KAREEM LEACH *v.* COMMISSIONER OF CORRECTION (AC 44228)

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

Syllabus

The petitioner, who had been convicted, following a jury trial, of robbery in the first degree and assault in the first degree, sought a writ of habeas corpus, claiming that his trial counsel, R, had provided ineffective assistance as a result of R's failure to meaningfully explain the state's plea offer and to review and explain certain surveillance video evidence prior to plea negotiations and trial. Following a hearing, the habeas court denied the petition. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*

that the habeas court did not abuse its discretion in denying the petition for certification to appeal, the petitioner having failed to demonstrate that his claims involved issues that were debatable among jurists of reason, that a court could resolve the issues in a different manner or that the questions raised were adequate to deserve encouragement to proceed further: after a thorough review of the record and briefs, and based on the underlying facts as found by the habeas court, this court concluded that the habeas court properly found that R did not provide ineffective assistance of counsel, as the habeas court credited R's testimony that he explained the state's plea offer of six years of incarceration and that the petitioner understood the terms of the offer, the court did not credit the petitioner's testimony that he misunderstood the state's offer, the court found that R was generally aware of what the surveillance video depicted prior to viewing the video, R's failure to view the video before trial did not negate his pretrial discussions with the petitioner regarding the content of the video, and it was the petitioner who initially made R aware of the existence of the video; accordingly, R provided the petitioner with adequate information on which he could make an informed decision as to whether to accept or reject the state's plea offer.

Argued February 8—officially released April 12, 2022

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Chaplin, J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Peter G. Billings, assigned counsel, with whom, on the brief, was *Stephanie K. Toronto*, for the appellant (petitioner).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Paul J. Ferencek*, state's attorney, and *Juliana Waltersdorff*, assistant state's attorney, for the appellee (respondent).

Opinion

ALEXANDER, J. The petitioner, Kareem Leach, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the

petitioner claims that the court (1) abused its discretion by denying his petition for certification to appeal and (2) improperly concluded that his trial counsel had not provided ineffective assistance. We disagree that the court abused its discretion in denying the petition for certification to appeal and, accordingly, dismiss the appeal.

The following facts and procedural history are relevant to this appeal. The petitioner was involved in an incident that occurred on January 13, 2013, and, after a jury trial, he was convicted of robbery in the first degree with a deadly weapon in violation of General Statutes § 53a-134 (a) (2), and assault in the first degree by means of the discharge of a firearm in violation of General Statutes § 53-59 (a) (5). *State* v. *Leach*, 165 Conn. App. 28, 29?31, 138 A.3d 445, cert. denied, 323 Conn. 948, 169 A.3d 792 (2016). He was sentenced to a total effective term of fourteen years of imprisonment and six years of special parole. Id., 31.

The petitioner initiated this habeas action and, on January 16, 2019, filed an amended petition which contained one count alleging ineffective assistance of his criminal trial counsel, Attorney Neal Rogan. Relevant to this appeal, the petitioner claimed that Rogan failed to (1) meaningfully explain the state's plea offer to him and (2) review and explain certain surveillance video evidence prior to trial.

A trial on the habeas petition was held on January 31, 2020. On July 2, 2020, the court issued a memorandum of decision in which it denied the habeas petition, finding that the petitioner had failed to demonstrate that Rogan had rendered deficient performance. On July 17, 2020, the petitioner filed a petition for certification to appeal, which the court denied. This appeal followed.

I

We first address the petitioner's claim that the court abused its discretion in denying his petition for certification to appeal. We disagree.

General Statutes § 52-470 (g) provides: "No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies."

"As our Supreme Court has explained, one of the goals our legislature intended by enacting this statute was to limit the number of appeals filed in criminal cases and [to] hasten the final conclusion of the criminal justice process . . . . [T]he legislature intended to discourage frivolous habeas appeals. . . . [Section] 52-470 [g] acts as a limitation on the scope of review, and not the jurisdiction, of the appellate tribunal. . . .

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the [disposition] of his [or her] petition for [a writ of] habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he [or she] must demonstrate that the denial of his [or her] petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he [or she]

must then prove that the decision of the habeas court should be reversed on its merits. . . .

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Footnote omitted; internal quotation marks omitted.) *Harris* v. *Commissioner of Correction*, 205 Conn. App. 837, 843?44, 257 A.3d 343, cert. denied, 339 Conn. 905, 260 A.3d 484 (2021).

The petitioner requested certification to appeal the following issues, inter alia: "Whether the habeas court erred in finding that [the petitioner] did not prove ineffective assistance of counsel as to [Rogan] in that . . . Rogan failed to meaningfully explain the state's plea offer . . . [and] Rogan failed to review surveillance evidence to prepare for trial . . . ."[1]

[1] The petitioner also requested certification to appeal "[w]hether the habeas court erred in finding that [the petitioner] did not prove ineffective assistance of counsel as to [Rogan] in that . . . Rogan failed to meaningfully explain the state's evidence . . . Rogan failed to properly cross-examine witnesses . . . Rogan failed to move to preclude surveillance video; and/or . . . Rogan failed to object to improper jury instructions." None of these issues has been raised on appeal.

For the reasons set forth in part II of this opinion, we conclude that the petitioner has failed to demonstrate that (1) his claims involve issues that are debatable among jurists of reason, (2) a court could resolve the issues in a different manner, or (3) the questions are adequate to deserve encouragement to proceed further. See *Harris* v. *Commissioner of Correction*, supra, 205 Conn. App. 844. Accordingly, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal.

II

Turning to his substantive claims on appeal, the petitioner asserts that the court improperly concluded that Rogan had not provided ineffective assistance of counsel. Specifically, the petitioner alleged ineffective assistance as a result of Rogan's failure to (1) meaningfully explain the state's plea offer to him, and (2) review and explain certain surveillance video evidence prior to plea negotiations and trial.

We begin by setting forth our standard of review and the legal principles governing ineffective assistance of counsel claims. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Humble* v. *Commissioner of Correction*, 180 Conn. App. 697, 703?704, 184 A.3d 804, cert. denied, 330 Conn. 939, 195 A.3d 692 (2018).

"In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he

[or she] must show that counsel's assistance was so defective as to require reversal of [the] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he [or she] fails to meet either prong. . . .

"To satisfy the performance prong [of the *Strickland* test] the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." (Internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 201 Conn. App. 1, 12, 242 A.3d 107, cert. denied, 335 Conn. 983, 242 A.3d 105 (2020).

A

The petitioner first argues that the habeas court improperly denied his habeas petition because Rogan rendered deficient performance when he failed to meaningfully explain the state's plea offer to him prior to the petitioner rejecting the offer and proceeding to trial. We disagree.

The following additional facts, as found by the habeas court, are relevant to our resolution of this claim. During pretrial plea negotiations, the state extended an offer of twelve years of incarceration, execution suspended after six years, followed by five years of probation.

The petitioner rejected the state's offer and elected to proceed to trial.

"At [the habeas] trial, the petitioner testified that he briefly discussed the state's offer with [Rogan]. He testified that, as a result of that discussion, he understood the state's offer to require him to serve twelve years [of] incarceration. He testified that he did not understand that it meant that he would agree to serve six years [of] incarceration. He testified that, had he understood the offer correctly, he would have accepted the state's offer, instead of going to trial. The petitioner further testified that he had prior convictions, at least one of which included a split sentence . . . .

"[Rogan] testified that he discussed the offer at length with the petitioner, who was adamant that he . . . would not take any offer and that he wanted a trial. For that reason, the case proceeded on a speedy trial basis. He testified that he detailed for the petitioner the state's plea offer and the maximum exposure the petitioner faced if he went to trial. [Rogan] testified that he explained that the offer included six years [of] incarceration to the petitioner. He testified that the petitioner had familiarity with the criminal justice system and that he had no doubt that the petitioner understood the terms of the state's plea offer.

"The court credits [Rogan's] testimony that the petitioner understood the state's plea offer and that they discussed it in great detail. The court does not credit the petitioner's testimony that he understood the state's plea offer to include twelve . . . years of incarceration, instead of six . . . years of incarceration. The court finds that the petitioner failed to provide sufficient credible evidence to demonstrate that [Rogan] failed to meaningfully explain the state's plea offer."

After our thorough review of the record and briefs, and on the basis of the underlying facts found by the

habeas court, we agree with the habeas court that Rogan meaningfully explained the state's plea offer to the petitioner. The court's conclusion is based on a credibility determination as well as a proper application of the law. "[I]t is well established that a reviewing court is not in the position to make credibility determinations. . . . This court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *Martinez* v. *Commissioner of Correction*, 147 Conn. App. 307, 312, 82 A.3d 666 (2013), cert. denied, 311 Conn. 917, 85 A.3d 652 (2014).

The court credited Rogan's testimony that he explained the state's offer of six years of incarceration and that the petitioner understood the terms of the state's plea offer. The court explicitly stated that it did not credit the petitioner's testimony that he understood the state's offer was to serve twelve years of incarceration. On the basis of these credibility determinations, the court found that the petitioner had failed to prove that Rogan rendered deficient performance. The record supports the court's conclusion that Rogan meaningfully explained the plea offer to the petitioner, that the petitioner understood Rogan's explanation of the plea agreement, and that the petitioner rejected the offer and demanded a speedy trial. Therefore, the petitioner's claim must fail.

B

The petitioner next argues that Rogan rendered deficient performance by failing to review and explain certain surveillance video evidence[2] prior to pretrial plea

[2] The surveillance video was taken from a business that was located near the crime scene. At the petitioner's criminal trial, the state argued that the surveillance video depicted the petitioner and his codefendant, Anthony Jean Pierre, near the scene of the crime, but it did not capture or record

negotiations and trial. Specifically, the petitioner asserts that Rogan's representation was deficient because he "allowed the petitioner to reject the pretrial plea offer without either himself or the petitioner being aware of what evidence was contained in the surveillance video" and that Rogan's failure to meaningfully explain the surveillance video to the petitioner "resulted in the petitioner going to trial under the mistaken impression that the state did not have significant evidence against him."

In its memorandum of decision, the court found the following relevant facts: "[Rogan] testified that he met with the petitioner several times to discuss his case. . . . Rogan testified that *the petitioner* made him aware of the surveillance video. He testified that there were issues opening the video file and that he was not able to view the video until at trial, but before any pertinent testimony was given. [Rogan] further testified that he was generally aware of what the video depicted prior to viewing the video. He then testified that he and an associate attorney reviewed and discussed at length the implications of the surveillance video with the petitioner prior to any witness testifying about the surveillance video.

"Upon review of the testimony and the exhibits, the court finds that the petitioner failed to provide credible evidence that [Rogan] failed to discuss or meaningfully explain the state's evidence prior to trial. . . . Regarding the surveillance video, both the petitioner and [Rogan] testified that the petitioner did not have occasion to view the video prior to trial. The court credits [Rogan's] testimony as to the inability to open the video file. The court finds that the petitioner and [Rogan]

any part of the crime itself. At the habeas trial, the petitioner testified that he could not identify anyone in the video footage, including himself, due to the poor quality of the video. Rogan similarly testified that the video was of poor quality and that he had not objected to the use of the video at the petitioner's criminal trial because no one was clearly identified in the video.

viewed the video prior to any evidence being introduced regarding the video. *The court finds that* [*Rogan's*] *failure to show the video to the petitioner prior to trial does not negate his pretrial discussions with the petitioner regarding the content of the video* prior to any evidence being taken regarding the video. For those reasons, the court finds that the petitioner failed to provide sufficient credible evidence to demonstrate that [Rogan] failed to meaningfully explain the state's evidence prior to trial." (Emphasis added.)

The court concluded by determining that "[Rogan] was generally aware of what was depicted in the video prior to reviewing the video at trial and that he and an associate attorney reviewed the video at length with the petitioner prior to the presentation of any evidence regarding the video . . . to the jury. For these reasons, the court finds that [Rogan] failed to review the surveillance footage prior to trial, however, such failure did not cause [Rogan's] representation of the petitioner at his underlying criminal trial to fall below an objective standard of reasonableness. Therefore, the petitioner's claim must fail."

We next set forth the legal principles relevant to claims of ineffective assistance of counsel in the plea bargain context. "Pretrial negotiations implicating the decision whether to plead guilty is a critical stage in criminal proceedings . . . . Although this decision is ultimately made by the [petitioner], the [petitioner's] attorney must make an informed evaluation of the options and determine which alternative will offer the [petitioner] the most favorable outcome." (Citation omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 825, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

"[C]ounsel performs effectively and reasonably when he . . . provides [the petitioner] with adequate information and advice upon which the [petitioner] can make

an informed decision as to whether to accept the state's plea offer. . . . We are mindful that [c]ounsel's conclusion as to how best to advise a client in order to avoid, on the one hand, failing to give advice and, on the other, coercing a plea enjoys a wide range of reasonableness . . . . Accordingly, [t]he need for recommendation depends on countless factors, such as the [petitioner's] chances of prevailing at trial, the likely disparity in sentencing after a full trial compared to the guilty plea . . . whether [the] [petitioner] has maintained his innocence, and the [petitioner's] comprehension of the various factors that will inform [his] plea decision." (Internal quotation marks omitted.) *Salmon* v. *Commissioner of Correction*, 178 Conn. App. 695, 710–11, 177 A.3d 566 (2017).

Further, "[t]here is no per se rule requiring specific conduct of defense attorneys during plea negotiations. . . . Instead, we must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. . . . The parameters of appropriate advice required during plea negotiations are determined by a fact specific inquiry in which we consider whether an attorney's performance fell below an objective standard of reasonableness." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Moore* v. *Commissioner of Correction*, 338 Conn. 330, 341–42, 258 A.3d 40 (2021).

After our thorough review of the record and briefs, and on the basis of the underlying facts found by the habeas court, we agree with the court's conclusion that Rogan did not render deficient performance by failing to view the surveillance video evidence prior to the petitioner's rejection of the state's plea offer and the start of trial. Notably, it was the petitioner who initially made Rogan aware of the existence of such video. The court found that Rogan generally was aware of what

the video depicted prior to viewing the video and that Rogan's failure to view the video before trial did not negate his pretrial discussions with the petitioner regarding the content of the video. Therefore, although Rogan did not view the video prior to the start of trial, he was aware of and discussed the general contents of the video with the petitioner prior to trial and in relation to the state's plea offer.[3] Despite Rogan's pretrial discussions with him, including discussions regarding the surveillance video, the petitioner chose to reject the state's plea offer and proceed to trial. The record supports the habeas court's conclusion that the petitioner failed to demonstrate that Rogan rendered deficient performance by not viewing the surveillance video prior to trial because, given the facts and circumstances of the petitioner's case, Rogan provided the petitioner with adequate information with which he could make an informed decision as to whether to accept or reject the state's plea offer.

As to his claims of ineffective assistance of counsel, the petitioner has failed to demonstrate that the decision of the habeas court should be reversed on its merits. As indicated in part I of this opinion, the petitioner has not established that (1) his claims involve issues that are debatable among jurists of reason, (2) a court could resolve the issues in a different manner, or (3) the questions are adequate to deserve encouragement to proceed further. See *Harris* v. *Commissioner of Correction*, supra, 205 Conn. App. 844. Accordingly, we

[3] Although the petitioner contends that Rogan's failure to view the surveillance video resulted in the petitioner choosing to proceed to trial "under the mistaken impression that the state did not have significant evidence against him," the parties do not dispute that the video was poor quality and did not affirmatively identify the petitioner. Therefore, the petitioner's contention that viewing the poor quality surveillance video would have altered his impression of the state's evidence against him is unavailing, especially in light of Rogan's testimony that the petitioner "was adamant that he . . . would not take any offer and that he wanted to go to trial."

conclude that the petitioner has failed to demonstrate that the court abused its discretion in denying his petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

LANA ROSSOVA *v.* CHARTER COMMUNICATIONS, LLC
(AC 43153)

Alexander, Clark and Palmer, Js.

