity at the station from multiple angles both inside and outside of the convenience store. Upon returning to the gas station to conduct further investigation after the complainant had been treated at the hospital, Sullivan reviewed video footage of the incident, as recorded by the video surveillance system, and copied it onto a zip drive, from which he later made a second copy on a hard disk that he attached to his report. The video footage so recorded, which had no audio component but was marked on each frame with

the time and date on which it was recorded, was initially played for the jury in its entirety, without interruptions by counsel or commentary by Sullivan.

The video footage, which the prosecutor would later describe in closing argument to the jury as "98 percent of this case," depicted the following sequence of events. At 3:31:24 p.m. on April 6, 2017, a man identified as the defendant walked through the front door of the store, carrying nothing. At 3:31:33 p.m., the defendant approached the front counter of the store, which had a cash register on it, behind which two women, identified as the complainant and her daughter, were working. The defendant reached over to a rear counter behind the complainant's daughter and picked up a pink wallet that was lying there. At 3:31:36 p.m., the defendant turned away from the counter while opening the wallet and looked inside it. Shortly thereafter, however, at 3:31:39 p.m., the defendant quickly closed the wallet, turned back toward the counter, and set the wallet back down where he had picked it up without removing anything from it. He then walked around the front counter toward the complainant and reached behind her toward a brown and white handbag lying farther down the rear counter behind her. When he did so, at 3:31:42 p.m., the complainant stood up and forcefully pushed him away, initiating a physical altercation between them that would last for just over one minute before coming to an end.

Thirteen seconds into the altercation, at 3:31:55 p.m., the defendant finally seized the handbag for which he had been reaching behind the complainant with his right hand. Eight seconds later, however, at 3:32:03 p.m., he dropped the handbag to the floor as he and the complainant, still struggling with each other, moved out from behind the front counter. At that point, the complainant's daughter picked up a cell phone from the rear counter and walked out of the store. Nine seconds later, at 3:32:12 p.m., the complainant placed the defendant in a headlock,

from which he broke free by forcing her to sit down in a nearby chair. After the complainant was seated in the chair, the struggle continued, with the defendant leaning over the complainant while she held him with her arms and attempted to restrain him with her legs.

The video footage also depicts that, a third woman, later identified as Strede, drove into the gas station and got out of her vehicle, spoke briefly with the complainant's daughter, and then entered the store at 3:32:18 p.m. After the complainant, still seated, and the defendant, still leaning over her, exchanged multiple physical blows in Strede's presence, Strede approached them. As she did so, at 3:32:33 p.m., the complainant pointed down toward the handbag on the floor, and Strede picked it up and tossed it onto the front counter by the cash register. Immediately thereafter, Strede briefly exited the store and spoke again to the complainant's daughter, who was still standing outside the front door, while the defendant, who was still struggling with the complainant, continued to strike her with his right knee. Strede then reentered the store at 3:32:41 p.m., walked directly to the defendant and shoved him as he was kneeing the complainant at 3:32:45 p.m., then struck him in the back at 3:32:47 p.m. At that point, the defendant released his grasp of the complainant, stood up, and walked out of the store without reaching again for the handbag or taking anything else from the complainant or the store.

On cross-examination, Sullivan testified that, although he had been dispatched to the gas station on the report of an armed robbery, he never found any weapons at the gas station and was never told by anyone that the defendant had wielded a weapon in the course of the incident. He further testified that, to the best of his knowledge, the defendant never took anything from the complainant or the store in the course of the incident.

After Sullivan testified, the state called three more witnesses in the first part of the trial. Lieutenant Paul M. Hussey of the Willimantic Police Department testified that, as he and Officer James Salvatore were returning from a firearms range on the day of the incident, they heard a bulletin advising them to be on the lookout for the defendant. Because Hussey was familiar with the defendant and knew where he lived, he and Salvatore drove directly to the defendant's residence. Shortly after their arrival, a fellow officer, Corporal Matthew Nixon, arrived there as well. When the officers rang the defendant's doorbell, the defendant answered the door personally and correctly identified himself by name. The officers then asked the defendant if he had been at the gas station earlier that afternoon, and he admitted that he had. According to Nixon, who also later testified about his role in taking the defendant into custody, the defendant was cooperative and fully compliant with the officers throughout their interaction with him that afternoon.

