STATE OF CONNECTICUT *v.* SIGFREDO ROSARIO
(AC 42827)

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

Syllabus

Convicted, following a jury trial, of the crime of larceny in the second degree, the defendant appealed to this court. The defendant, a resident of a condominium complex in Waterbury, became the president of the board of directors of the condominium association. P, the treasurer of the board of directors, became concerned about the association's finances and asked the defendant for financial information, which he failed to provide. P examined the bank records of the association and noticed that checks had been written from the association's bank account to the defendant and deposited in the defendant's personal bank account. The defendant explained that he made withdrawals from his personal bank account for legitimate purchases for the condominium complex,

but admitted that he also used the funds for personal items. The defendant's sentence included probation with special conditions, including the payment of restitution. On the defendant's appeal to this court, *held*:

1. The defendant could not prevail on his claim that the trial court committed plain error when it required him, as a special condition of probation, to pay restitution, which was based on his claim that the court did not first consider the factors enumerated in the applicable statute (§ 53a-28 (c)): the court did consider the factors in § 53a-28 (c) (3), as it stated in its second articulation that the defendant had an earning capacity that would enable him to make restitution, and the court noted that, at sentencing, the defendant stated that he was able to work and that he was financially supported by his mother, and the court also considered the rehabilitative effect on the defendant of paying restitution and the impact on the victims.
2. The trial court did not abuse its discretion in denying the defendant's motion for an extension of time within which to begin making restitution payments: the court granted the defendant an extension of time to begin making restitution payments to six months after the original start date, and, although the defendant claimed that he was not provided with sufficient time to generate income, the court found that the defendant had a responsibility to find alternative ways to earn funds to make the restitution payments.
3. The defendant could not prevail on his unpreserved constitutional claim that the trial court violated his due process right to a fair and impartial trial when it questioned him and two of the state's witnesses, H and P: the court's questioning of H, a detective, was not inappropriate because the court stated that its questions were intended to clarify H's testimony, and the record appeared consistent with this purpose; moreover, the court properly intervened to clarify the self-represented defendant's testimony, particularly in light of his inclusion of irrelevant material in his testimony and his disruptive conduct, the fact that the court's questions may have drawn attention to the strength of the state's case did not render those questions improper, the court's questions did not suggest anything about the credibility of any witnesses or advocate in favor of a particular verdict, and the court's questions did not prejudice the defendant because the elicited facts were not truly in dispute; furthermore, the court did not act as an advocate for the state when it questioned P regarding the defendant's identity, as the court's questions, viewed in the context of the entire trial, did not prejudice the defendant or improperly influence the outcome of the proceedings.

Argued October 12, 2021—officially released January 4, 2022

Procedural History

Substitute information charging the defendant with the crime of larceny in the second degree, brought to

the Superior Court in the judicial district of Waterbury, geographical area number four, and tried to the jury before *Crawford*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Raymond L. Durelli, assigned counsel, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Joseph S. Danielowski*, assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, J. The defendant, Sigfredo Rosario, appeals from the judgment of conviction, rendered following a jury trial, of larceny in the second degree in violation of General Statutes §§ 53a-119 (1) and 53a-123 (a) (2). On appeal, the defendant claims that the court (1) improperly ordered that he pay restitution without first considering the factors enumerated in General Statutes § 53a-28 (c), (2) abused its discretion in denying his motion for an extension of time within which to begin making restitution payments and (3) violated his due process right to a fair and impartial trial when it questioned him and two of the state's witnesses.[1] We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant. The defendant resided at the Lincoln Park condominium complex in Waterbury and became the president of the

[1] The defendant also claims that the court abused its discretion in denying his motion for stay of execution of his probation and his motion for stay of the conditions of probation. At oral argument before this court, defense counsel withdrew this claim. We note that this challenge is not reviewable on appeal. See, e.g., Practice Book § 61-14; *Clark* v. *Clark*, 150 Conn. App. 551, 575–76, 91 A.3d 944 (2014) (declining to review claim that trial court improperly lifted appellate stay because it was improperly presented for resolution on appeal, rather than by motion for review).