Syllabus

The plaintiff sought to recover damages for the alleged wrongful termination of her employment by the defendant, which she claimed was the result of pregnancy discrimination in violation of the Connecticut Fair Employment Practices Act (§ 46a-51 et seq.). The defendant hired the plaintiff to work in its brand and creative strategy department. S, the only other employee in the department, was her supervisor. According to the plaintiff, the two had a good working relationship through the end of her first month of employment, when the plaintiff informed S that she was pregnant. Thereafter, the relationship deteriorated. According to the plaintiff, S no longer invited her to collaborate on projects, became curt and unfriendly, and began to micromanage and criticize her work. S also started to document the plaintiff's alleged performance deficiencies. Less than five weeks after the plaintiff disclosed her pregnancy, S informed the plaintiff that her employment was being terminated for her poor performance. Following a trial to the jury, the jury returned a verdict in favor of the plaintiff on the issue of liability. Thereafter, the trial court denied the defendant's motion for judgment notwithstanding the verdict and awarded the plaintiff economic damages in addition to prejudgment interest, postjudgment interest, and attorney's fees. On appeal to this court, the defendant challenged only one element of the plaintiff's prima facie case, namely, whether she established that the termination of her employment occurred under circumstances that gave rise to an inference of discrimination. *Held*:

1. The trial court properly denied the defendant's motion for judgment notwithstanding the verdict:

   a. The plaintiff satisfied her initial burden of establishing a prima facie case of discrimination: there was sufficient evidence in the record from which a rational fact finder could have inferred that the termination of the plaintiff's employment was motivated by discriminatory bias based

on her pregnancy, including evidence of the change in the working environment and in the relationship between the plaintiff and S following the plaintiff's disclosure of her pregnancy.

b. There was sufficient evidence from which the jury reasonably could have found that the defendant's stated reason for the termination of the plaintiff's employment was pretextual and that the defendant intentionally discriminated against the plaintiff on the basis of her pregnancy: evidence in the record supported the plaintiff's claims of a drastic change in the work environment and the working relationship between the plaintiff and S following the plaintiff's disclosure of her pregnancy and there was a lack of documentary evidence of the plaintiff's allegedly defective performance prior to her disclosure, with the exception of a single e-mail, which the jury reasonably could have determined was of little to no consequence when juxtaposed against the considerable evidence supporting the plaintiff's contention that her disclosure marked a dramatic shift in work environment; moreover, pursuant to the United States Supreme Court's holding in *Reeves* v. *Sanderson Plumbing Products, Inc.* (530 U.S. 133), the jury was permitted to infer the ultimate fact of intentional discrimination on the basis of the inferences reasonably drawn from the evidence establishing the plaintiff's prima facie case and rebutting the defendant's nondiscriminatory explanation for the termination of the plaintiff's employment; furthermore, contrary to the defendant's assertion, the plaintiff did not rely solely on evidence of the temporal proximity of the disclosure of her pregnancy to her dismissal to establish her claim, as other evidence, even though not overwhelming, was sufficient when viewed in the light most favorable to sustaining the verdict for the jury to have inferred that the defendant's nondiscriminatory reason was pretextual and that the termination of the plaintiff's employment was actually motivated by intentional discrimination.

2. The trial court's assessment of the plaintiff's damages was not clearly erroneous: the trial court determined that the defendant proved that the plaintiff had failed to mitigate her damages for only seventeen of the fifty-two months that she was unemployed on the basis of all of the evidence before it and, contrary to the defendant's claim, did not rely solely on documentary evidence or the lack thereof; moreover, the burden was on the defendant to prove that suitable work existed and that the plaintiff did not exercise reasonable diligence to obtain employment, and the trial court found that the testimony of the defendant's expert regarding such matters was entitled to little weight.

Argued November 10, 2021—officially released April 12, 2022

Procedural History

Action to recover damages for, inter alia, alleged employment discrimination, and for other relief, brought to the Superior Court in the judicial district of Stamford-

Norwalk and tried to the jury before *Povodator*, *J.*; verdict for the plaintiff; thereafter, the court, *Povodator*, *J.*, denied the defendant's motion for judgment notwithstanding the verdict; subsequently, the court, *Hon. Kenneth B. Povodator*, judge trial referee, rendered judgment in accordance with the verdict and awarded the plaintiff compensatory damages, prejudgment and postjudgment interest and attorney's fees, from which the defendant appealed to this court. *Affirmed.*

Proloy K. Das, with whom were *Patricia E. Reilly* and *Lorey Rives Leddy*, for the appellant (defendant).

John M. Walsh, *Jr.*, for the appellee (plaintiff).

Opinion

CLARK, J. The defendant, Charter Communications, LLC, appeals from the judgment of the trial court, rendered after a jury trial, in favor of the plaintiff, Lana Rossova. The plaintiff brought this action alleging pregnancy discrimination in violation of the Connecticut Fair Employment Practices Act, General Statutes § 46a-51 et seq., after the defendant terminated her employment.[1] On appeal, the defendant claims that the court (1) improperly denied its motion for judgment notwithstanding the verdict because the plaintiff failed to establish a prima facie case of pregnancy discrimination and that the defendant's reason for terminating her employment was a pretext for discrimination against her on the basis of her pregnancy and (2) miscalculated the plaintiff's damages. We disagree with the defendant's claims and, accordingly, affirm the judgment of the court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this

[1] The plaintiff also asserted a claim of negligent infliction of emotional distress, which was resolved on a motion for summary judgment rendered in favor of the defendant. The plaintiff does not challenge that ruling on appeal.

appeal. In February, 2013, the defendant hired the plaintiff as a senior manager of digital marketing at its Stamford location. Per the defendant's policy, all new employees must successfully complete a ninety day probationary period. The plaintiff began her employment with the defendant on March 4, 2013, and worked directly for the director of the brand and creative strategy department, Jennifer Smith. The plaintiff and Smith were the only two employees in the department. Smith hired the plaintiff to fill a newly created position with the expectation that the plaintiff would improve communications between their department and the digital marketing team and make recommendations to increase sales.

According to the plaintiff, she and Smith had a great relationship during the first few weeks of her employment and had become friends. Smith invited the plaintiff to her office to collaborate on projects and brainstorm ideas on a daily basis. They sometimes spent one half of the day working together in Smith's office and ate lunch together. On March 29, 2013, the plaintiff told Smith that she was pregnant. Smith was happy for the plaintiff and shared that, coincidentally, she was also pregnant. Smith thereafter instructed the plaintiff to speak with the human resources manager, Karina Patel, to complete paperwork to start the process of finding a substitute for the plaintiff while she was on maternity leave. When speaking with Patel, the plaintiff inquired as to whether she would be able to work from home if she experienced complications related to her pregnancy. The plaintiff previously had experienced a high-risk pregnancy, which required her to be on bed rest for more than two months, and her physician had warned that she would encounter similar complications in subsequent pregnancies. Patel informed the plaintiff that, for liability reasons, she would not be permitted

to work from home and then discussed the plaintiff's eligibility for leave.

A few days after informing Smith that she was pregnant, the relationship between the plaintiff and Smith deteriorated. Smith became less cordial than she had been prior to learning that the plaintiff was pregnant. When interacting with the plaintiff following the disclosure, Smith was curt and unfriendly. Although Smith still met with the plaintiff, she no longer invited the plaintiff into her office to brainstorm or collaborate on projects. According to the plaintiff, Smith never expressed concerns about the plaintiff's performance in the first month of her employment but began to micromanage her and criticize the quality of her work after the plaintiff disclosed her pregnancy. The plaintiff acknowledged that she had made some mistakes in her work but claimed that Smith never expressed dissatisfaction with the plaintiff's overall performance or communicated that her employment was in jeopardy of being terminated. On May 2, 2013, fewer than five weeks after the plaintiff disclosed her pregnancy, Smith informed the plaintiff that her employment was being terminated for poor performance. Smith did not elaborate on the reasons supporting her decision to terminate the plaintiff's employment or provide the plaintiff with any documents explaining her alleged performance deficiencies.

On September 20, 2013, the plaintiff filed a discrimination complaint with the Commission on Human Rights and Opportunities (commission). On October 21, 2014, after receiving a release of jurisdiction from the commission, the plaintiff commenced the present action, alleging that the defendant unlawfully had terminated her employment on the basis of pregnancy, in violation of General Statutes § 46a-60 (b) (7) (A).[2] The parties

[2] General Statutes § 46a-60 (b) provides in relevant part: "It shall be a discriminatory practice in violation of this section . . . (7) [f]or an employer, by the employer or the employer's agent: (A) [t]o terminate a woman's employment because of her pregnancy . . . ."

agreed to bifurcate the issues of liability and damages at trial. The issue of liability was tried to a jury on December 6 and 7, 2016. Following the plaintiff's case-in-chief, the defendant moved for a directed verdict on the ground that the plaintiff had failed to establish a prima facie case of pregnancy discrimination. The court reserved its decision on the defendant's motion pursuant to Practice Book § 16-37.[3]

On December 9, 2016, the jury returned a verdict in favor of the plaintiff. Thereafter, the defendant filed a posttrial motion for judgment notwithstanding the verdict, claiming that the plaintiff had failed to establish a prima facie case of discrimination because the evidence was insufficient to establish that the termination of the plaintiff's employment occurred under circumstances giving rise to an inference of discrimination and, additionally, that the plaintiff had failed to carry her ultimate burden of establishing that the defendant's reason for terminating her employment was pretextual and that her dismissal was motivated by unlawful discrimination.[4] In its memorandum of decision denying the defendant's motion, the court concluded that, although the evidence was not overwhelming, the jury

[3] Practice Book § 16-37 provides in relevant part: "Whenever a motion for a directed verdict made at any time after the close of the plaintiff's case-in-chief is denied or for any reason is not granted, the judicial authority is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. . . ."

[4] The defendant also claimed that it was entitled to judgment notwithstanding the verdict because the plaintiff failed to prove that she was qualified for her position, as is required to establish a prima facie case of employment discrimination. But see *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 514 n.34, 43 A.3d 69 (2012) (courts require showing that plaintiff is qualified for position only when it is germane to issues involved). Additionally, the defendant moved to set aside the verdict on the ground that, before the court instructed the jury to reconcile the discrepancy, the jury's initial answer to an interrogatory was inconsistent with its verdict and, thus, demonstrated that the jury was confused, warranting a new trial. The trial court rejected both claims, and the defendant does not appeal from those rulings.

reasonably could have inferred from the "relatively sharp" change in Smith's attitude toward the plaintiff and the abrupt commencement of complaints regarding the plaintiff's job performance after she disclosed her pregnancy that the defendant's proffered reason for terminating the plaintiff's employment was pretextual and that the defendant intentionally had discriminated against her on the basis of pregnancy.

On November 1, 2018, the issue of damages was tried to the court. The court awarded the plaintiff $315,187.83 in economic damages, as well as prejudgment and postjudgment interest and attorney's fees. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

On appeal, the defendant claims that the court improperly denied its motion for judgment notwithstanding the verdict because the plaintiff failed to establish (1) a prima facie case of pregnancy discrimination and (2) that the defendant's reason for terminating the plaintiff's employment was a pretext for intentional discrimination.[5]

We begin our discussion of the defendant's claim that it was entitled to judgment as a matter of law by setting forth the standard of review. "Appellate review of a trial court's refusal to render judgment notwithstanding

[5] In its principal brief, the defendant specifically claimed that the court improperly denied its motion for a directed verdict on the ground that the plaintiff failed to establish a prima facie case of discrimination. As we previously noted in this opinion, the court deferred its decision on the defendant's motion, which, pursuant to our rules of practice, was "the equivalent of a denial of the motion for purposes of subsequent proceedings . . . ." *Riley* v. *Travelers Home & Marine Ins. Co.*, 333 Conn. 60, 72, 214 A.3d 345 (2019). The defendant renewed its motion for a directed verdict in its posttrial motion for judgment notwithstanding the verdict, and, accordingly, the court's ruling on the posttrial motion became the controlling disposition for purposes of this appeal. See id., 73.

the verdict occurs within carefully defined parameters." (Internal quotation marks omitted.) *Elliott* v. *Larson*, 81 Conn. App. 468, 472, 840 A.2d 59 (2004). "We must consider the evidence, and all inferences that may be drawn from the evidence, in a light most favorable to the party that was successful at trial. . . . This standard of review extends deference to the judgment of the judge and the jury who were present to evaluate witnesses and testimony." (Citation omitted.) *Craine* v. *Trinity College*, 259 Conn. 625, 635–36, 791 A.2d 518 (2002).

"Judgment notwithstanding the verdict should be granted only if we find that the jurors could not reasonably and legally have reached the conclusion that they did reach." (Internal quotation marks omitted.) *Elliott* v. *Larson*, supra, 81 Conn. App. 472–73. "Although it is the jury's right to draw logical deductions and make reasonable inferences from the facts proven . . . it may not resort to mere conjecture and speculation." (Internal quotation marks omitted.) *Bagley* v. *Adel Wiggins Group*, 327 Conn. 89, 102, 171 A.3d 432 (2017). "Whether the evidence presented by the plaintiff was sufficient to withstand a motion for [judgment notwithstanding the verdict] is a question of law, over which our review is plenary."[6] *Curran* v. *Kroll*, 303 Conn. 845, 855, 37 A.3d 700 (2012).

[6] Relying on various appellate cases, the parties assert that the proper standard of review of the defendant's claim is the abuse of discretion standard. As this court recently has explained, however, although our opinions sometimes have referred to the abuse of discretion standard in the context of reviewing a trial court's decision regarding a motion for judgment notwithstanding the verdict, where a party challenges a trial court's ruling on a motion for judgment notwithstanding the verdict on the basis of insufficient evidence, our review is plenary. *Cockayne* v. *Bristol Hospital, Inc.*, 210 Conn. App. 450, 457–59, A.3d (2022), petition for cert. filed (Conn. February 28, 2022) (No. 210338); see also *Pellet* v. *Keller Williams Realty Corp.*, 177 Conn. App. 42, 50 n.9, 172 A.3d 283 (2017) (standard of review governing claims that trial court improperly granted motion for directed verdict became conflated with standard of review governing challenges to trial court's granting or denying motion to set aside verdict, but plenary

"Two further fundamental points bear emphasis. First, the plaintiff in a civil matter is not required to prove [her] case beyond a reasonable doubt; a mere preponderance of the evidence is sufficient. Second, the well established standards compelling great deference to the historical function of the jury find their roots in the constitutional right to a trial by jury." (Internal quotation marks omitted.) *Madigan* v. *Housing Authority*, 156 Conn. App. 339, 362, 113 A.3d 1018 (2015).