Finally, the jury heard testimony from Strede, who confirmed that she had witnessed the latter portion of the incident at the gas station, as shown on the video recording. Strede further testified that she was familiar with the complainant, who worked as a cashier in the convenience store at the station, because she went there almost every day to buy provisions for work before the start of her evening shift at a local restaurant. Strede recalled that, on the day of the incident, when she pulled up to the gas station, she saw the complainant's daughter outside, "kinda panicking . . . ." Upon entering the store, Strede saw the complainant seated in a chair, with a handbag on the floor near her and a man Strede recognized as the defendant leaning over the complainant and hitting her. Strede knew the defendant because they had previously attended the same "AA meetings" in town.

Strede was then questioned about what she observed during the incident while the video footage of the inci-

dent was replayed for the jury. Strede first viewed video footage showing her approaching the complainant as she sat in a chair, struggling with the defendant, who was leaning over her. When the video showed the complainant pointing to the handbag on the floor and Strede picking it up and tossing it onto the counter by the cash register, Strede recounted that that had happened as "[the defendant] was mentioning something about keys, and [the complainant] was telling me to grab her purse. And I seen her purse on the floor." Strede was then shown video footage of her exiting the store and talking briefly with the complainant's daughter before reentering the store, approaching the parties, and striking the defendant in the back. Strede explained that she left the store at that time to ask the complainant's daughter to call the police. When the complainant's daughter told her that she had already done so, Strede decided to reenter the store to try to stop the altercation herself before the police arrived by telling the defendant that the police had been called and were on their way to the gas station. She recalled that seconds after she so informed the defendant and struck him in the back, he released the complainant from his grasp, stood up, and walked out of the store, empty-handed. On cross-examination, Strede testified that she knew the defendant had come to the store that day to get some keys, but she did not know which particular keys he was there for.

At the conclusion of Strede's testimony, the state rested without calling either the complainant or her daughter to testify, whereupon the defendant moved for a judgment of acquittal on all charges except assault in the third degree. The court denied the motion.

The next day, the jury heard testimony from the defendant, who was the only witness called by the defense. He began his testimony by stating that, in 2010, he had been convicted of three felonies. Thereafter, concerning the present incident, the defendant testified

that in April, 2017, he was working at a homeless shelter in Willimantic, where his duties included attending to the needs of the guests and making repairs, as needed, around the shelter. Prior to the incident, the defendant said, he had lent one of his vehicles, a truck, to the complainant because her car had recently broken down. The defendant kept the tools he used for making repairs at the shelter in the truck that he had lent to the complainant. On April 3, 2017, however, before the complainant returned the borrowed truck to the defendant, she called him to tell him that "she wasn't coming home." In response to this declaration, the defendant testified that, "I didn't question the reason why. I kinda like just said okay, when you figure out what you're going to do, then you can let me know." Three days later, however, upon returning home from work on April 6, 2017, seeing that the truck he had let the complainant use was still gone and realizing that he needed the tools stored in the truck for work, he called the complainant in an effort to get them back. Because, he explained, the complainant did not return his calls, he "just went to the gas station to retrieve [his] keys."

The defendant testified that, as he walked into the store that afternoon, he asked the complainant about the keys, but she told him that she was not going to give them back to him. This response, he admitted, led to an argument between him and the complainant, during which he physically assaulted her. The defendant denied, however, that he went to the gas station that day intending to assault the complainant or to rob her or steal anything from her. Instead, denying repeated suggestions by the prosecutor to the contrary, the defendant insisted that his only purpose in going to the gas station that day was to get his truck keys from the complainant so that he could retrieve the tools he needed for work from the truck she had borrowed but not yet returned. Additional facts will be set forth as necessary.

I

THE DEFENDANT'S EVIDENTIARY INSUFFICIENCY CLAIMS

The defendant claims on appeal that the trial court erred in failing to enter judgments of acquittal on the charges of robbery in the third degree and unlawful restraint in the first degree because the evidence at trial was insufficient to prove each essential element of either charge beyond a reasonable doubt. Because both claims are governed by the same standard of review, we will first set forth that standard.

"In [a defendant's] challenge to the sufficiency of the evidence . . . [w]hether we review the findings of a trial court or the verdict of a jury, our underlying task is the same. . . . We first review the evidence presented at trial, construing it in the light most favorable to sustaining the facts expressly found by the trial court or impliedly found by the jury. We then decide whether, upon the facts thus established and the inferences reasonably drawn therefrom, the trial court or the jury could reasonably have concluded that the cumulative effect of the evidence established the defendant's guilt beyond a reasonable doubt. . . . [W]e give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses." (Citation omitted; internal quotation marks omitted.) *State* v. *Adams*, 327 Conn. 297, 304–305, 173 A.3d 943 (2017).

"[T]he jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . An appellate court defers to the jury's assessment of the credibility of witnesses on the basis of their firsthand observation of their conduct." (Citation omitted; internal quotation marks omitted.) *State* v. *Thorne*, 204 Conn. App. 249,

256–57, 253 A.3d 1021, cert. denied, 336 Conn. 953, 251 A.3d 993 (2021).