board of directors of the Lincoln Park condominium association (association) in May, 2013. In November, 2014, Omayra Pizarro, the treasurer of the board of directors of the association, became concerned about the finances of the association and asked the defendant for financial information related to her concerns. When the defendant failed to provide such information, Pizarro examined the bank records of the association and noticed that checks had been written from the association's bank account to the defendant. Pizarro shared her concerns with James Loughlin, the general counsel for the association, and Loughlin asked the defendant for an accounting, which the defendant declined to provide.

Pizarro then contacted Detective Kyle Howles of the Waterbury Police Department and provided him with the association's bank records and bylaws, which state that no member of the board of directors shall receive compensation from the association for acting as such. Howles then contacted the defendant, who provided Howles with his personal bank records. Howles' investigation revealed that thirteen checks, totaling $47,931.60, had been written from the association's bank account to the defendant and had been deposited in the defendant's personal bank account. The defendant made withdrawals from that same personal bank account for legitimate purchases for the condominium complex, as well as for personal items such as gasoline, groceries, fast food, mortgage payments and cell phone bills. The defendant explained to Howles that he had placed the money into his personal bank account because he needed cash to pay for projects around the condominium, to pay day laborers who only accepted cash and to negotiate better prices with contractors; he did concede, however, that there was no accounting, notes, or record of those expenses. Howles did not include in his calculation of personal expenses any withdrawals that possibly were

related to condominium improvements. Howles determined that the defendant had withdrawn "just short of $20,000" from the subject bank account for expenses that the defendant had acknowledged were personal. The defendant testified at trial that he "took thirteen checks for $47,131.60" from the association and that he used $17,515.09 of that amount for personal expenses.

Following a jury trial, the defendant was convicted of larceny in the second degree. The court, *Crawford*, *J.*, sentenced the defendant to five years of imprisonment, execution suspended, and five years of probation with special conditions, including the payment of restitution in the amount of $17,500, to be paid at a rate of $400 per month beginning in February, 2019. This appeal followed.

The defendant filed a motion for stay of execution of his probation, a motion for stay of the conditions of his probation and a motion for extension of time to start making the restitution payments, which motions the trial court denied. The defendant filed a motion for articulation on December 11, 2019, requesting that the court articulate the basis, according to the factors in § 53a-28 (c), for its order of restitution. On January 8, 2020, the court issued an articulation in which it referenced an excerpt of the transcript of a June 17, 2019 hearing on the defendant's postverdict motions for stay of execution of his probation, for stay of the conditions of his probation and for an extension of time to start making the restitution payments. The defendant filed a second motion for articulation on January 23, 2020, requesting a further articulation as to the court's decision to impose restitution pursuant to § 53a-28 (c). The court issued a second articulation on March 4, 2020, explaining the factual and legal basis for its decision to impose restitution. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the court committed plain error when it required him, as a special condition of probation, to pay restitution in the amount of $400 per month without first considering the factors enumerated in § 53a-28 (c).[2] He argues that the court had before it no evidence that he had any income, assets or the ability to generate enough income to pay $400 per month in restitution. We are not persuaded.

"Plain error review may be appropriate when a court fails to follow or apply a statute that is clearly relevant to the case. . . . Nevertheless, [r]eview under the plain error doctrine is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . [T]he core of the plain error doctrine . . . concerns whether a defendant can prevail on the merits of a claim, not simply whether the claim can be reviewed. . . . Consequently, [w]here a trial court's action does not result