Having set forth the applicable standard of review, we now turn to the general principles governing a claim of pregnancy discrimination in violation of § 46a-60 (b) (7) (A). Although the language of Title VII of the Civil Rights Act of 1964 and the Connecticut Fair Employment Practices Act differ slightly, our Supreme Court has observed that the legislature intended to make our state discrimination laws coextensive with the federal statute. *State* v. *Commission on Human Rights & Opportunities*, 211 Conn. 464, 469–70, 559 A.2d 1120 (1989). Thus, Connecticut courts often look to federal employment discrimination law for guidance in enforcing our own antidiscrimination statute. Id.; *Ayantola* v. *Board of Trustees of Technical Colleges*, 116 Conn. App. 531, 536, 976 A.2d 784 (2009).

"The framework this court employs in assessing . . . discrimination claims under Connecticut law was adapted from the United States Supreme Court's decision in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its progeny." (Internal quotation marks omitted.) *Tomick* v. *United Parcel Service, Inc.*, 157 Conn. App. 312, 325, 115 A.3d 1143 (2015), aff'd, 324 Conn. 470, 153 A.3d 615 (2016). Under the *McDonnell Douglas Corp.* burden shifting analysis, the employee must "first make a prima

review applies when party moves for directed verdict on basis of insufficient evidence).

facie case of discrimination. . . . The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. . . . The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." (Internal quotation marks omitted.) *Taing* v. *CAMRAC, LLC*, 189 Conn. App. 23, 28, 206 A.3d 194 (2019).

In reviewing a discrimination claim we bear in mind that "the question facing triers of fact in [employment] discrimination cases is both sensitive and difficult . . . . There rarely will be direct evidence of discrimination." (Citation omitted; internal quotation marks omitted.) *Board of Education* v. *Commission on Human Rights & Opportunities*, 266 Conn. 492, 516, 832 A.2d 660 (2003). The *McDonnell Douglas Corp.* framework "is intended to provide guidance to fact finders who are faced with the difficult task of determining intent in complicated discrimination cases. It must not, however, cloud the fact that it is the plaintiff's ultimate burden to prove that the defendant intentionally discriminated against her because of her [pregnancy]." *Craine* v. *Trinity College*, supra, 259 Conn. 637; see also *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

A

Prima Facie Case of Discrimination

We first address whether the plaintiff established a prima facie case of pregnancy discrimination. In general, "[i]n order for the employee to first make a prima facie case of discrimination, the plaintiff must show: (1) the plaintiff is a member of a protected class; (2) the plaintiff was qualified for the position; (3) the plaintiff suffered an adverse employment action; and (4) the

adverse employment action occurred under circumstances that give rise to an inference of discrimination." (Internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 73, 111 A.3d 453 (2015).

If the plaintiff succeeds in establishing a prima facie case, it creates a rebuttable presumption that the employer intentionally discriminated against the employee. *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 506, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993); see also *Texas Dept. of Community Affairs* v. *Burdine*, supra, 450 U.S. 254 n.7. Thereafter, the burden shifts to the defendant to rebut the presumption raised by articulating a legitimate, nondiscriminatory reason for the adverse employment action. *St. Mary's Honor Center* v. *Hicks*, supra, 506–507.

On appeal, the defendant does not challenge the plaintiff's prima facie case on the grounds that she failed to prove that she was a member of a protected class, was qualified for her position, and suffered an adverse employment action. See footnote 4 of this opinion. Accordingly, only the fourth element of the plaintiff's prima facie case—whether the plaintiff established that the termination of her employment occurred under circumstances giving rise to an inference of discrimination—is at issue in this appeal.

"Circumstances contributing to a permissible inference of discriminatory intent may include the employer's continuing, after discharging the plaintiff, to seek applicants from persons of the plaintiff's qualifications to fill that position . . . or [the employer's] invidious comments about others in the employee's protected group . . . or the more favorable treatment of employees not in the protected group . . . or the sequence of events leading to the plaintiff's discharge . . . or the timing of the discharge . . . ." (Citations omitted.) *Chambers* v. *TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d

Cir. 1994); see also *Martinez* v. *Premier Maintenance, Inc.*, 185 Conn. App. 425, 439–40, 197 A.3d 919 (2018). As our Supreme Court has recognized, however, "[n]othing in *McDonnell Douglas Corp.* . . . limits the type of circumstantial evidence that may be used to establish the fourth prong of the test for a prima facie case of [pregnancy] discrimination." *Craine* v. *Trinity College*, supra, 259 Conn. 640–41.

The plaintiff primarily relies on the sequence of events over the course of her employment with the defendant to establish that her dismissal occurred under circumstances giving rise to an inference of discrimination. Specifically, the plaintiff testified that, in the first few weeks of her employment, Smith was very friendly to her, spent hours working collaboratively with her on projects, and developed a great working relationship with her. Furthermore, prior to the disclosure of her pregnancy, Smith neither informed the plaintiff that she was not meeting Smith's expectations nor otherwise indicated that her performance was deficient. The plaintiff testified, however, that after disclosing her pregnancy to Smith, Smith's attitude toward her abruptly changed and Smith began to micromanage her and criticized her work. Smith subsequently terminated her employment, approximately five weeks after the plaintiff had disclosed that she was pregnant.

The defendant contends that the plaintiff's evidence was insufficient to give rise to an inference that her dismissal was the result of discrimination. We disagree and conclude that there is sufficient evidence in the record from which a rational fact finder could infer that the termination of the plaintiff's employment was motivated by discriminatory bias toward the plaintiff based on her pregnancy.

Evidence of the working environment and the relationship between the plaintiff and Smith prior to, and

after, the plaintiff's disclosure of her pregnancy, namely, Smith's (1) sudden micromanagement of the plaintiff, (2) brusque and cold manner toward the plaintiff, (3) abrupt dissatisfaction with the plaintiff's job performance, and (4) discharging of the plaintiff shortly after learning of the plaintiff's pregnancy, was sufficient to create an inference that the defendant unlawfully discriminated against the plaintiff on the basis of pregnancy when it terminated her employment.

Viewing the plaintiff's evidence in its entirety, the jury reasonably could have inferred that a nexus existed between the plaintiff's disclosure of her pregnancy and the defendant's termination of her employment. In the context of a wrongful discharge action, this court previously has held that, for purposes of a prima facie case, a plaintiff may establish an inference of discrimination by demonstrating that the protected activity was followed close in time by an adverse action. See, e.g., *Li* v. *Canberra Industries*, 134 Conn. App. 448, 454–57, 39 A.3d 789 (2012); see also *El Sayed* v. *Hilton Hotels Corp.*, 627 F.3d 931, 933 (2d Cir. 2010) (temporal proximity between employee filing complaint and subsequent discharge may give rise to inference sufficient to establish prima facie case of retaliation); *Asmo* v. *Keane, Inc.*, 471 F.3d 588, 594 (6th Cir. 2006) (two months between supervisor learning plaintiff was pregnant and termination of plaintiff's employment was sufficient to establish nexus for purposes of prima facie case of discrimination).

Because the plaintiff put forth sufficient evidence to establish that the termination of her employment occurred under circumstances giving rise to an inference of discrimination, the plaintiff satisfied her initial burden of establishing a prima facie case of discrimination. The trial court, therefore, properly denied the defendant's motion for judgment notwithstanding the verdict on that ground.

B

Pretext and Intentional Discrimination

We next turn to whether there was sufficient evidence to support the jury's finding that the defendant intentionally discriminated against the plaintiff on the basis of her pregnancy. The defendant claims that the court improperly denied its motion for judgment notwithstanding the verdict because there was no evidentiary basis to support the jury's determination that the defendant's proffered reason for terminating the plaintiff's employment was pretextual or that the defendant intentionally discriminated against the plaintiff.[7] The defendant argues that, even assuming that the plaintiff adduced evidence sufficient to support a finding that the defendant's explanation was pretextual, the plaintiff failed to adduce any concrete evidence, beyond the inferences relied on in her prima facie case, to establish that her dismissal was motivated by intentional discrimination and that the jury, therefore, resorted to impermissible speculation and conjecture in returning its verdict in favor of the plaintiff. The defendant relatedly argues that the plaintiff did not adduce evidence beyond the temporal proximity between her pregnancy disclosure and her dismissal to prove that the defendant's explanation was a pretext for intentional discrimination, which is insufficient as a matter of law to establish a discrimination claim. See *Govori* v. *Goat Fifty, L.L.C.*,

[7] In its principal brief, the defendant asserts that the "trial court erred in denying [the defendant's] motion to set aside the jury verdict on liability" and "*should have . . . entered judgment in favor of* [*the defendant*]" and that the proper standard of review on appeal of the trial court's denial of a motion to set aside the verdict is abuse of discretion. (Emphasis added.) We agree that the appropriate standard of appellate review with respect to a trial court's ruling on a motion to set aside a verdict is abuse of discretion. See *Madigan* v. *Housing Authority*, supra, 156 Conn. App. 348. We interpret the defendant's claim on appeal, however, as seeking review of the court's denial of its motion for judgment notwithstanding the verdict on the basis of insufficient evidence, which we review de novo.

519 Fed. Appx. 732, 734 (2d Cir. 2013). For the following reasons, we conclude that there was sufficient evidence from which the jury reasonably could have found that the defendant discriminated against the plaintiff on the basis of her pregnancy.

We first set forth the relevant legal principles that guide our analysis of this claim. Once a plaintiff has adduced evidence sufficient to establish a prima facie case of discrimination, the burden shifts to the defendant to rebut the presumption raised, by articulating a legitimate, nondiscriminatory reason for the adverse employment action. *Taing* v. *CAMRAC, LLC*, 189 Conn. App. 23, 28, 206 A.3d 194 (2019). The defendant's "burden is one of production, not persuasion; it can involve no credibility assessment." (Internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, supra, 316 Conn. 74. Although the defendant must produce sufficient evidence to support its nondiscriminatory explanation, it bears emphasizing that the ultimate burden of persuading the fact finder "that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." (Internal quotation marks omitted.) *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

If the defendant carries its burden of production, the presumption raised by the plaintiff's prima facie case "drops from the case"; (internal quotation marks omitted) *St. Mary's Honor Center* v. *Hicks*, supra, 509 U.S. 507; and the sole remaining issue becomes "discrimination vel non . . . ." (Citation omitted; internal quotation marks omitted.) *Reeves* v. *Sanderson Plumbing Products, Inc.*, supra, 530 U.S. 143. In other words, the plaintiff must persuade the trier of fact, by a preponderance of the evidence, that the defendant's justification for her dismissal "is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." *Craine* v. *Trinity College*, supra, 259 Conn. 637.

"[The plaintiff] may succeed in this either directly by persuading the [jury] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dept. of Community Affairs* v. *Burdine*, supra, 450 U.S. 256.

Although the presumption created by the prima facie case disappears after the defendant has produced evidence sufficient to establish a nondiscriminatory reason for the adverse employment action, "the plaintiff may rely upon the evidence used in establishing [her] prima facie case to prove the ultimate issue of [pregnancy] discrimination." *Craine* v. *Trinity College*, supra, 259 Conn. 644. Furthermore, "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and . . . upon such rejection, [n]o additional proof of discrimination is required . . . ." (Internal quotation marks omitted.) *Jackson* v. *Water Pollution Control Authority*, 278 Conn. 692, 706, 900 A.2d 498 (2006), quoting *St. Mary's Honor Center* v. *Hicks*, supra, 509 U.S. 511.

The following additional facts, viewed in the light most favorable to the plaintiff, are relevant to our resolution of the defendant's claim. At trial, the defendant contended that it terminated the plaintiff's employment because of her poor performance. Smith testified that, after she had received feedback from Patel on the plaintiff's first day of work that the plaintiff appeared disinterested and unengaged at orientation, Smith and Patel frequently discussed among themselves Smith's concerns about the plaintiff's performance. Smith began documenting the plaintiff's performance issues when,

in Smith's opinion, the plaintiff's performance did not improve following later discussions with the plaintiff about her deficiencies.

The defendant placed into evidence a chart generated by Smith that summarized the plaintiff's performance issues, as well as e-mails that purported to support Smith's observations. Among other things, Smith noted that the plaintiff's performance was deficient in the following areas: communication, knowledge of the defendant's brand and products, organization, attention to detail, being proactive, and adhering to the expected work schedule. Significantly, all of the documents introduced into evidence by the defendant were dated on or after March 29, 2013, the day that the plaintiff disclosed her pregnancy to Smith. Moreover, the plaintiff produced evidence calling into question many of the defendant's claims about her deficient performance.

With respect to the defendant's claims about the plaintiff's schedule, Smith testified that she did not instruct the plaintiff to arrive for work by 8:30 a.m. Instead, she testified that she told the plaintiff that she generally arrived to work between 8 and 8:30 a.m. and that she therefore had expected that the plaintiff would arrive at approximately the same time. The plaintiff routinely arrived at approximately 9 a.m. until Smith e-mailed the plaintiff on April 5, 2013, to inform her that she was expected to attend daily meetings with the digital team at 8:30 a.m. The plaintiff regularly met with Smith in the first few weeks of her employment, often for many hours at a time, and it was only after disclosing her pregnancy that Smith told her that she was expected to attend the digital team's morning meetings and that she must arrive to work by 8:30 a.m. The plaintiff had assumed that her hours were that of a "regular job, nine to five," and was never told otherwise until after she informed Smith about her pregnancy. The plaintiff started attending the digital team's daily

morning meetings after receiving Smith's e-mail about her expected work hours.

With respect to the defendant's claim concerning the plaintiff's communication issues, Smith noted that the plaintiff did not effectively communicate with her when she had childcare obligations requiring her to arrive late or leave early. In her April 5, 2013 e-mail to the plaintiff, Smith asked the plaintiff for the first time to communicate her schedule. The plaintiff subsequently provided Smith with her schedule for the following two weeks and adhered to that schedule. Smith testified that she did not receive any further communications from the plaintiff about any scheduling conflicts. Smith, however, could not say definitively whether the plaintiff continued to have childcare related scheduling issues or whether any such issues were resolved, which, if resolved, would obviate any need for the plaintiff to keep Smith apprised of any such issues.

Smith also documented the plaintiff's lack of organizational skills, proactivity, and attention to detail. Specifically, she testified that, on March 29, 2013, the plaintiff hastily responded to a request for marketing materials from another department within the company and, in so doing, did not send all of the marketing images or file sizes requested. On April 22, 2013, Smith also received feedback from the director of the digital team, Brad Stamulis, that the plaintiff had not been proactive in providing his team with information about when they could expect certain marketing materials. The plaintiff testified, however, that she was unable to provide that information because, after e-mailing Smith to express that she urgently needed Smith to respond about the outstanding materials, Smith had failed to reply.

The defendant also produced evidence that, on April 10, 2013, the plaintiff gave approval to an external agency to publish an advertisement with the wrong

hyperlink. Smith testified that, had Smith not recognized and rectified the advertisement the plaintiff had approved, it would have directed consumers to a product that was unavailable in the market segment where the advertisement was to be published. According to Smith, such an error potentially could have exposed the defendant to legal action. The plaintiff acknowledged that she made a " 'huge mistake,' " but also testified that the error was partly due to a problem with the notification feature in the defendant's project management system that had caused her to overlook a communication from someone seeking to confirm that the hyperlink was correct.

With respect to the plaintiff's knowledge of the defendant's brand and products, Smith testified that, on April 12, 2013, the plaintiff provided incorrect information to an external marketing agency, which demonstrated a fundamental lack of understanding about the defendant's rate plans. The plaintiff testified, however, that the defendant did not provide her with official training on the defendant's pricing policies until April 18, 2013.