"On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [trier's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Adams*, supra, 327 Conn. 305. If we determine that the evidence is insufficient to support the guilty verdict and ultimate conviction, then the defendant is entitled to a judgment of acquittal. See *State* v. *Quintiliano*, 206 Conn. App. 712, 720, 261 A.3d 31, cert. denied, 339 Conn. 918, 262 A.3d 136 (2021).

A

Robbery in the Third Degree

The defendant first argues that the evidence was insufficient to convict him of robbery in the third degree in violation of § 53a-136. Section 53a-136 provides that "[a] person is guilty of robbery in the third degree when he commits robbery as defined in [General Statutes §] 53a-133." Section 53a-133, in turn, provides in relevant part: "A person commits robbery when, *in the course of committing a larceny*, he uses . . . physical force upon another person for the purpose of: (1) . . . overcoming resistance to the taking of the [person's] property. . . ." (Emphasis added.) Under these statutes, which the state specified in the long form information as its basis for charging the defendant with robbery in the third degree, the defendant could not be convicted of that offense without proof beyond a reasonable doubt, inter alia, that he used physical force on another person while *engaged in the commission of a larceny*.

General Statutes § 53a-119 provides in relevant part: "A person commits larceny when, *with intent to deprive another of property* or to appropriate the same

to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. . . .'' (Emphasis added.) In light of this definition, the essential elements of larceny have been held to be ''(1) the wrongful taking or carrying away of the personal property of another; (2) *the existence of a felonious intent in the taker to deprive the owner of* [*the property*] *permanently*; and (3) the lack of consent of the owner.'' (Emphasis added; internal quotation marks omitted.) *State* v. *Adams*, supra, 327 Conn. 305–306. In the present case, where the state based its prosecution of the defendant for robbery in the third degree on his brief seizure of the complainant's handbag in the course of their physical altercation on April 6, 2017, the defendant challenges the sufficiency of the state's evidence to prove that he engaged in such conduct with the intent to deprive the complainant permanently of the handbag.

The defendant testified that he had no such intent, insisting that his only purpose in seizing the handbag during his physical altercation with the complainant was to search it for the keys to the truck he had loaned her so that he could retrieve his work tools from inside the truck. The state responds that the jury reasonably could have discredited the defendant's explanation of his conduct, concluding to the contrary that he took the handbag with the intent to steal it from the complainant, and thus to deprive her of it permanently, because he engaged in a prolonged physical struggle with her to overcome her resistance to its taking and only changed his plan once Strede informed him that the police had been called to the scene and were on their way.

Although it is true that the jury was entitled to reject the defendant's testimony as to his nonlarcenous purpose in taking brief possession of the complainant's handbag in the course of their altercation, it is equally true that the jury was not entitled, on that basis, to

draw the contrary inference that his intent at that time was to steal the handbag, and thereby deprive the complainant of it permanently. In *State* v. *Alfonso*, 195 Conn. 624, 490 A.2d 75 (1985), our Supreme Court stated: "While it is true that it is within the province of the jury to accept or reject a defendant's testimony, a jury in rejecting such testimony cannot conclude that the opposite is true." (Internal quotation marks omitted.) Id., 634. Instead, the court ruled that no such contrary inference could be drawn by the jury "without positive evidence supporting such a conclusion." Id.

In *Alfonso*, where the defendant challenged the sufficiency of the state's evidence to prove that he knowingly possessed marijuana found on premises where he and several others were present at the time of its discovery by the police, our Supreme Court examined the trial court record for any positive evidence, based on the defendant's acts or statements in the surrounding circumstances, that might have supported a reasonable inference that he had such guilty knowledge, despite his denial, at the time of his alleged possession. See id. Upon finding that there was no positive evidence from which the jury reasonably could have drawn a nonspeculative inference that he had such guilty knowledge at the time of his alleged possession of the marijuana, for the marijuana was discovered in a common area, it was not among the defendant's possessions, and there was no evidence that he had smoked marijuana in the past, and another self-incriminating statement he had made about possessing some cocaine found elsewhere on the premises was irrelevant to his alleged possession of marijuana, the court reversed his conviction on that charge. See id., 634–35.