In sum, Smith asserted that the plaintiff was in probationary status throughout her employment and that, per the defendant's policy, Smith was not required to notify the plaintiff that her performance was deficient or warn her that she was in jeopardy of her employment being terminated. Smith testified that, although she did not document the exact dates or details regarding the discussions she had with the plaintiff and did not provide the plaintiff with any written documentation of her concerns with the plaintiff's performance, she frequently had talked with the plaintiff about her performance issues over the course of her employment and had fairly apprised the plaintiff of her deficiencies. Additionally, Smith and Patel testified that they reviewed the chart

that Smith generated and made the decision to terminate the plaintiff's employment because her performance had not improved. Smith and Patel further testified that the plaintiff's employment was terminated because she had made basic errors and did not satisfactorily meet the expectations of the senior manager position.

The plaintiff did not dispute that she had made some mistakes during her employment with the defendant. The plaintiff, however, testified that Smith never had expressed dissatisfaction with her performance or otherwise indicated that she was not meeting Smith's expectations. Rather, Smith told the plaintiff that she understood that the plaintiff was still learning and occasionally would make mistakes. According to the plaintiff, it was not until she disclosed her pregnancy that Smith began to critique and micromanage her work on every project that she was assigned. The plaintiff testified that her dismissal came as a "complete shock" and that she never had been shown the documents regarding her performance deficiencies until after she filed a complaint with the commission.

Having set forth the relevant facts, we first review whether the plaintiff adduced evidence from which the jury could have found that the defendant's nondiscriminatory reason for terminating the plaintiff's employment was pretextual. "A plaintiff may show pretext by demonstrating such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable [fact finder] could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." (Internal quotation marks omitted.) *Stubbs* v. *ICare Management, LLC*, 198 Conn. App. 511, 523, 233 A.3d 1170 (2020).

Having reviewed the record, we conclude that there was sufficient evidence for the jury to have concluded that the defendant's stated reason for the plaintiff's dismissal was pretextual. To wit, the plaintiff established that Smith did not begin documenting her allegedly deficient performance until after she informed Smith that she was pregnant. Although Smith testified that she had numerous conversations with the plaintiff about her performance before the plaintiff disclosed that she was pregnant, none of the documents admitted into evidence supports that claim. Moreover, the plaintiff testified that, prior to disclosing her pregnancy, Smith never expressed dissatisfaction with her performance and that Smith began to micromanage and criticize her work only after learning that the plaintiff was pregnant. As the trial court observed in its memorandum of decision denying the defendant's motion for judgment notwithstanding the verdict, the jury was not required to assume that the rather abrupt identification of performance problems, as evidenced by the defendant's documents and the plaintiff's testimony, was a mere coincidence. The jury reasonably could infer from the timing of Smith's marked dissatisfaction with the plaintiff's performance, which coincided with the plaintiff's disclosure of her pregnancy, that the termination of the plaintiff's employment was more likely motivated by discriminatory bias than by her alleged performance deficiencies.

The defendant contends that its uncontroverted proof of a performance issue identified on the same day the plaintiff disclosed her pregnancy, by someone without knowledge of the plaintiff's pregnancy, contradicts any inference that the defendant's nondiscriminatory reason for terminating her employment was pretextual. Specifically, the defendant asserts that the March 29, 2013 e-mail indicating that the plaintiff did not provide all of the marketing materials requested by another

department within the company conflicts with the plaintiff's claim that she did not receive any feedback about her performance until after she disclosed her pregnancy and, consequently, that the plaintiff's evidence was insufficient to prove that the defendant's justification for terminating her employment was false. Evidence, however, is not insufficient simply because it is conflicting or inconsistent. *State* v. *Douglas F.*, 145 Conn. App. 238, 244, 73 A.3d 915, cert. denied, 310 Conn. 955, 81 A.3d 1181 (2013). Moreover, it is well established that "[i]t is the jury's right to accept some, none or all of the evidence presented. . . . It is the [jury's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses." (Internal quotation marks omitted.) *Cusano* v. *Lajoie*, 178 Conn. App. 605, 609, 176 A.3d 1228 (2017). Accordingly, the jury reasonably could have determined that the March 29, 2013 e-mail was of little to no consequence, especially when juxtaposed against the considerable evidence supporting the plaintiff's contention that her pregnancy disclosure marked a dramatic shift in the work environment.

There was also evidence that, although not directly refuting the alleged performance issues, may have nevertheless persuaded the jury that the defendant's nondiscriminatory justification was not the real reason underlying the plaintiff's dismissal. The plaintiff's evidence, if believed, cast doubt on some of the defendant's claims about her performance issues. With respect to the plaintiff's failure to adhere to the required work schedule, for example, the plaintiff testified that she was never informed that she was to report to work at 8:30 a.m. prior to disclosing her pregnancy. The plaintiff's testimony that she and Smith spent many hours collaborating in the first few weeks of the plaintiff's employment and, according to the plaintiff, Smith never discussed with the plaintiff that she was reporting late to work until after learning the plaintiff was pregnant,

supports a reasonable inference that the plaintiff's timeliness was not a legitimate concern. See *Board of Education* v. *Commission on Human Rights & Opportunities*, supra, 266 Conn. 513–14 (there is distinction between fact finder second-guessing employer's business judgment, which would be improper, and fact finder concluding that employer's justifications are not credible). Although Smith disputed the plaintiff's account, the jury was not required to accept Smith's testimony. See *State* v. *Brown*, 198 Conn. App. 630, 637, 233 A.3d 1258, cert. denied, 335 Conn. 942, 237 A.3d 730 (2020). The plaintiff also testified that Stamulis' feedback about her lack of proactivity at a morning meeting resulted from Smith's failure to respond to the plaintiff's questions about certain marketing materials. Additionally, Smith's own testimony appeared to undermine her assertion that the plaintiff failed to keep her apprised of scheduling conflicts. Smith could not state definitively whether the plaintiff's childcare obligations had been resolved, which would have made it unnecessary to keep Smith apprised of any such conflicts.

We conclude that the evidence at trial was sufficient for a rational jury to reject the defendant's proffered explanation and find that the plaintiff's dismissal was actually motivated by discrimination. The jury reasonably could have found that, prior to the plaintiff's disclosure of her pregnancy to Smith, the plaintiff and Smith often worked collaboratively for many hours and had developed a good relationship; Smith was cordial when interacting with the plaintiff; and Smith never indicated to the plaintiff that she was not meeting expectations or criticized the plaintiff's work. Within a few days of disclosing her pregnancy to Smith and informing Patel, who met regularly with Smith to discuss the plaintiff's alleged performance issues, that she would almost certainly require an extended leave of absence because of potential pregnancy complications, Smith began to treat

the plaintiff differently. After informing Smith that she was pregnant, Smith was curt and unfriendly toward the plaintiff, no longer invited the plaintiff into her office to collaborate on projects, micromanaged the plaintiff, became critical of the plaintiff's work performance and terminated the plaintiff's employment fewer than five weeks later. On the basis of this evidence, the jury reasonably could have found that the timing of Smith's abrupt dissatisfaction with the plaintiff's performance was suspicious and that there was a nexus between the plaintiff's pregnancy and the termination of her employment. This inference is further buttressed by the fact that Smith extensively documented the plaintiff's alleged performance deficiencies only after the plaintiff disclosed her pregnancy.

Although there may well be other reasonable inferences that can be drawn from the plaintiff's evidence, we do not agree that the jury must have resorted to speculation and conjecture in reaching its verdict. As our Supreme Court has observed, "[p]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis. It is sufficient if the evidence produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . [A]n inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference." (Internal quotation marks omitted.) *Curran* v. *Kroll*, supra, 303 Conn. 857. We find these principles particularly compelling in the context of a discrimination claim where a plaintiff is often constrained to rely on circumstantial evidence to prove intent. See, e.g., *Chambers* v. *TRM Copy Centers Corp.*, supra, 43 F.3d 37 ("[e]mployers are rarely so cooperative as to include a notation in the personnel file that their actions are motivated by factors expressly forbidden by law" (internal quotation marks omitted)).

At oral argument before this court, the defendant contended that, assuming, arguendo, there was sufficient evidence to establish that the defendant's proffered justification was pretextual, pursuant to *Craine* v. *Trinity College*, supra, 259 Conn. 625, and *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 43 A.3d 69 (2012), the plaintiff was also required to adduce additional evidence beyond the inferences relied on in support of her prima facie case in order to prevail. We are not persuaded by the defendant's reading of *Craine* or *Perez-Dickson*. Neither of those decisions stands for the broad proposition that, if a plaintiff successfully rebuts the defendant's nondiscriminatory reason for the adverse employment action, a plaintiff must produce *additional* evidence of discriminatory intent beyond that which may be inferred from the plaintiff's prima facie case in order to prevail in an employment discrimination action. Rather, our Supreme Court's conclusions in *Craine* and in *Perez-Dickson* turned on the specific facts and circumstances of those cases.

Furthermore, in *Craine*, the court was guided by the United States Supreme Court's holding in *Reeves* v. *Sanderson Plumbing Products, Inc.*, supra, 530 U.S. 148. In *Reeves*, the court held that a plaintiff's prima facie case, combined with sufficient evidence for a reasonable fact finder to reject the employer's nondiscriminatory explanation for the adverse employment action, *permits* the trier of fact to conclude that the employer unlawfully discriminated. Id.; see also *Craine* v. *Trinity College*, supra, 259 Conn. 645. Stated differently, on establishing that the employer's asserted reason for its action is pretextual, the plaintiff is not required to put forth additional evidence of discrimination to prevail.[8]

[8] The United States Supreme Court, however, also noted that the plaintiff would not be entitled to judgment as a matter of law on putting forth sufficient evidence to prove the defendant's explanation was pretextual, stating: "This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case

The defendant has not directed us to any legal authority that would make *Reeves* inapplicable to the present appeal. The jury, therefore, on rejecting the defendant's reason, was permitted to infer the ultimate fact of intentional discrimination on the basis of the inferences reasonably drawn from the evidence rebutting the defendant's explanation and establishing the plaintiff's prima facie case.

The defendant additionally claims that the plaintiff relied solely on evidence of "temporal proximity" to prove her discrimination claim, without bringing forth any additional evidence that the defendant's proffered legitimate reason for its action was pretextual, which it argues is insufficient as matter of law. The defendant cites *Govori* v. *Goat Fifty, L.L.C.*, supra, 519 Fed. Appx. 734, for the proposition that, although proximity between protected activity and an adverse employment action may be sufficient to establish a prima facie case of discrimination, such evidence is, by itself, insufficient to establish that an employer's nondiscriminatory reasons for dismissing an employee are pretextual.

In contending that the plaintiff relied solely on evidence of temporal proximity to establish her pregnancy discrimination claim, the defendant mistakenly conflates the concept of temporal proximity evidence with evidence establishing a sequence of events that transpired following the plaintiff's disclosure of her protected status. Evidence contrasting the plaintiff's working environment prior to and after she disclosed her pregnancy, however, is more than evidence merely establishing temporal proximity between the plaintiff's

and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." (Emphasis in original.) *Reeves* v. *Sanderson Plumbing Products, Inc.*, supra, 530 U.S. 148; see also *St. Mary's Honor Center* v. *Hicks*, supra, 509 U.S. 511 (fact finder's rejection of employer's legitimate nondiscriminatory reason for its actions does not *compel* judgment for plaintiff).

disclosure and her subsequent dismissal. Whereas temporal proximity between two events alone may be sufficient to establish a prima facie case, the broader sequence of events leading up to and including an adverse employment decision provides important context that may establish whether there exists a nexus between those two events. In other words, the close proximity between when Smith learned about the plaintiff's pregnancy and the plaintiff's subsequent dismissal raises a permissible inference that there exists a relationship between those events. The stark contrast between the working environment prior to and after the plaintiff disclosed her pregnancy constitutes evidence beyond mere "temporal proximity" and supports the inference of unlawful discrimination.

Although, as the trial court noted, the plaintiff's evidence was not particularly overwhelming, viewed in the light most favorable to sustaining the verdict, we conclude that there was sufficient evidence from which the jury could have inferred that the defendant's nondiscriminatory reason for terminating the plaintiff's employment was pretextual and that the plaintiff's dismissal was actually motivated by intentional discrimination. In so concluding, we are mindful of the well recognized principles that compel our deference to the historical function of the jury. See, e.g., *Jackson* v. *Water Pollution Control Authority*, supra, 278 Conn. 704 ("[i]f the jury could reasonably have reached its conclusion, the verdict must stand, even if this court disagrees with it" (internal quotation marks omitted)); *Elliott* v. *Larson*, supra, 81 Conn. App. 475 ("[w]e test the propriety of a motion for a judgment notwithstanding the verdict in accordance with the principle that we give the evidence at trial the most favorable reasonable construction in support of the verdict to which it is entitled" (internal quotation marks omitted)).

Because "it is apparent that there was some evidence upon which the jury might reasonably [have] reach[ed]

[its] conclusion"; (internal quotation marks omitted) *Salaman* v. *Waterbury*, 246 Conn. 298, 304, 717 A.2d 161 (1998); the trial court properly denied the defendant's motion for judgment notwithstanding the verdict.

II

The defendant's final claim is that the court miscalculated the plaintiff's damages because it improperly failed to exclude from the plaintiff's award ten months of back pay for which the plaintiff did not produce documents to prove her efforts to obtain employment. The defendant's claim is predicated on its belief that the court based its decision to exclude seventeen months of back pay entirely on the plaintiff's failure to produce documents supporting her request for damages for those months. The defendant therefore argues that the court similarly should not have awarded back pay for any month in which the plaintiff failed to produce documentary evidence that she attempted to mitigate her damages by actively seeking employment. We disagree with the defendant's interpretation of the court's decision and conclude that the court's assessment of damages was not clearly erroneous.

Before addressing the merits of the defendant's claim, we set forth the relevant legal principles and standard of review that guide our analysis. It is axiomatic that a plaintiff has a duty to make reasonable efforts to mitigate damages. *Cweklinsky* v. *Mobil Chemical Co.*, 267 Conn. 210, 223, 837 A.2d 759 (2004). An employer seeking to reduce or avoid a back pay award "bears the burden of demonstrating that a plaintiff has failed to satisfy the duty to mitigate." (Internal quotation marks omitted.) *Gaither* v. *Stop & Shop Supermarket Co., LLC*, 84 F. Supp. 3d 113, 123 (D. Conn. 2015); see also *Ann Howard's Apricots Restaurant, Inc.* v. *Commission on Human Rights & Opportunities*, 237 Conn. 209, 229, 676 A.2d 844 (1996). The employer must therefore

demonstrate that "suitable work existed, and that the employee did not make reasonable efforts to obtain it." *Clarke* v. *Frank*, 960 F.2d 1146, 1152 (2d Cir. 1992).

Whether a plaintiff made a reasonable effort to mitigate her damages under the circumstances of a particular case is a question of fact. *Dunleavey* v. *Paris Ceramics USA, Inc.*, 97 Conn. App. 579, 582, 905 A.2d 703 (2006). "In a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony." (Internal quotation marks omitted.) *Aldin Associates Ltd. Partnership* v. *Hess Corp.*, 176 Conn. App. 461, 484, 170 A.3d 682 (2017). "[W]e will upset a factual determination of the trial court only if it is clearly erroneous. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Dunleavey* v. *Paris Ceramics USA, Inc.*, supra, 583.

The following additional facts and procedural history are relevant to our resolution of the defendant's claim. Following her dismissal, the plaintiff was unable to obtain employment until September, 2017. During the damages portion of the trial, which was tried to the court, the plaintiff sought approximately fifty-two months of back pay.[9] For twenty-seven of the approximately fifty-two months that she was unemployed, the plaintiff did not produce documents supporting her

[9] The court calculated the plaintiff's presumptive damages, net of unemployment compensation she had received, as $468,279.07.

claim that she made efforts to mitigate her damages. The plaintiff worked with several recruiters, utilized employment websites, regularly spoke with acquaintances about potential opportunities, and networked with former coworkers approximately once a week to learn of available jobs. She failed, however, to maintain a complete set of records of her search efforts. Instead, she attempted to document her efforts to find employment by combining information from her e-mails, networking websites, employer websites, the contact list on her cell phone, and memory. The plaintiff also acknowledged that she inadvertently may have failed to produce some documents that would further demonstrate her mitigation efforts due to the volume of e-mails that were in her inbox.[10]

A vocational expert, Rona Wexler, testified on behalf of the defendant. Wexler opined that the plaintiff's search for employment was ineffective, inconsistent, and evidenced minimal effort. According to Wexler, the marketing industry was still recovering from the recession in 2013 when the plaintiff was seeking employment, but the demand for employees with digital marketing experience increased in the following few years. She was unaware of how many opportunities actually existed in the geographical area where the plaintiff sought employment during the time the plaintiff was unemployed.

In its memorandum of decision, the court found that the plaintiff had failed to record and preserve documents relating to her mitigation efforts, which it weighed in its determination of damages. As to Wexler's testimony, the court found that it lacked specificity with regard to the number and types of comparable positions that were available in the marketing industry when the

[10] There were approximately 40,000 e-mails in the plaintiff's inbox. She had conducted a keyword search to find documents to comply with the defendant's request for production.

plaintiff was searching for employment, thus diminishing the persuasiveness of Wexler's conclusions about the plaintiff's search efforts. Because the plaintiff had provided no documents and "no satisfactory explanation" regarding the absence of tangible proof concerning her search during significant periods of time, the court found that the defendant had proven that the plaintiff failed to satisfy her duty to mitigate damages during certain months when she was unemployed. Specifically, the court found that the plaintiff did not actively participate in the job market from May to December, 2013, when she was on bed rest and postpartum. The court also found that there was a pattern of minimal to no activity during the summer months in 2014, 2015, and 2016. Accordingly, the court awarded the plaintiff approximately thirty-five months of back pay, not the fifty-two months of back pay that she was seeking.[11]

On appeal, the defendant claims that the court improperly awarded the plaintiff ten months of back pay because the plaintiff did not provide any tangible proof of her efforts to obtain employment during those months. The defendant argues that the trial court's decision awarding the plaintiff back pay for those ten months is inconsistent with, and contrary to, the court's decision to exclude seventeen months of back pay based on the plaintiff's failure to produce physical evidence supporting her mitigation efforts during those months. The defendant mischaracterizes the court's findings.

The court's memorandum of decision makes clear that it did not determine that the plaintiff had failed to mitigate her damages for a total of seventeen months

[11] The court found that the plaintiff was not entitled to back pay for eight months in 2013 and three summer months in years 2014, 2015, and 2016.

on the basis of the plaintiff's failure to produce physical evidence alone. The court took into account the plaintiff's failure to adequately document or preserve evidence of her efforts with respect to her job search, stating that it goes "to the weight of the evidence presented and at least in some measure to the credibility of the plaintiff." Accordingly, although the plaintiff testified that she consistently searched for employment, the court concluded, on the basis of all of the evidence it heard concerning her damages, not just the documentary evidence or lack thereof, that the plaintiff did not make a reasonable effort to mitigate her damages for seventeen months while she was unemployed.

We therefore conclude that the court's decision to award back pay for some months in which the plaintiff did not corroborate her mitigation efforts with tangible proof was not clearly erroneous. It was for the court, as the finder of fact, to weigh the plaintiff's testimony with respect to her overall efforts to obtain employment against the lack of tangible evidence of those efforts. See *Llera* v. *Commissioner of Correction*, 156 Conn. App. 421, 440, 114 A.3d 178, cert. denied, 317 Conn. 907, 114 A.3d 1222 (2015). Moreover, it was the defendant's burden to prove that suitable work existed and that the plaintiff did not exercise reasonable diligence to obtain employment. The court found that Wexler's testimony on each of those points was entitled to little weight.

On the basis of our review of the record, we conclude that the court's finding that the defendant had proven that the plaintiff had failed to mitigate her damages for only seventeen of the fifty-two months that she was unemployed was not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

MICHAEL KLING *v.* HARTFORD CASUALTY INSURANCE COMPANY (AC 44292)

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

Syllabus

The plaintiff sought to recover damages from the defendant insurance company for, inter alia, breach of contract, claiming that the defendant had a duty to defend C, doing business as E Co., under a business liability insurance policy it had issued to C, and that its failure to do so left the defendant liable to the plaintiff for damages the plaintiff suffered due to C's and E Co.'s negligence. The plaintiff sustained injuries when a trailer that was attached to a pickup truck driven by C, transporting large kettle corn equipment owned by E Co., dislodged from the pickup truck and struck the plaintiff. After the incident occurred, the plaintiff brought a personal injury action against C and E Co., seeking to recover damages for his injuries. At the time of the incident, C was insured under the business liability insurance policy issued by the defendant. The defendant, however, declined to defend C, citing a provision that excluded coverage for bodily injuries that arose out of the use of an "auto." C did not appear or otherwise defend the personal injury action, and the plaintiff obtained a default judgment against C and E Co. Thereafter, the plaintiff brought the present action against the defendant pursuant to the applicable statute (§ 38a-321). The defendant filed a motion for summary judgment, arguing that, on the basis of a provision in the policy that excluded coverage for injuries arising out of the operation of an "auto," it was entitled to a declaration that the policy did not provide liability coverage for the injuries sustained by the plaintiff. While that motion was pending, the case proceeded to a bench trial on the breach of contract count based on a stipulated record. The trial court rendered judgment for the defendant on that count, finding that the defendant did not have a duty to defend C or E Co. because the policy's auto exclusion applied and, thus, precluded coverage for the plaintiff's injuries. The trial court also dismissed the remaining two counts of the plaintiff's complaint, concluding that the plaintiff did not have standing to bring either count in light of the court's conclusion that the plaintiff did not have privity of contract with the defendant and there was no statutory or common-law basis to support the plaintiff's allegations under either count. On the plaintiff's appeal to this court, *held* that the trial court did not err in determining that the defendant did not have a duty to defend C and E Co., that court having correctly concluded that all of the injuries that the plaintiff sustained were excluded from coverage under the provision in the business liability insurance policy applicable to injuries arising out of the use of an auto:

the auto exclusion in C's insurance policy plainly and unambiguously precluded coverage for the plaintiff's injuries as the injuries that he sustained arose out of C's act of driving his truck and trailer on public roads and, therefore, arose out of the use of an auto; moreover, although negligence unrelated to the use of an auto, namely, the claim that the trailer and kettle corn equipment were disconnected from C's truck due to his failure to properly secure the trailer to the truck and/or his failure to properly maintain the hitch on the truck to which the trailer was attached, may have contributed to the plaintiff's injuries, those injuries nonetheless arose out of the use of an auto because the plaintiff would not have been injured without C's use of the truck and trailer.

Argued November 17, 2021—officially released April 12, 2022

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Haven, and tried to the court, *S. Richards*, *J.*, as to count one of the complaint in accordance with the parties' stipulation; thereafter, the court, *S. Richards*, *J.*, granted the defendant's motion to dismiss the remaining counts of the complaint; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Leann Riether, for the appellant (plaintiff).

Daniel J. Raccuia, for the appellee (defendant).

Opinion

BRIGHT, C. J. The plaintiff, Michael Kling, appeals from the judgment of the trial court in favor of the defendant, Hartford Casualty Insurance Company.[1] On appeal, the plaintiff claims that the court erred in concluding that the defendant did not owe a duty to defend its insured, Newton Carroll doing business as Elm City Kettle Corn Company (Elm City), in connection with injuries that the plaintiff suffered as a result of Carroll's

[1] Although the plaintiff named "The Hartford" as the defendant on the summons, the plaintiff identified the defendant in the complaint as "Hartford Casualty Insurance Company," which is the defendant's correct name.

and Elm City's negligence. We affirm the judgment of the trial court.

The following facts, which are undisputed, and procedural history are relevant to our resolution of this appeal. On the morning of July 13, 2012, the plaintiff was walking north on the sidewalk along Orchard Street in New Haven. At the same time, Carroll was driving a pickup truck that was towing a trailer north on Orchard Street. Attached to the inside of the trailer was equipment that Carroll used to make kettle corn. As Carroll was driving past where the plaintiff was walking, the trailer detached from the truck, catapulted over a curb, and struck the plaintiff, pinning him to the ground. The plaintiff suffered several injuries including a fractured right femur, a fractured right elbow, and meniscal tears in his right knee.

In May, 2014, the plaintiff brought a personal injury action against Carroll and Elm City, alleging that Carroll's negligence in operating his truck and trailer—specifically, Carroll's failure to ensure that the trailer was securely attached to the truck—had caused the plaintiff "severe personal and painful injuries." See *Kling* v. *Elm City Kettle Corn Co., LLC*, Superior Court, judicial district of New Haven, Docket No. CV-14-6047194-S. At the time of the accident, Carroll and Elm City were insured under a business liability policy that had been issued by the defendant, which provided coverage for "sums that the insured becomes legally obligated to pay as damages because of 'bodily injury . . . .' " The policy also stated that the defendant had "the right and duty to defend the insured against any 'suit' seeking those damages." The defendant declined to defend Carroll, citing a provision in the policy that excluded coverage for bodily injuries that arose out of the use of an automobile. Carroll did not appear or otherwise defend the personal injury action, and the

plaintiff obtained a default judgment against him and Elm City for $495,843.57.

The plaintiff then filed this action against the defendant pursuant to General Statutes § 38a-321,[2] alleging in the operative complaint breach of contract (count one), breach of the implied covenant of good faith and fair dealing (count two), and negligent infliction of emotional distress (count three). The underlying premise of the plaintiff's claims was that the defendant had a duty to defend Carroll and Elm City under the business liability policy and that its failure to do so left the defendant liable to the plaintiff for the damages he suffered due to Carroll's and Elm City's negligence. In its answer to the plaintiff's complaint, the defendant, inter alia, alleged in its second special defense that the plaintiff's claims were barred by the language of the business liability policy, in particular the language that excludes coverage for injuries resulting from the operation of an "auto."

The defendant then moved for summary judgment on all three counts based on the alleged auto exclusion. The court denied the defendant's motion for summary judgment after finding that the language of the insurance policy was ambiguous. The defendant then filed a motion to dismiss counts two and three on the basis that the plaintiff lacked standing to assert those claims because § 38a-321 only permits a direct action by a plaintiff for breach of contract. While that motion was

[2] General Statutes § 38a-321 provides in relevant part: "Upon the recovery of a final judgment against any person, firm or corporation by any person . . . for loss or damage on account of bodily injury or death or damage to property, if the defendant in such action was insured against such loss or damage at the time when the right of action arose and if such judgment is not satisfied within thirty days after the date when it was rendered, such judgment creditor shall be subrogated to all the rights of the defendant and shall have a right of action against the insurer to the same extent that the defendant in such action could have enforced his claim against such insurer had such defendant paid such judgment."

pending, the case proceeded to a bench trial on count one based on a stipulated record. In count one, the plaintiff specifically alleged that the defendant had breached its contract of insurance when it failed to defend Carroll and Elm City in the plaintiff's personal injury action.

Thereafter, the court issued its memorandum of decision, wherein it rendered judgment for the defendant on count one, after finding that the defendant had no duty to defend Carroll and Elm City because the policy's auto exclusion applied, thus precluding coverage for the plaintiff's injuries. The court also dismissed counts two and three of the plaintiff's complaint after concluding that the plaintiff did not have standing to bring either count in light of the court's conclusion that the plaintiff did not have privity of contract with the defendant and that there was no statutory or common-law basis to support the plaintiff's allegations under either count. The plaintiff then filed a motion to reargue/reconsider, which the court denied. This appeal followed, challenging both the judgment rendered after the trial on count one and the dismissal of counts two and three. Additional facts will be set forth as necessary.

The parties agree, as do we, that if the court's contractual analysis regarding the duty to defend is correct then the plaintiff cannot succeed on any of his three counts. Consequently, we address that issue first. We begin by setting forth the applicable standard of review and principles of law that guide our analysis. Our standard of review for interpreting insurance policies is well settled. "The construction of an insurance policy presents a question of law that we review de novo." *Warzecha* v. *USAA Casualty Ins. Co.*, 206 Conn. App. 188, 191, 259 A.3d 1251 (2021). When construing an insurance policy, "we look at the [policy] as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach

a reasonable overall result." (Internal quotation marks omitted.) *Israel* v. *State Farm Mutual Automobile Ins. Co.*, 259 Conn. 503, 509, 789 A.2d 974 (2002). "Insurance policies are interpreted based on the same rules that govern the interpretation of contracts. . . . In accordance with those rules, [t]he determinative question is the intent of the parties . . . . If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. . . . In determining whether the terms of an insurance policy are clear and unambiguous, [a] court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . Under those circumstances, any ambiguity in the terms of an insurance policy must be construed in favor of the insured . . . ." (Citation omitted; internal quotation marks omitted.) *Warzecha* v. *USAA Casualty Ins. Co.*, supra, 191–92.

An insurer's duty to defend "is determined by reference to the allegations contained in the [underlying] complaint." (Internal quotation marks omitted.) *DaCruz* v. *State Farm Fire & Casualty Co.*, 268 Conn. 675, 687, 846 A.2d 849 (2004). The duty to defend "does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether [the complaint] stated facts which bring the injury within the coverage." (Internal quotation marks omitted.) *Security Ins. Co. of Hartford* v. *Lumbermens Mutual Casualty Co.*, 264 Conn. 688, 712, 826 A.2d 107 (2003). "If an allegation of the complaint falls even

possibly within the coverage, then the insurance company must defend the insured." (Internal quotation marks omitted.) *Moore* v. *Continental Casualty Co.*, 252 Conn. 405, 409, 746 A.2d 1252 (2000). That being said, an insurer "has a duty to defend only if the underlying complaint *reasonably* alleges an injury that is covered by the policy." (Emphasis in original.) *Misiti, LLC* v. *Travelers Property Casualty Co. of America*, 308 Conn. 146, 156, 61 A.3d 485 (2013). "[W]e will not predicate the duty to defend on a reading of the complaint that is . . . conceivable but tortured and unreasonable." (Internal quotation marks omitted.) Id. There is also no duty to defend "if the complaint alleges a liability which the policy does not cover . . . ." (Internal quotation marks omitted.) Id.

The plaintiff claims that the defendant has a duty to defend because (1) the policy language is ambiguous and, thus, must be construed in favor of providing coverage and (2) the allegations in the plaintiff's complaint have a clear possibility of falling within the coverage provided under the policy.[3] On the basis of our review of the policy language and the plaintiff's complaint, we are not persuaded.

We begin with the relevant language of the plaintiff's complaint in the personal injury action on which he relies for his claim of coverage:

"2. On [July 13, 2012, at approximately 9:25 a.m., Carroll] was the operator of a 2012 Dodge truck . . . which vehicle was towing a trailer with large kettle corn equipment affixed . . . and was traveling north on Orchard Street . . . .