In this case, as in *Alfonso*, the element of robbery in the third degree as to which the defendant claims that the evidence was insufficient to convict him concerns the mental state with which he was acting at the time he

allegedly committed that offense. A defendant's mental state is an element that must typically be proved by inference from the defendant's proven words or conduct. See, e.g., *State* v. *Fredrik H.*, 197 Conn. App. 213, 219, 231 A.3d 371 (2020) ("[b]ecause direct evidence of an accused's state of mind typically is not available, his intent often must be inferred from his conduct, other circumstantial evidence and rational inferences that may be drawn therefrom" (internal quotation marks omitted)), cert. denied, 338 Conn. 906, 258 A.3d 1279 (2021). Thus, the state's "positive evidence supporting [the] conclusion" that he acted with that mental state—the intent to deprive the complainant permanently of her handbag—must have consisted of inferences arising either from other statements he was shown to have made at or before the trial or from other conduct he was shown to have engaged in before, during, or after the incident. *State* v. *Alfonso*, supra, 195 Conn. 634.

Here, however, the jury heard no evidence of any statements made by the defendant suggesting that he had a different motive for taking the complainant's handbag during their altercation than that to which he testified, and frequently reiterated on cross-examination, at trial. Apart from such testimony, in which he insisted that his only purpose in coming to the gas station that day was to get the keys to the borrowed truck and use them to retrieve the work tools he stored in the truck, the only other evidence of statements he made from which any inference of intent might have been drawn were his words, to or in the presence of Strede as he struggled with the complainant, confirming that he had come to the gas station that day to get his keys. Such statements undermined the state's claim that he was then acting with felonious intent. No other evidence was introduced as to any statement he had ever made to anyone, including the complainant or her daughter, expressing any interest on his part in the handbag or its contents, or otherwise giving him a possi-

ble motive for stealing it from the complainant. Finally, and tellingly, the complainant's only descriptions of the incident that were ever brought to the attention of the jury were her hearsay statements to the police and to hospital staff that the defendant had attacked or assaulted her inside the store. These descriptions of the defendant's conduct during the incident, however damning on the charges of assault and unlawful restraint, undermined the state's claim against him on the charge of robbery because they made no mention of any alleged effort or purpose on his part to steal the handbag from the complainant in the course of the incident.

Under these circumstances, the only positive evidence from which the jury might have drawn an inference as to the defendant's intent when he seized the complainant's handbag was the video footage of the incident. What the video footage showed, however, was at best unhelpful to the state on that issue. To begin with, it showed that upon entering the store on the day of the incident, the defendant did not go initially to the complainant's handbag, which lay on the rear counter behind her, but to the pink wallet lying at the far end of that counter at that time. When the defendant picked up the wallet and began to look inside it, he was turning away from the counter as if to head back toward the door of the store. Almost immediately, however, he closed the wallet without taking anything from it and returned it to the counter where he had picked it up before reaching behind the complainant toward her handbag. These actions, which are consistent with the defendant's testimony that his only purpose in coming to the gas station that day was to get his truck keys from the complainant so he could retrieve his work tools from the borrowed truck, suggested that if he had found what he was looking for inside the wallet, he would simply have taken it and left the store, for he showed no apparent interest in the wallet itself or in any of its other contents. Only

after the defendant had looked inside the wallet and returned it to the counter without removing anything from it did he reach behind the complainant toward the handbag. By reasonable inference, the defendant's search of the handbag, had he managed to conduct it, would have proceeded in similar fashion to his search of the wallet, with him looking briefly inside it until he found what he was looking for or determined that it was not there, but no longer.

The jury could not infer the defendant's intent from his reach for the handbag because the complainant rose and began to struggle with the defendant as soon as he reached for the handbag, impeding his course. The complainant's strong resistance to his efforts delayed his seizure of the handbag and ultimately prevented him from searching it, for it took him more than twenty seconds to seize the handbag once his struggle with the complainant began, and he held on to it for only eight seconds thereafter before dropping it to the floor. Here again, with no basis in the evidence for inferring that the defendant had any other interest in the handbag or its contents than that to which he testified, the record provided no nonspeculative basis for inferring that his true purpose in seizing it was to steal it, and thus to deprive the complainant of it permanently.

The state further argues, not without reason, that, whatever the defendant intended when he first picked up the handbag appeared to change once Strede struck him in the back and told him that the police had been called to the scene and were on their way. Although that inference is reasonable, it sheds no light on the intent with which the defendant initially took possession of the handbag. Even if he abandoned his struggle with the complainant because he feared that he might be arrested if they came to the gas station, that would reveal nothing about the intent with which he seized the handbag, for regardless of that intent, he had ample

reason to believe he might be arrested if the police came to the station because he had just physically assaulted his wife in the presence of multiple witnesses who knew and could readily identify him. Thus, his interest in leaving the scene before the police arrived did not support an inference that he initially took the handbag with the intent to steal it from the complainant and deprive her of it permanently.

In sum, the jury had no reasonable basis in this case for finding that the defendant's brief taking of the complainant's handbag in the course of their physical altercation was accompanied by a felonious intent to steal it from her, and thus to deprive her of it permanently. In the absence of positive proof that he acted with that intent, there was insufficient evidence to support the jury's necessary finding that he seized the handbag in the course of committing a larceny, as required to convict him of robbery in the third degree.

B

Unlawful Restraint in the First Degree

The defendant next argues that the evidence was insufficient to convict him of unlawful restraint in the first degree in violation of § 53a-95. Section 53a-95 (a) provides: "A person is guilty of unlawful restraint in the first degree when he restrains another person under circumstances which expose such other person to a substantial risk of physical injury." So written, § 53a-95 requires proof beyond a reasonable doubt of two essential elements before a defendant can be convicted of unlawful restraint in the first degree: first, that the defendant restrained another person; and second, that he did so under circumstances exposing the other person to a substantial risk of physical harm. The defendant claims that the state failed to establish either such essential element beyond a reasonable doubt.

As used in § 53a-95, the term "restrain" is defined by statute to mean "to restrict a person's movements inten-

tionally and unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent." General Statutes § 53a-91 (1). This element requires proof not only that the defendant actually restricted the complainant's movements in such a manner as to interfere substantially with her liberty, without her consent, but that he did so intentionally, that is, with the "conscious objective" of causing that result. General Statutes § 53a-3 (11). Here again, we note that, "[b]ecause direct evidence of an accused's state of mind typically is not available, his intent often must be inferred from his conduct, other circumstantial evidence and rational inferences that may be drawn therefrom. . . . For example, intent may be inferred from the events leading up to, and immediately following, the conduct in question . . . the accused's physical acts and the general surrounding circumstances." (Internal quotation marks omitted.) *State* v. *Fredrik H.*, supra, 197 Conn. App. 219.

A person restrains another under circumstances exposing her to a substantial risk of physical injury when his intentional and unlawful restriction of her movements in the manner specified in § 53a-95 exposes her to a substantial risk of suffering "impairment of physical condition or pain," as physical injury is defined in § 53a-3 (3). Although a person shown to have been restrained within the meaning of § 53a-91 (1) need not be shown to have suffered actual physical injury as a result of such restraint to establish this second element of unlawful restraint in the first degree, proof that the restraint did in fact cause her to suffer physical injury is sufficient to establish that she was restrained under circumstances exposing her to a substantial risk of such injury. See *State* v. *Jordan*, 64 Conn. App. 143, 148, 781 A.2d 310 (2001) ("jury finding of actual physical injury encompasses the statutory requirement of mere expo-

sure to physical injury necessary to obtain a conviction of unlawful restraint in the first degree'').

In this case, the state sought to prove that the defendant restricted the complainant's movements in such a way as to interfere substantially with her liberty during their physical altercation on April 6, 2017, and thereby restrained her, by forcing her down into a chair, leaning over her, striking her repeatedly, and forcing her to remain in the chair as their struggle continued. The defendant disagrees, contending that the evidence fails to show that he restrained the complainant, intentionally or otherwise, at any time. To the contrary, he claims, she is the one who restrained him, for video footage of the altercation assertedly shows that she initiated the physical struggle between them when he first reached for her handbag, she put him in a headlock and held him up against a wall as they stood next to one another and continued to struggle, and once she was sitting in the chair, she grabbed him and held him down with her arms and legs until the incident ended. Claiming that the complainant both had and made use of the opportunity to strike and to hold onto him during the incident, the defendant argues that her movements were essentially unrestricted by his proven conduct.

Considering the evidence in the light most favorable to sustaining the jury's guilty verdict, we agree with the state that there was more than enough evidence to support the jury's findings beyond a reasonable doubt that the defendant restrained the complainant during their physical altercation on April 6, 2017, and that he thereby exposed her to a substantial risk of physical injury. To begin with, the complainant's statements to Sullivan and the hospital staff were that the defendant had attacked or assaulted her. She further told the staff at the hospital that the defendant had punched her and caused her to fall into a chair, where he kneed her and kicked her in the head. Although no witness other than

the defendant testified to what happened in the first part of the parties' altercation, Strede testified, and the video corroborated her testimony, that, after the complainant was seated in the chair, the defendant continued to lean over her and to strike her, causing her to remain in the chair when she attempted to get up. This testimony reasonably could have supported a finding by the jury that, at least by the time the complainant was sitting in the chair, the defendant was intentionally preventing her from standing up and getting away from him, thereby restricting her movements in a way that interfered substantially with her liberty. Although the defendant may also have had other purposes in mind when he was restricting the complainant's physical movements at that time, it would have been reasonable for the jury to conclude that he engaged in such conduct with the specific intent to interfere substantially with her liberty. See *State* v. *Fredrik H.*, supra, 197 Conn. App. 219 (holding that defendant's actions designed to accomplish purposes other than restraining another person may be sufficient to establish intent element of unlawful restraint if he is shown to have engaged in such actions with specific intent to interfere substantially with other person's liberty).