"4. [W]hile said vehicle was being operated by [Carroll], said trailer with large kettle corn equipment owned

[3] For the sake of clarity and ease of discussion, we have reordered the arguments as they are set forth in the plaintiff's brief.

by [Elm City] dislodged from the truck, catapulted over the curb striking the plaintiff and pinning the plaintiff thereby causing the plaintiff severe personal and painful injuries as hereinafter more particularly set forth. . . .

"6. Said collision of debris and the resulting injuries, damages, and losses to the plaintiff were caused by the carelessness and negligence of [Carroll doing business as Elm City] in one or more of the following ways . . .

"c. in that he secured the truck camp trailer improperly to prevent equipment to fall on the roadway, posing a risk to the plaintiff . . . .

"f. in that the fastening equipment on the trailer hitch was in a broken condition and the defendant failed to inspect the trailer to observe the broken and loose condition of the trailer hitch; [and]

"g. in that [Carroll] failed to adequately secure a safety chain to secure the trailer in the event that the hitch/fastening equipment became dislodged."

The plaintiff argues that these allegations fall within the coverage of the business liability insurance policy issued by the defendant which provides liability coverage, including a legal defense, for any lawsuits seeking damages "because of 'bodily injury' . . . to which this insurance applies." The defendant agrees that there would be coverage for the plaintiff's injuries if it were not for the policy's exclusions, principally the auto exclusion. Under that exclusion, the policy does not provide coverage or a duty to defend for " 'bodily injury' . . . *arising out of* the ownership, maintenance, use or entrustment to others of any . . . auto . . . owned or operated by . . . any insured." (Emphasis added.) "Auto" is defined under the policy as "a land motor vehicle, trailer or semi-trailer designed for travel on public roads, including any attached machinery or equipment."

The defendant argues that the language of the exclusion is plain and unambiguous as applied to the plaintiff's claim. In particular, it argues that there is no question that the plaintiff's injuries, as alleged, arose out of Carroll's operation of an auto owned by Elm City. The defendant further argues that the definition of auto in the exclusion includes not only the truck Carroll was driving, but also the trailer attached thereto and the kettle corn equipment attached to the trailer. Consequently, the defendant argues that the claim clearly is excluded from coverage, and that the defendant owed no duty to defend Carroll and Elm City in the personal injury action.

Connecticut courts have had previous occasions to interpret the phrase "arising out of," as the phrase is used in auto exclusions in insurance policies and consistently have held that the phrase broadly applies to preclude coverage for claims whenever a plaintiff's injuries are related—even slightly—to the use of an automobile. See *New London County Mutual Ins. Co.* v. *Nantes*, 303 Conn. 737, 753–54, 36 A.3d 224 (2012); *Hogle* v. *Hogle*, 167 Conn. 572, 577, 356 A.2d 172 (1975).

For example, in *Hogle*, our Supreme Court concluded that a homeowners insurance policy did not provide coverage for injuries that a passenger in a car sustained when the driver's dog jumped from the rear seat into the front seat, causing the driver to crash the car and injure the passenger. *Hogle* v. *Hogle*, supra, 167 Conn. 578–79. The policy in *Hogle* included an auto exclusion, which stated that "coverage does not apply to the operation . . . of . . . automobiles . . . while away from" the insured's home. (Internal quotation marks omitted.) Id., 576. In interpreting that exclusion, the court broadly held that "it is generally understood that for liability for an accident or an injury to be said to arise out of the use of an automobile for the purpose of determining coverage under the appropriate provisions of a liability

insurance policy, it is sufficient to show only that the accident or injury was connected with, had its origins in, grew out of, flowed from, or was incident to the use of the automobile, in order to meet the requirement that there be a causal relationship between the accident or injury and the use of the automobile." (Internal quotation marks omitted.) Id., 577. Accordingly, because the driver's use of a car was in some way connected "with the accident or the creation of a condition that caused the accident," there was no coverage for the passenger's injuries under the auto exclusion, and the insurer thus did not have a duty to defend. Id., 578.

Similarly, in *Nantes*, our Supreme Court determined that a homeowners insurance policy did not provide coverage for injuries that houseguests suffered from carbon monoxide poisoning that was caused by the homeowner leaving her car running overnight in an attached garage. *New London County Mutual Ins. Co.* v. *Nantes*, supra, 303 Conn. 759. That policy also contained an auto exclusion, which stated that coverage "do[es] not apply to bodily injury or property damage . . . [a]rising out of . . . [t]he . . . use . . . of motor vehicles . . . ." (Internal quotation marks omitted.) Id., 741. On the basis of this exclusion, and the court's earlier holding in *Hogle*, the court in *Nantes* likewise concluded that, because the guests' injuries "had [their] origins in, grew out of, flowed from, or [were] incident to" the homeowner's use of a car, the insurer had no duty to defend. (Internal quotation marks omitted.) Id., 759.

As alleged in the underlying complaint, the plaintiff's injuries resulted from Carroll's operation of a truck and trailer on the public roads of New Haven. Specifically, the plaintiff was injured when the trailer transporting the attached kettle corn equipment detached from the truck and struck him. The auto exclusion in the insurance policy issued by the defendant unambiguously

precludes coverage for injuries that arise out of the use of an auto. The policy also unambiguously defines "auto" to include "land motor vehicles" (such as trucks), trailers, *and* any equipment that is *attached* to said trailers. Under the plain language of the policy, it is indisputable that the plaintiff's injuries arose out of the use of an auto: but for Carroll's use of a truck, an auto, to transport a trailer containing kettle corn equipment, a second auto, the plaintiff never would have been struck by the trailer and, consequently, would not have been injured. Therefore, those injuries are connected with, have their origins in, grew out of, flowed from, or were incident to Carroll's use of two autos. See *Hogle* v. *Hogle*, supra, 167 Conn. 577. As such, because the plaintiff's injuries were related to, and thus arose out of, Carroll's use of an auto, there is no coverage for those injuries under the insurance policy.

Given our conclusion that the auto exclusion clearly precludes coverage for the plaintiff's injuries, we necessarily reject the plaintiff's claim that the language of the policy is ambiguous. The plaintiff claims that both factual and legal uncertainty exist with regard to whether the defendant has a duty to defend, and that such uncertainty is enough to make the policy ambiguous. In *Nash Street, LLC* v. *Main Street America Assurance Co.*, 337 Conn. 1, 10–11, 251 A.3d 600 (2020), our Supreme Court explained how factual and/or legal uncertainty can create ambiguity in an insurance policy and thus give rise to a duty to defend: "Factual uncertainty arises when it is unclear from the face of the complaint whether an alleged injury occurred in a manner that is covered by the policy. . . . Legal uncertainty arises when it is unclear how a court might interpret the policy language at issue, and, as a result, it is unclear whether the alleged injury falls within coverage." (Citations omitted.)

The plaintiff argues that there is factual uncertainty because the complaint in the personal injury action

included allegations that the trailer and kettle corn equipment became disconnected from Carroll's truck due to his failure to properly secure the trailer to the truck and/or due to his failure to properly maintain the hitch on the truck to which the trailer was attached. Thus, according to the plaintiff, his injuries were due to Carroll's negligence before he ever began operating the truck to which the trailer was attached and, thus, did not arise out of the use of an auto. He argues that, at the very least, the allegations of his personal injury complaint raised the possibility of coverage and, therefore, triggered the defendant's duty to defend. We are not persuaded.

We initially note that the word "maintenance" is never used in the plaintiff's complaint and that the plaintiff conceded as much at oral argument before this court. In addition, the auto exclusion applies not only to bodily injuries arising out of the operation of an auto, but also to those arising out of the ownership, maintenance, and use of an auto. The exclusion defines "use" as including " 'loading or unloading.' " Thus, even construing the allegations of the plaintiff's personal injury complaint as alleging negligence in how Carroll and Elm City maintained the truck or trailer or how they connected the two, the claims are excluded from coverage by the plain language of the policy.

Finally, as noted previously in this opinion, our Supreme Court consistently has interpreted the "arising out of" language in auto exclusions very broadly. In both *Hogle* and *Nantes*, our Supreme Court concluded that the auto exclusions in both insurance policies precluded coverage for the plaintiff's injuries *even though* the underlying complaints in both cases alleged acts of negligence that occurred independently of the insured's use of an automobile. See *Hogle* v. *Hogle*, supra, 167 Conn. 578 ("Aetna's obligation to pay the judgment rendered . . . does not depend on whether it was [the

driver's] negligent operation of the car, or the activities of his dog inside the car, which constituted the 'proximate cause' of the accident . . . . Such obligation, rather, depends in this case on another fact, namely whether [the driver's] 'use' of his car was connected with the accident or the creation of a condition that caused the accident."); see also *New London County Mutual Ins. Co.* v. *Nantes*, supra, 303 Conn. 758 ("[I]t is irrelevant that an arguably covered event—[the host's] closing of the garage door—was a contributing cause of [the guests'] injuries. . . . [T]he fact that [the host's] use of her motor vehicle was connected to or created a condition that caused [the guests'] injuries is enough to bring [the injuries] within the motor vehicle exclusion.").

In the present case, as in those two cases, although negligence unrelated to the use of an auto *may* have contributed to the plaintiff's injuries, those injuries nonetheless arose out of the use of an auto because, again, the plaintiff would not have been injured without Carroll's use of two autos: his truck and trailer. Consequently, the role that those autos played in injuring the plaintiff is enough to exclude those injuries from coverage under the policy, regardless of any other non-auto related acts of negligence that may have also contributed to the plaintiff's injuries. Whatever the specific cause for the dislodging of the trailer from Carroll's truck, there is no question that the plaintiff's complaint in the personal injury action alleged that his injuries arose out of the operation of an auto, the definition of which includes both the truck and the trailer with its attached equipment. Consequently, there is no factual uncertainty as to how the plaintiff's injuries were alleged to have occurred.

As to legal uncertainty, the plaintiff argues that the definition of auto in the policy, to which the auto exclusion applies, states that " 'auto' does not include 'mobile

equipment.' " He argues that, because the kettle corn equipment that was affixed to the trailer is mobile equipment, there is legal uncertainty as to whether the auto exclusion applies to injuries caused by any of the kettle corn equipment that may have struck the plaintiff.[4]

There are a number of problems with the plaintiff's argument. First, the policy has a definition of "mobile equipment," which is limited to a specific list of "land vehicles." The kettle corn equipment at issue does not fall under any of the vehicles listed in the mobile equipment definition.

Second, it is clear from the policy language that the kettle corn equipment attached to the trailer also meets the definition of auto under the policy's exclusions. The insurance policy defines "auto" as including trailers that are "designed for travel on public roads, *including any attached machinery or equipment*." (Emphasis added.) The trailer and attached equipment here certainly fall within that definition of "auto," meaning that the auto exclusion applies to bar coverage for any injuries that arose out of the use of that trailer and equipment.

Finally, the plaintiff's complaint did not allege that his injuries arose out of the operation of the kettle corn equipment. The complaint alleged that the plaintiff's injuries arose during the transportation of the kettle corn equipment. The policy explicitly excludes from

[4] The plaintiff's fourth amended complaint does not explicitly allege that he was struck by the kettle corn equipment. Instead, it alleges that while Carroll was driving his truck the "trailer with large kettle corn equipment . . . dislodged from the truck, catapulted over the curb striking the plaintiff and pinning the plaintiff thereby causing the plaintiff severe personal and painful injuries . . . ." This allegation suggests that the plaintiff was struck by the trailer and not separately by the kettle corn equipment. Nevertheless, in considering the plaintiff's "mobile equipment" argument, we will construe the allegation broadly as encompassing the possibility that the plaintiff was struck by the kettle corn equipment.

coverage bodily injury arising out of "[t]he transportation of 'mobile equipment' by an 'auto' owned or operated by or rented or loaned to any insured . . . ." Thus, even if the kettle corn equipment was considered mobile equipment under the policy, the exclusion of coverage for the transportation of mobile equipment clearly would apply. Consequently, there is no legal uncertainty that the defendant had no duty to defend Carroll and Elm City.

Nevertheless, the plaintiff contends that the policy language is ambiguous because the various exceptions in the policy "essentially foreclose all liability coverage" and that such a result cannot be what the parties intended. We are not persuaded. Even though the insurance policy does not provide coverage for the injuries alleged in the present case, the policy still provides valuable coverage. For example, the policy certainly would provide coverage if, while Carroll was making and selling kettle corn on the sidewalk, a vat of hot oil spilled and caused injury to a patron or a passerby. Thus, just because the policy does not cover the plaintiff's injuries in the present case does not mean that the policy provides no coverage in other situations.

We also reject the plaintiff's argument that the law of the case doctrine compels us to conclude that the policy language was ambiguous. According to the plaintiff, because the trial court found the policy language ambiguous when it denied the defendant's motion for summary judgment, it could not conclude otherwise at trial, and we too should conclude that such ambiguity exists. This assertion, however, ignores the fact that appellate courts review a lower court's interpretation of an insurance policy de novo. *Warzecha* v. *USAA Casualty Ins. Co.*, supra, 206 Conn. App. 191. As such, we are not bound by the trial court's findings or by the law of the case that was made during the proceedings at trial. *Danehy* v. *Danehy*, 118 Conn. App. 29, 33 n.5, 982

A.2d 273 (2009) (law of case "cannot bind an appellate court, whose function is to determine whether the trial court correctly applied the law"). Thus, our conclusion that the policy's auto exclusion unambiguously precludes coverage for the plaintiff's injuries is unaffected by the trial court's prior conclusion that the policy was ambiguous.[5] See id.

In sum, given our Supreme Court's broad interpretation of the phrase "arising out of" in both *Hogle* and *Nantes*, we conclude that the auto exclusion in the business liability policy at issue here plainly and unambiguously precludes coverage for the plaintiff's injuries.[6] Accordingly, the defendant did not have a duty to defend Carroll and Elm City in the personal injury action.[7]

The judgment is affirmed.

In this opinion the other judges concurred.

[5] We also note that, given the trial court's eventual holding that the defendant did not owe a duty to defend, the court itself appears to have rejected its earlier conclusion that the policy language was ambiguous, which it was permitted to do. See *Knoblaugh* v. *Marshall*, 64 Conn. App. 32, 37, 779 A.2d 218 ("A judge should hesitate to change his own rulings in a case . . . . Nevertheless, if the case comes before him regularly and he becomes convinced that the view of the law previously applied . . . was clearly erroneous and would work a manifest injustice if followed, he may apply his own judgment." (Internal quotation marks omitted.)), cert. denied, 258 Conn. 916, 782 A.2d 1243 (2001).

[6] In his reply brief, the plaintiff attempts to distinguish *Nantes* and *Hogle* by arguing that both cases involved homeowners policies and that this case involves a business liability policy. The plaintiff does not explain why the type of policy matters to the analysis and we conclude that it does not. The same contract interpretation principles apply regardless of the underlying coverage provided by the policy. Consequently, our Supreme Court's reasoning in those cases is equally applicable in the present case, despite the difference in the type of policy.

[7] Given our conclusion regarding count one, and because the plaintiff conceded at oral argument before this court that if he loses on count one, he also loses on counts two and three, we further conclude that the defendant was entitled to judgment in its favor as to counts two and three.