With respect to the defendant's suggestion that his altercation with the complainant involved only mutual combat, where she restrained him as much as he restrained her, the video footage reasonably could have been found to show, as Strede testified, that the defendant assaulted the complainant and leaned over her to keep her down once she was seated in the chair. Here, then, as in *State* v. *Luster*, 48 Conn. App. 872, 713 A.2d 277, cert. denied, 246 Conn. 901, 717 A.2d 239 (1998), in which a similar claim of innocence was made by a defendant whose alleged victim was able to struggle with and resist him despite his efforts to force her down on a bed, "[t]he jury . . . reasonably could have concluded that the victim was restricted in her move-

ments in a manner that interfered with her liberty." Id., 881.

Finally, as to the defendant's suggestion that any restraint he might have applied to the complainant was not applied in such circumstances as to expose her to a substantial risk of physical injury, that suggestion must be rejected for several reasons, not the least of which is the defendant's own admission that he assaulted the complainant in the course of the incident.[4] See *State* v. *Cotton*, 77 Conn. App. 749, 776, 825 A.2d 189 ("evidence of the defendant's assault on the victim in the parking lot was ample to support a factual determination that by his behavior, the defendant exposed the victim to a substantial risk of physical injury"), cert. denied, 265 Conn. 911, 831 A.2d 251 (2003). In addition to the defendant's own admission, the state presented evidence that included the hospital record documenting the complainant's injuries, the video footage showing that he physically struggled with the complainant for more than one minute, and Strede's account of the several times he kneed the complainant while she was forced to remain sitting in the chair. The jury reasonably could have concluded from this evidence that the defendant restrained the complainant under circumstances that exposed her to a substantial risk of physical injury.

On the basis of the foregoing, the evidence was sufficient to support the defendant's conviction of unlawful restraint in the first degree.

[4] When the defendant testified at trial, the following colloquy took place on direct examination:

"Q. Tell us what occurred, what happened in the—at—what we saw in the video.

"A. When I got to the gas station, me and my wife we ended up getting into an argument and then we ended up getting into an altercation and I ended up hitting my wife.

"Q. So you did in fact assault her?

"A. Yes, I did."

II

THE DEFENDANT'S EVIDENTIARY AND CONFRONTATION CLAUSE CLAIMS

The defendant's additional claims of error concern the court's admission of hearsay testimony from Sullivan concerning the nontestifying complainant's initial oral statement to him, in which she accused the defendant of attacking her.

A

Evidentiary Challenge to Admissibility of Complainant's Initial Oral Statement to Police As a Spontaneous Utterance

We first address the defendant's claim that the challenged statement was improperly admitted as a spontaneous utterance, over his timely hearsay objection, under § 8-3 (2) of the Connecticut Code of Evidence. The state disagrees, asserting that the statement was properly admitted under the spontaneous utterance exception to the rule against hearsay and that, even if its admission on that basis was erroneous, that error does not require reversal of his conviction because the defendant has failed to establish that the statement was harmful to his defense. We agree with the state.

We begin by setting forth the relevant standard of review. "As a general rule, hearsay is inadmissible unless an exception from the Code of Evidence, the General Statutes or the rules of practice applies. . . . To the extent a trial court's admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. They require determinations about which reasonable minds may not differ; there is no judgment call

by the trial court . . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *State* v. *Vega*, 181 Conn. App. 456, 463–64, 187 A.3d 424, cert. denied, 330 Conn. 928, 194 A.3d 777 (2018).

"An out-of-court statement offered to prove the truth of the matter asserted is hearsay and is generally inadmissible unless an exception to the general rule applies. . . . Among the recognized exceptions to the hearsay rule is the spontaneous utterance exception, which applies to an utterance or declaration that: (1) follows some startling occurrence; (2) refers to the occurrence; (3) is made by one having the opportunity to observe the occurrence; and (4) is made in such close connection to the occurrence and under such circumstances as to negate the opportunity for deliberation and fabrication by the declarant. . . . [T]he ultimate question is whether the utterance was spontaneous and unreflective and made under such circumstances as to indicate absence of opportunity for contrivance and misrepresentation. . . . Whether an utterance is spontaneous and made under circumstances that would preclude contrivance and misrepresentation is a preliminary question of fact to be decided by the trial judge. . . . The trial judge exercises broad discretion in deciding this preliminary question, and that decision will not be reversed on appeal absent an unreasonable exercise of discretion." (Internal quotation marks omitted.) *State* v. *Pugh*, 176 Conn. App. 518, 523–24, 170 A.3d 710, cert. denied, 327 Conn. 985, 175 A.3d 43 (2017), quoting *State* v. *Wargo*, 255 Conn. 113, 127–28, 763 A.2d 1 (2000); see also Conn. Code Evid. § 8-3 (2).

Here, the defendant claims that the record was insufficient to establish that the complainant was under the stress or excitement caused by the incident when she gave the statement to the police. He bases this claim

on the state's alleged failure to establish either the exact time at which the statement was made in relation to the end of the complainant's physical altercation with him or the exact circumstances in which the complainant made the challenged statement, particularly, whether the statement was made spontaneously, without prompting, in the immediate aftermath of the incident, or made more self-reflectively, in response to less immediate, nonemergency police interrogation. We conclude that the record clearly supports the trial court's finding that the statement was made spontaneously and that the defendant has not demonstrated how that ruling was an "unreasonable exercise of discretion." (Internal quotation marks omitted.) *State* v. *Pugh*, supra, 176 Conn. App. 524. This is because, although the record does not establish exactly how much time elapsed between the end of the incident mentioned in the statement and the making of the statement, the state presented ample evidence, through the testimony of Sullivan, to demonstrate that the complainant was still under sufficient emotional stress resulting from the incident at the time she made the statement as to make it unlikely that the statement was the product of contrivance or misrepresentation on her part.[5] As described by Sullivan when she first spoke to him, the complainant "appeared in distress, her hair was a mess, she appeared to be crying, she was breathing heavy. . . . [S]he appeared to be in a stressful situation prior and she was just breathing heavy, a little anxious, very emotional."

On the basis of the evidence presented, it was reasonable for the court to conclude that the complainant's state-

[5] "[T]here is no identifiable discrete time interval within which an utterance becomes spontaneous; [e]ach case must be decided on its particular circumstances." (Internal quotation marks omitted.) *State* v. *Kirby*, 280 Conn. 361, 375, 908 A.2d 506 (2006); see *State* v. *Slater*, 285 Conn. 162, 179–80, 939 A.2d 1105 (despite it being unclear how much time had passed, victim's emotional state, appearing visibly shaken, supported court's finding that statement was spontaneous utterance "made under circumstances that had negated the opportunity for deliberation or fabrication"), cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008).

ment to Sullivan was a spontaneous utterance. Not only was the complainant "in distress" and "very emotional" when she first spoke with Sullivan, but she made her initial oral statement to him shortly after he arrived at the gas station at 3:36 p.m., roughly three minutes after the defendant released her from his grasp and drove away. Additionally, the fact that the complainant arrived at the hospital at 4:02 p.m. and later gave a fuller, more detailed statement regarding the events at the gas station shows that her initial statement to Sullivan "was spontaneous and unreflective and made under such circumstances as to indicate absence of opportunity for contrivance and misrepresentation." (Internal quotation marks omitted.) *State* v. *Pugh*, supra, 176 Conn. App. 523.

Even if we were to assume, however, that the trial court erred in admitting the complainant's initial oral statement as a spontaneous utterance, the defendant would not be entitled to a new trial on that basis, for he has failed to demonstrate that admission of the statement, allegedly a nonconstitutional evidentiary error, substantially affected the verdict. See, e.g., *State* v. *Edwards*, 325 Conn. 97, 133, 156 A.3d 506 (2017) (defendant bears burden of demonstrating nonconstitutional evidentiary error was harmful). "Whether the error was harmless depends on a number of factors, such as the importance of the evidence to the state's case, whether the evidence was cumulative of properly admitted evidence, the presence or absence of corroborating evidence, and, of course, the overall strength of the state's case." *State* v. *Culbreath*, 340 Conn. 167, 192, 263 A.3d 350 (2021). Although the complainant's challenged statement identified the defendant by name and generally described his actions at the gas station as an attack, there was overwhelming additional evidence that proved those facts as well. The complainant's statement merely corroborated the defendant's own admission that he had

assaulted the complainant at the station, as well as the other unchallenged evidence, such as the video footage of the entire incident that showed the defendant's conduct throughout the incident. On the basis of the defendant's unqualified admission of the assault, and the state's overwhelming evidence confirming that admission, any error in admitting the complainant's initial oral statement was clearly harmless.