The plaintiff also claims on appeal that the court erred when it denied his motion to reargue/reconsider. Because our conclusion that the defendant

ELECTRICAL CONTRACTORS, INC. *v.* 50 MORGAN HOSPITALITY GROUP, LLC, ET AL.
(AC 44475)

Alvord, Cradle and Lavine, Js.

Syllabus

The plaintiff subcontractor sought to recover damages from, among others, the defendant general contractor, G Co., for, inter alia, breach of contract and breach of the implied covenant of good faith and fair dealing. The plaintiff entered into a contract with G Co. in connection with a construction project for the renovation of a property owned by the named defendant, M Co. In its operative complaint, the plaintiff alleged, inter alia, that G Co. had failed to pay for materials and services that the plaintiff had provided. In its special defenses, G Co. asserted that language in the parties' contract made clear that the G Co.'s obligation to pay the plaintiff was dependent upon G Co. first receiving payment from M Co. Specifically, the contract stated that the plaintiff expressly agreed that payment by M Co. to G Co. was a "condition precedent" to G Co.'s obligation to make partial or final payments to the plaintiff. G Co. filed a motion for summary judgment on the counts against it based on that contractual language, arguing that it had no duty to pay the plaintiff because it had not yet received payment from M Co. The trial court granted G Co.'s motion and rendered summary judgment in favor of G Co., and the plaintiff appealed to this court.

1. The trial court properly granted G Co.'s motion for summary judgment as to the plaintiff's breach of contract claim: the clear and unambiguous language of the parties' contract provided that G Co. was not obligated to pay the plaintiff until it received payment from M Co.; moreover, this court declined the plaintiff's invitation to find ambiguity in the payment provision and to interpret it to mean that G Co.'s obligation to pay the plaintiff merely was postponed for a reasonable period of time; furthermore, the plaintiff did not cite any binding appellate authority to support its assertion that clauses such as the one at issue in the present case are disfavored in Connecticut and, more particularly, in the construction industry.
2. The trial court properly granted G Co.'s motion for summary judgment as to the plaintiff's claim for breach of the implied covenant of good faith and fair dealing: the plaintiff failed to allege or to provide any evidence to create a genuine issue of material fact that G Co. acted in bad faith in attempting to collect payment from M Co. or in failing to pay the plaintiff; moreover, this court's independent review of the record that was before the trial court when it rendered its summary judgment

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did not have a duty to defend is dispositive of the claims raised in the motion to reargue/reconsider, we need not address this argument.

did not reveal a potential sinister motive or dishonest purpose on the part of G Co.

Argued January 3—officially released April 12, 2022

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Moukawsher*, *J.*, rendered summary judgment in favor of the defendant Greython Construction, LLC, and the plaintiff appealed to this court. *Affirmed.*

Paul R. Fitzgerald, for the appellant (plaintiff).

Edward R. Scofield, with whom, on the brief, were *Heather Spaide* and *Joseph J. Cessario*, for the appellee (defendant Greython Construction, LLC).

Opinion

LAVINE, J. The plaintiff, Electrical Contractors, Inc., appeals from the summary judgment rendered by the trial court in favor of the defendant Greython Construction, LLC (Greython), regarding claims arising out of a contract between the plaintiff and Greython pursuant to which the plaintiff, as Greython's subcontractor, was to complete work on a property owned by the defendant 50 Morgan Hospitality Group, LLC (50 Morgan).[1] On appeal, the plaintiff claims that the court erred in granting Greython's motion for summary judgment (1) based on language in the contract providing that payment by 50 Morgan to Greython was a "condition precedent" to Greython's obligation to make payments to the plaintiff, and (2) because Greython failed to present any evidence demonstrating the absence of a genuine issue of material fact either that it was not the cause of 50 Morgan's

[1] The amended complaint, which serves as the operative complaint, lists sixteen defendants, including Greython and 50 Morgan. Greython is the only defendant participating in the present appeal. For purposes of clarity, we will refer in this opinion to Greython and 50 Morgan by name.

failure to make payment or that it had made a substantive effort to collect payment. We disagree with the plaintiff and, accordingly, affirm the judgment of the court.

The record reveals the following relevant undisputed facts and procedural history. Greython served as the general contractor for a project involving the renovation of a property owned by 50 Morgan. The plaintiff served as a subcontractor for Greython. On or about February 3, 2017, Greython entered into a contract with the plaintiff in which the plaintiff agreed to "furnish all labor, material, and equipment to perform all [electrical] work" for the project. The plaintiff provided Greython with requisitions seeking payment for materials furnished and services provided in connection with the project.

At the heart of this appeal is the meaning of the following language of the contract between the plaintiff and Greython. Article 2 of the contract provides that Greython will pay the plaintiff fixed sums of money in accordance with article 6 of the contract. Article 6 provides in relevant part: "[The plaintiff] shall submit to [Greython] a requisition, on forms provided by [Greython] . . . . Partial payments shall be due following receipt of payment [from] [50 Morgan] to [Greython] in the amount of 95 [percent] of the material in place for which payment has been made to [Greython] by [50 Morgan]. [*The plaintiff*] *expressly agrees that payment by* [*50 Morgan*] *to* [*Greython*] *is a condition precedent to* [*Greython's*] *obligation to make partial or final payments to* [*the plaintiff*] *as provided in this paragraph.* . . ." (Emphasis added.)

On January 31, 2018, the plaintiff commenced this action seeking payment for the costs of the materials it had furnished and the services it had provided in connection with the renovation project. On July 6, 2018, the plaintiff filed the amended complaint, which is the

operative complaint. In the complaint, the plaintiff alleged that it performed its obligations under the subcontract by providing labor, materials, and equipment for the project. Greython, however, failed to pay the plaintiff for all amounts due for the work it had completed on the project. The plaintiff asserted that "the sum of $350,616.65, plus attorney's fees, accrued interest, and costs remains due and owing to [the plaintiff]."

The plaintiff alleged the following relevant counts against Greython:[2] breach of contract for failing to pay the plaintiff the contract balance of $350,616.65 (count two); breach of the implied covenant of good faith and fair dealing for "failing to make payment of the sums due to [the plaintiff] that are not subject to a good faith dispute" and for "failing to provide notice or response to [the plaintiff] in good faith as to the specific, justifiable reasons for Greython's failure to make payment to [the plaintiff]" (count three); unjust enrichment (count four); and a violation of General Statutes § 42-158j for failure to pay the plaintiff any undisputed amount and refusing to place any disputed funds in escrow when it was put on notice of the plaintiff's claim (count six).[3]

On March 4, 2019, Greython filed an amended answer and special defenses to the operative complaint, in which it asserted two special defenses, both of which contended that the relevant language in article 6 made clear that Greython's obligation to pay the plaintiff was dependent upon Greython first receiving payment from 50 Morgan. On the same date, Greython filed a motion for summary judgment as to the second, third, fourth, and sixth counts of the operative complaint. Greython

[2] The first count of the operative complaint was brought against all of the defendants, including Greython, to foreclose on a mechanic's lien that the plaintiff filed on the land records for the city of Hartford. On October 24, 2019, the plaintiff withdrew that count.

[3] Counts five, seven, and eight of the operative complaint were directed against 50 Morgan, which is not a party to this appeal.

filed a memorandum of law in support of its motion, in which it argued that the language in article 6 of the contract was clear and unambiguous that it was not obligated to pay the plaintiff until it received payment from 50 Morgan. Because it had not yet received payment from 50 Morgan, Greython argued, "[it] ha[d] no duty to pay [the plaintiff] . . . ." On April 5, 2019, the plaintiff filed an objection to Greython's motion and an accompanying memorandum of law. The gist of the plaintiff's argument was that the payment provision in article 6 was ambiguous as to which party bore the risk of 50 Morgan's nonpayment. Thus, the plaintiff argued, this provision should be interpreted to mean that nonpayment by 50 Morgan "merely postpone[s] for a reasonable period of time" Greython's obligation to pay the plaintiff. On April 18, 2019, Greython filed a reply to the plaintiff's objection.

On April 24, 2019, the court heard oral argument on Greython's motion for summary judgment. On April 30, 2019, the court issued a memorandum of decision granting Greython's motion for summary judgment in its entirety as it pertained to the plaintiff. The court concluded that, pursuant to article 6 of the contract, Greython was not obligated to pay the plaintiff until 50 Morgan paid Greython. The court stated: "[The plaintiff] say[s] the court should read the language at issue [in article 6 of the contract] to mean that [Greython] will pay [the plaintiff] within a reasonable period of time even if the owner never pays [Greython]." The court noted that "courts have deviated from this view and read into some contracts the reasonable time language based upon the implications of labelling a provision . . . 'pay-when-paid' . . . or . . . ['pay-if-paid'].[4] But

[4] See, e.g., *DeCarlo & Doll, Inc.* v. *Dilozir*, 45 Conn. App. 633, 641 n.4, 698 A.2d 318 (1997) (comparing contract provision to "pay-when-paid" clause, which had been held by Massachusetts Supreme Judicial Court to merely postpone general contractor's obligation to pay subcontractors for reasonable time); *Titan Mechanical Contractors, Inc.* v. *Klewin Building Co.*, Superior Court, judicial district of Hartford, Docket No. CV-07-5009771

none of [their decisions] bind [the trial] court to do likewise." (Footnote added.) On the contrary, the court stated, "[t]he courts that do bind [the trial] court suggest that [a reviewing court] will see an obvious condition precedent and the risk bearing arrangement it reflects and enforce it."

The court further stated: "The obvious import of the contract language in this case is that if [Greython] never gets paid then neither do its subcontractors. Because [50 Morgan's] payment is labelled a condition precedent—a thing that *must* happen first—the contract needed no additional words to make this consequence clear to a reader of ordinary intelligence." (Emphasis in original.) The court concluded: "So [the plaintiff cannot]—under the present circumstances—win under the plain language of the contract."

Regarding the count alleging breach of the covenant of good faith and fair dealing, the court stated: "[T]he [plaintiff] certainly express[es] dissatisfaction with Greython's efforts [to collect payment from 50 Morgan] but [does not] offer any evidence sufficient to create an issue of fact over whether Greython acted in bad faith. Instead, [although] questions have been raised about Greython's efforts, the [plaintiff has] cited no evidence that could possibly support a claim that Greython has acted from some interested or sinister motive."

On May 15, 2019, the plaintiff, pursuant to Practice Book §§ 11-11 and 11-12, filed a "motion for reargument/

(October 30, 2007) (44 Conn. L. Rptr. 429, 429–30) (contract stated that payment from owner to general contractor was "express condition precedent to any payment by [g]eneral [c]ontractor to [s]ubcontractor," but court interpreted provision as "pay-when-paid" clause and stated that "under this interpretation payment would be required within a reasonable time even if [the general contractor was] not paid"); *R & L Acoustics* v. *Liberty Mutual Ins. Co.*, Superior Court, judicial district of Fairfield, Docket No. CV-00-0380506-S (September 27, 2001) (even though parties expressly and unambiguously conditioned subcontractor's right to payment on general contractor's receipt of funds from owner, court held that general contractor's duty to pay subcontractor was only temporarily postponed for reasonable time).

reconsideration and articulation" of the court's decision on Greython's motion for summary judgment. On May 20, 2019, the court denied that motion. This appeal followed.[5] Additional facts and procedural history will be set forth as necessary.

We begin by setting forth the relevant standard of review, which applies to both of the plaintiff's claims. "This court's standard of review for a motion for summary judgment is well established. 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. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . 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. . . . [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. . . . 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 sup-

[5] The court rendered summary judgment in favor of Greython as to counts two, three, four, and six. The plaintiff's appeal form states that it is appealing from the "granting of [Greython's] motion for summary judgment." In its brief to this court, the plaintiff only challenges the court's conclusions as to count two (breach of contract) and count three (breach of the implied covenant of good faith and fair dealing).

port in the record." (Internal quotation marks omitted.) *Buehler* v. *Newtown*, 206 Conn. App. 472, 480–81, 262 A.3d 170 (2021).

I

The plaintiff first claims that the court erred in granting Greython's motion for summary judgment based on language in the contract providing that payment by 50 Morgan was a "condition precedent" to Greython's obligation to make payments to the plaintiff. The plaintiff contends that "the overwhelming weight of authority in Connecticut holds that similar provisions in construction contracts do not excuse a general contractor's payment obligations to its subcontractors." We disagree.

The following legal principles govern our interpretation of contracts. "A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . .

"[T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the [writing]. . . . Where the language of the [writing] is clear and unambiguous, the [writing] is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a [written instrument] must emanate from the language used in the [writing] rather than from one party's subjective perception of the terms. . . . If a contract is unambiguous within its four corners, the determination of what the parties intended by their contractual commitments is a question of law." (Cita-

tions omitted; internal quotation marks omitted.) *Murtha* v. *Hartford*, 303 Conn. 1, 7–8, 35 A.3d 177 (2011).

The plaintiff argues that the court incorrectly interpreted the payment provision in article 6 to mean that if Greython never receives payment from 50 Morgan, it is not obligated to pay its subcontractors. Specifically, the plaintiff argues that the court incorrectly interpreted the payment provision in article 6 as a "pay-if-paid" clause. The plaintiff states: " 'Pay-if-paid' provisions in construction contracts seek to transfer the risk of owner default between the general contractor and subcontractor by contractually making the owner's payment to the general contractor a condition precedent to the general contractor's payment to the subcontractor." Thus, unlike a "pay-when-paid" clause, if a general contractor never receives payment from an owner, it is not obligated to pay its subcontractors at all. The plaintiff asserts that the court instead should have interpreted the payment provision in article 6 as a "pay-when-paid" clause. A "pay-when-paid" clause merely postpones a general contractor's obligation to pay its subcontractors for a reasonable period of time, as opposed to creating a condition precedent to payment. See *DeCarlo & Doll, Inc.* v. *Dilozir*, 45 Conn. App. 633, 641 n.4, 698 A.2d 318 (1997) (*DeCarlo*). Thus, it claims, when a contract contains a "pay-when-paid" clause, a general contractor remains obligated to pay its subcontractors even if it never receives payment from the owner.

The plaintiff argues that clauses like the one in article 6 are "disfavored" in Connecticut and that "[t]he trial court's decision . . . represents the minority position not only in Connecticut, but also nationally." The plaintiff reasons that because such clauses "are disfavored by courts, they will be enforced only where the contract language clearly reflects the subcontractor's agreement to assume the risk of the owner's nonpayment." The

plaintiff contends, without citing any binding authority, that "Connecticut courts have universally stated that in order to effectively transfer the risk of owner nonpayment from the general contractor to a subcontractor, a contingent payment provision must be clear and unequivocal," and, "[a]t [a] minimum, the provision must clearly state which party bears the risk of the project owner failing to pay or becoming insolvent."[6] The plaintiff argues that article 6 "is not sufficiently clear and unequivocal to transfer the risk of [50 Morgan's] default from [Greython] to the plaintiff." In essence, the plaintiff argues that article 6 is ambiguous as to which party assumed the risk of 50 Morgan becoming insolvent. Thus, the plaintiff asks this court to interpret the payment provision in article 6 to mean that Greython's obligation to pay it merely was temporarily postponed for a reasonable period of time and insists that Connecticut law favors such a result.

The plaintiff, however, is unable to cite any binding appellate authority, and we are aware of none, that supports its assertion that clauses like the one in article 6 are disfavored in Connecticut generally, and particularly, as it argues, in the construction industry.[7] In support of its argument that we should interpret the relevant language in article 6 as a "pay-when-paid" clause, the plaintiff relies primarily on *DeCarlo & Doll, Inc.* v. *Dilozir*, supra, 45 Conn. App. 633, which is distinguish-

[6] At oral argument before this court, counsel for the plaintiff acknowledged that he is not aware of any appellate authority to support the plaintiff's contention that including the phrase "condition precedent" in a contract without clarifying language is not sufficient to clearly and unambiguously transfer the risk of owner nonpayment from a general contractor to its subcontractor.

[7] In advancing this argument, the plaintiff relies on *Thos. J. Dyer Co.* v. *Bishop International Engineering Co.*, 303 F.2d 655 (6th Cir. 1962), and *R & L Acoustics* v. *Liberty Mutual Ins. Co.*, Superior Court, judicial district of Fairfield, Docket No. CV-00-0380506-S (September 27, 2001), neither of which is binding on this court.

able from the present case.[8] As this court noted in *Suntech of Connecticut, Inc.* v. *Lawrence Brunoli, Inc.*, 143 Conn. App. 581, 591 n.4, 72 A.3d 1113, cert. denied, 310 Conn. 910, 76 A.3d 626 (2013), *DeCarlo* "simply did

[8] In *DeCarlo & Doll, Inc.* v. *Dilozir*, supra, 45 Conn. App. 639, the contract provided that payment from the defendant to the plaintiff was due thirty days after the defendant was billed on the first invoice. The parties then amended the contract by adding a clause that stated: " 'Subject to payment with all outstanding payments to be paid in full at time of financing of project' . . . ." Id., 637. The defendant did not receive financing and did not pay the entire bill for the services rendered by the plaintiff. Id. The plaintiff brought a breach of contract action against the defendant and "the trial court permitted the defendant to prevail on a special defense that alleged that the defendant's payment obligations under the contract were conditioned on the defendant's securing financing from a third party, which never occurred." Id., 634. On appeal, this court stated that the clause "was not a condition on which payment was contingent." Id., 641. This court held: "Viewing the contract as a whole, we conclude that the clause 'subject to payment with all outstanding payments to be paid in full at time of financing' is not a condition precedent but a date of payment set by the defendant." Id., 643. In reaching its conclusion, this court compared the clause to a "pay when paid" clause used by contractors in the construction industry. Id., 641 n.4.

Several Superior Court cases have cited *DeCarlo* when interpreting contract clauses that, like the clause in the present case, expressly and unambiguously condition an obligee's right to payment on an obligor's receipt of payment from a third party. Some of those cases refer to these types of clauses as "pay-if-paid" clauses. Our trial courts have reached different conclusions as to the interpretation of this type of clause. See, e.g., *R & L Acoustics* v. *Liberty Mutual Ins. Co.*, Superior Court, judicial district of Fairfield, Docket No. CV-00-0380506-S (September 27, 2001) (clause not enforceable as condition precedent even though it stated "[t]he Contractor shall have no liability or responsibility for any amount due or claimed to be due to Subcontractor except to the extent Contractor actually receives funds from Owner specifically designated for disbursement to the Subcontractor as receipt of such funds from the Owner are *specifically made a condition precedent* to the Contractor's obligation to make payments to Subcontractor hereunder" (emphasis added; internal quotation marks omitted)); *Lindade Construction, Inc.* v. *Continental Casualty Co.*, Superior Court, judicial district of Waterbury, Docket No. CV-05-008767-S (February 25, 2009) (47 Conn. L. Rptr. 323) ("pay-if-paid" clause was enforceable and not void as against public policy given strong public policy in Connecticut favoring freedom of contract). In the present case, the plaintiff does not cite any Connecticut appellate cases, and we are aware of none, that address the enforceability of "pay-if-paid" clauses.

not involve a 'pay-when-paid' provision. Although the court made a comparison to 'pay-when-paid' provisions, that comparison was dicta . . . ." (Citation omitted.) Furthermore, unlike in the present case, the clause at issue in *DeCarlo* did not include the phrase "condition precedent," and this court expressly concluded in *DeCarlo* that the relevant provision "[was] not a condition precedent . . . ." *DeCarlo & Doll, Inc.* v. *Dilozir*, supra, 643.[9]

Greython counters that the payment provision in article 6 is clear and unambiguous that its obligation to pay the plaintiff is expressly conditioned on it receiving payment from 50 Morgan. Greython notes that article 6 "contains no language or provisions [that] are focused on establish[ing] the time frame in which [the plaintiff] must or shall be paid by Greython." We agree.

We decline the plaintiff's invitation to find ambiguity in the payment provision in article 6 when we see none. Rather, we rely on the plain language of the contract, which has just one possible reasonable interpretation. To reiterate, the relevant payment provision in article 6 of the contract states: "[The plaintiff] expressly agrees that payment by [50 Morgan] to [Greython] is a *condition precedent* to [Greython's] obligation to make partial or final payments to [the plaintiff] . . . ." (Emphasis added.) It is well settled that "[a] condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. . . . A condition is distinguished from a promise in that

[9] At oral argument before this court, counsel for the plaintiff stated that he was "100 percent certain" that Greython drafted the contract and asserted that it is typical for a general contractor to use its own standard form contract with its subcontractors. Because we conclude that the contractual language is plain and unambiguous, we need not consider the maxim of contract construction that states that, where an ambiguity exists, contractual language is to be construed against the drafter. See, e.g., *Cantonbury Heights Condominium Assn., Inc.* v. *Local Land Development, LLC*, 273 Conn. 724, 735, 873 A.2d 898 (2005).

it creates no right or duty in and of itself but is merely a limiting or modifying factor. . . . If the condition is not fulfilled, the right to enforce the contract does not come into existence. . . . Whether a provision in a contract is a condition the [nonfulfillment] of which excuses performance depends [on] the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Lorson*, 341 Conn. 430, 440, 267 A.3d 1 (2021).

The plaintiff has not cited any appellate case holding that the term "condition precedent" has a special, understood meaning in the construction industry, nor has the plaintiff pointed to any industry custom in which these types of contractual provisions are acknowledged to require a general contractor to pay its subcontractors within a reasonable time even if the general contractor never receives payment from the owner. We decline to read into the contract a "reasonable time" provision. Instead, we are duty bound to rely on the plain language of the contract, which makes clear that 50 Morgan must pay Greython in order to trigger Greython's duty to pay the plaintiff.

"There is a strong public policy in Connecticut favoring freedom of contract . . . . This freedom includes the right to contract for the assumption of known or unknown hazards and risks that may arise as a consequence of the execution of the contract. Accordingly, in private disputes, a court must enforce the contract as drafted by the parties and may not relieve a contracting party from anticipated or actual difficulties undertaken pursuant to the contract, unless the contract is voidable on grounds such as mistake, fraud or unconscionability. . . . If a contract violates public policy, this would be a ground to not enforce the contract. . . . *A contract*

. . . however, does not violate public policy just because the contract was made unwisely. . . . [C]ourts do not unmake bargains unwisely made. Absent other infirmities, bargains moved on calculated considerations, and whether provident or improvident, are entitled nevertheless to sanctions of the law. . . . *Although parties might prefer to have the court decide the plain effect of their contract contrary to the agreement, it is not within its power to make a new and different agreement; contracts voluntarily and fairly made should be held valid and enforced in the courts.*" (Emphasis added; internal quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, 322 Conn. 385, 392–93, 142 A.3d 227 (2016).

In any construction project, there is a risk that an owner will become insolvent and therefore be unable to pay its general contractor. The plaintiff in the present case is a sophisticated construction company.[10] It could have added language to the contract specifying that Greython's duty to pay would be postponed *only temporarily* if Greython did not receive payment from 50 Morgan. Instead, the plaintiff now asks this court to write such clarifying language into the contract. We are not inclined to make a new and different agreement by adding terms to which the plaintiff and Greython did not agree. Furthermore, as the court noted in its memorandum of decision, our conclusion "[does not] change the [plaintiff's] right to be paid any time Greython gets paid in the future. It just means that not having been paid by [50 Morgan], Greython's failure to pay the [plaintiff] now [does not] breach the express contract language."

We are not being asked whether the contractual language, in hindsight, appears to us to be fair or reasonable. We are simply being asked to determine if the

[10] At oral argument before this court, counsel for the plaintiff agreed with this court's characterization of the plaintiff as a "sophisticated" construction company.

language means what it says. We conclude that the plain language of article 6 of the contract is clear and unambiguous that Greython is not obligated to pay the plaintiff until it receives payment from 50 Morgan. Accordingly, we also conclude that the court properly granted Greython's motion for summary judgment as to the plaintiff's breach of contract claim.[11]

II

The plaintiff next claims that the court erred in granting Greython's motion for summary judgment because Greython failed to present any evidence demonstrating the absence of a genuine issue of material fact either that it was not the cause of 50 Morgan's failure to make payment or that it had made a substantive effort to collect payment. We will address this argument as it relates to the plaintiff's breach of the implied covenant of good faith and fair dealing claim against Greython.[12] We conclude that the court did not err in granting Greython's motion for summary judgment as to this claim.[13]

[11] Our conclusion as to this claim addresses the court's determination as to count two of the operative complaint. In part II of this opinion, we will address the court's determination as to count three. The plaintiff does not challenge the court's determinations as to counts four and six. See footnote 5 of this opinion.

[12] In this claim, the plaintiff challenges the court's conclusions as to the granting of Greython's motion for summary judgment regarding both the breach of contract and the breach of the implied covenant of good faith and fair dealing claims. Previously in this opinion, we have concluded that Greython is not required to pay the plaintiff until it receives payment from 50 Morgan. The plaintiff does not cite any binding appellate authority that supports its assertion that, in order for Greython to prevail on its motion for summary judgment, Greython was required to demonstrate that it either was not the cause of 50 Morgan's failure to make payment or that it made a substantive effort to collect payment. For the reasons set forth in this section of the opinion, the plaintiff's argument on this issue is more properly encompassed by its claim that Greython breached the implied covenant of good faith and fair dealing.

[13] As part of this claim, the plaintiff argues that there was no factual support for the court's conclusion that Greython provided evidence that it acted in good faith. In its memorandum of decision, the court stated: "In support of its motion, Greython asserts that it has a great deal of its own

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

money at stake and [it] has tried diligently to collect the sums owed to it and its subcontractors." After concluding that the plaintiff did not offer evidence sufficient to create an issue of fact as to whether Greython acted in bad faith, the court stated: "The [plaintiff cannot] survive summary judgment when [it has] produced no evidence of bad faith in response to [Greython's] evidence of good faith." The plaintiff takes issue with the court's conclusion that Greython provided evidence of good faith regarding its efforts to collect from 50 Morgan. It argues that Greython "failed to present any evidence that it made any effort—beyond merely forwarding the plaintiff's payment applications to [50 Morgan]—to obtain payment from [50 Morgan] for the plaintiff's work."

Our independent review of the record before the court at the time it granted the motion for summary judgment indicates that the only evidence that Greython presented about its good faith efforts to collect payment from 50 Morgan came from a portion of the affidavit of Kyle Klewin, Greython's president, which states that Greython submitted requisitions seeking payments for the materials and services provided both by Greython and its subcontractors. At the hearing on Greython's motion for summary judgment, counsel for Greython detailed its efforts to collect payment from 50 Morgan. In its memorandum of decision, the court appeared to rely in part on those statements by counsel, which are not evidence. Accordingly, the court apparently overstated the scant evidence in the record about Greython's efforts to collect payment from 50 Morgan. As we discuss in more detail later in this opinion, however, the plaintiff did not submit evidence of bad faith on the part of Greython. Thus, there was a lack of evidence sufficient to create a genuine issue of material fact as to Greython's bad faith. In the absence of such evidence, this mischaracterization in the court's memorandum of decision does not affect the outcome of this case.

faith." (Internal quotation marks omitted.) *Renaissance Management Co.* v. *Connecticut Housing Finance Authority*, 281 Conn. 227, 240, 915 A.2d 290 (2007).

"Bad faith in general implies . . . actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose." (Internal quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, supra, 322 Conn. 399–400. "The standard of proof applicable to claims of bad faith is clear and convincing evidence." *M.J. Daly & Sons, Inc.* v. *West Haven*, 66 Conn. App. 41, 53, 783 A.2d 1138, cert. denied, 258 Conn. 944, 786 A.2d 430 (2001).

The following additional procedural history is relevant to this claim. In the operative complaint, the plaintiff stated that the contract "contains an implied covenant of good faith and fair dealing requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement." The plaintiff alleged that Greython breached its duty of good faith and fair dealing by (1) "failing to make payment of the sums due to [the plaintiff] that are not subject to a good faith dispute," and (2) "failing to provide notice or response to [the plaintiff] in good faith as to the specific, justifiable reasons for Greython's failure to make payment to [the plaintiff]." The plaintiff further alleged: "These acts and omissions by Greython were undertaken in bad faith, solely for the purpose of avoiding Greython's express and implied obligations under the parties' contract." We reasonably interpret the plaintiff's claim before this court as arguing that Greython breached the implied covenant of good faith and fair dealing by not making a "substantive effort" to collect payment from 50 Morgan, thereby injuring

the plaintiff's right to receive the benefits of its agreement with Greython.[14]

Viewing the record in the light most favorable to the plaintiff as the nonmoving party, there is no evidence, let alone evidence sufficient to create a genuine issue of material fact, that Greython acted in bad faith when attempting to collect payment from 50 Morgan. Our independent review of the evidence that was before the court when it rendered its summary judgment does not reveal a potential sinister motive or dishonest purpose on the part of Greython.[15]

The plaintiff did not allege or provide evidence that Greython acted with a dishonest purpose in unsuccessfully attempting to collect payment from 50 Morgan.

[14] For example, at oral argument before this court, when discussing the lack of evidence of bad faith submitted by the plaintiff, counsel for the plaintiff argued that Greython's "failure to take any action" against 50 Morgan was "telling." In other words, the plaintiff seemed to argue that Greython's failure to more aggressively pursue payment from 50 Morgan is evidence of bad faith.

[15] Greython attached to its memorandum in support of its motion for summary judgment the affidavit of its president, Kyle Klewin. This affidavit states that Greython submitted requisitions seeking payment for the materials and services provided both by it and its subcontractors. The plaintiff argues that Greython failed to present evidence that it made any effort to collect payment beyond merely submitting those requisitions. The affidavit of William Flynn, Jr., the plaintiff's vice president, which was attached to the plaintiff's memorandum in opposition to summary judgment, provides some insight into why Greython did not take additional steps to collect payment from 50 Morgan. Flynn's affidavit states that on July 25, 2018, "Greython advised [the plaintiff] that [50 Morgan] had obtained new funding for the Project and that [the plaintiff] would be paid in full with proceeds from the loan closing." The affidavit further states that on August 16, 2018, and January 4, 2019, Greython contacted the plaintiff and reiterated that the loan closing was taking place and that the plaintiff would be paid in full with proceeds from the loan. E-mails supporting these statements were attached to the affidavit as exhibits. The affidavit then states that the closing never occurred.

The plaintiff did not attempt to show that Greython's statements about the closing were made in bad faith. It did not allege, for example, that those statements were false or misleading. Although the correspondences about the closing took place after the plaintiff brought its action against Greython, they nevertheless provide evidence of Greython's effort to collect payment from 50 Morgan.

Accordingly, we conclude that the court properly decided that there was no genuine issue of material fact that Greython did not act in bad faith when it did not pay the plaintiff.

The judgment is affirmed.

In this opinion the other judges concurred.