B

The Defendant's Confrontation Clause Claim

Finally, we turn to the defendant's constitutional claim that admission of the nontestifying complainant's initial oral statement to the police accusing him of attacking her violated his sixth and fourteenth amendment rights to confront the witnesses against him because he never was afforded the opportunity to cross-examine her about that statement, either before or during trial. The defendant concedes, as he must, that this claim was not preserved at trial, and thus he requests that we review it under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). In response, the state asserts that the defendant's claim should not be reviewed under *Golding* because the record does not clearly establish that the statement was testimonial in nature and thus that its admission without affording him the opportunity to cross-examine the complainant constituted a constitutional violation, and, even if admission of the statement in these circumstances constituted a constitutional violation, that violation should not result in reversal of the defendant's conviction because it was harmless beyond a reasonable doubt in light of the abundance of other evidence, including the defendant's own admission, that he assaulted the complainant at the gas station in Willimantic on April 6, 2017.

It is well established that "a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances. . . . [T]he first two [prongs of *Golding*] involve a determination of whether the claim is reviewable . . . and under those two prongs, [t]he defendant bears the responsibility for providing a record that is adequate for review of his claim of constitutional error. . . . [T]he second two [prongs of *Golding*] . . . involve a determination of whether the defendant may prevail." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Vega*, supra, 181 Conn. App. 484–85. Consistent with this approach to analyzing the appropriateness of reviewing an unpreserved constitutional claim under *Golding*, we will first determine if, under the fourth prong of *Golding*, the state has demonstrated that any constitutional error that may have resulted from the admission of the nontestifying complainant's initial oral statement to the police was harmless beyond a reasonable doubt.

"[W]hether a defendant is entitled to any remedy for a violation of his right to confront witnesses depends on whether the violation is legally harmless." Id., 485. "It is well established that a violation of the defendant's right to confront witnesses is subject to harmless error

analysis . . . .'' (Internal quotation marks omitted.) *State* v. *Campbell*, 328 Conn. 444, 512, 180 A.3d 882 (2018); see also *State* v. *Pugh*, supra, 176 Conn. App. 528–30 (conducting harmless error analysis to resolve confrontation clause claim).

''[T]he test for determining whether a constitutional [error] is harmless . . . is whether it appears beyond a reasonable doubt that the [error] complained of did not contribute to the verdict obtained. . . . [Our Supreme Court] has held in a number of cases that when there is independent overwhelming evidence of guilt, a constitutional error would be rendered harmless beyond a reasonable doubt. . . . [W]e must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . That determination must be made in light of the entire record [including the strength of the state's case without the evidence admitted in error]. . . . Additional factors that we have considered in determining whether an error is harmless in a particular case include the importance of the challenged evidence to the prosecution's case, whether it is cumulative, the extent of cross-examination permitted, and the presence or absence of corroborating or contradicting evidence or testimony.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Edwards*, 334 Conn. 688, 706–707, 224 A.3d 504 (2020).

As previously noted, it is significant to our analysis that the complainant's out-of-court statement accusing the defendant of attacking her did not serve as an integral portion of the state's case against the defendant. Instead, the role it served was merely cumulative, for it was corroborated not only by the video footage of the entire incident, which clearly showed the defendant striking the complainant, and by records from the hospital documenting her resulting physical injuries, but also

by Strede's independent description of the assault and identification of the defendant as the perpetrator and, importantly, the defendant's own admission of the assault. See *State* v. *Smith*, 289 Conn. 598, 628–29, 960 A.2d 993 (2008) (concluding that admission of statement, even though improper, was ultimately harmless error because statement was cumulative). In light of this evidence, which overwhelmingly supported the state's claim that the defendant assaulted the complainant in the course of their physical altercation on April 6, 2017, the state never mentioned the complainant's challenged statement in its closing argument to the jury. For all of these reasons, we conclude that, even if the admission of the complainant's statement to Sullivan violated the defendant's constitutional right to confrontation, any error in its admission was harmless beyond a reasonable doubt. See *State* v. *Edwards*, supra, 334 Conn. 713. Therefore, the defendant's claim fails under *Golding*'s fourth prong.

III

CONCLUSION

We agree with the defendant that the evidence was insufficient to sustain his conviction of robbery in the third degree. Accordingly, we reverse his conviction on that charge and remand this case to the trial court with direction to enter a judgment of acquittal thereon. We disagree with the defendant, however, as to his other claims of error, and thus affirm the challenged judgment in all other respects.

The judgment is reversed as to the conviction of robbery in the third degree and the case is remanded with direction to enter a judgment of acquittal on that charge; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.