[2] The defendant also contends that the court's first and second articulations are inconsistent with each other because, at the June 17, 2019 hearing on the defendant's postverdict motions, which was incorporated by reference into the court's first articulation, the court determined that there was no documentation confirming the defendant's income or employment but the court in its second articulation had clarified that the defendant had an earning capacity that would enable him to make the restitution payments. Even if we were to assume that the court's statements at the June 17, 2019 postsentencing hearing—that the defendant had not provided the court with documentation of income or employment—were somehow relevant to the defendant's ability to pay restitution at the time of sentencing, those statements are not inconsistent with the court's statement in its second articulation that the defendant has an *earning capacity*, which relates to an ability to earn money in the future. Accordingly, because the actions that form the basis for the claim of error did not occur, there can be no manifest injustice warranting reversal of the judgment pursuant to the plain error doctrine. See, e.g., *State* v. *Moore*, 85 Conn. App. 7, 11, 855 A.2d 1006 (claim under plain error doctrine does not warrant review when trial court's action does not result in any manifest injustice), cert. denied, 271 Conn. 937, 861 A.2d 510 (2004).

in any manifest injustice, a defendant's claim under the plain error doctrine does not warrant review." (Citations omitted; internal quotation marks omitted.) *State* v. *Moore*, 85 Conn. App. 7, 11, 855 A.2d 1006, cert. denied, 271 Conn. 937, 861 A.2d 510 (2004).

Section 53a-28 (c) (3) provides in relevant part that, "[i]n determining the appropriate terms of financial restitution, the court shall consider: (A) The financial resources of the offender and the burden restitution will place on other obligations of the offender; (B) the offender's ability to pay based on installments or other conditions; (C) the rehabilitative effect on the offender of the payment of restitution and the method of payment; and (D) other circumstances, including the financial burden and impact on the victim, that the court determines make the terms of restitution appropriate. . . . The court shall articulate its findings on the record with respect to each of the factors set forth in subparagraphs (A) to (D), inclusive, of this subsection. . . ."

We conclude that the court's remarks at sentencing, combined with its second articulation, make clear that the court considered the relevant factors in § 53a-28 (c) (3) (A) through (D).[3] In light of our determination that the alleged error did not occur, we need not address the defendant's argument that § 53a-28 (c) (3) mandates that the court articulate its findings on the record with respect to the four factors in subparagraphs (A) through (D).

With respect to the factors enumerated in subparagraphs (A) and (B) of § 53a-28 (c) (3), which concern the defendant's ability to pay restitution and the defendant's financial resources and the burden restitution would place on him, the court, in its second articulation, stated

[3] We do not consider the court's January 8, 2020 articulation, which referenced the June 17, 2019 hearing on postverdict motions at which the defendant testified, in this analysis. We instead confine our review to the evidence before the court at the time of sentencing.

that "[t]he defendant has an earning capacity that would enable him to make . . . restitution." The court further elaborated that the defendant graduated from high school, received a certificate from a Turbo Jet Flight Engineer course, earned credits from two other programs, has experience in real estate, "can be of help in the community in reviving vacant office buildings," has computer skills, can work as a consultant related to computers and has worked as a consultant from 2008 through 2015. The court also noted in that second articulation that, at sentencing, in requesting probation, the defendant stated that he has the ability to work and further noted that the defendant is supported financially by his mother.

The court also considered the rehabilitative effect on the offender of paying restitution and the impact on the victims pursuant to subparagraphs (C) and (D) of § 53a-28 (c) (3). At the sentencing hearing, the court stated to the defendant: "[Y]ou knew you had no access to the funds, and I didn't know at what point you decided that you were entitled to it, but . . . these are hardworking people and I think it's more important that there be restitution." In its second articulation, the court explained that "[t]he victims here are the individual condo unit owners who paid their condo fees to the association so that those funds would be available to pay the expenses connected with common ownership. The defendant said he was really sorry and remorseful. Therefore, the defendant making restitution would make the victims whole, be an acceptance of responsibility for his criminal conduct, and a step towards rehabilitation." For the foregoing reasons and in light of the fact that the court articulated its findings on the record regarding the four factors in § 53a-28 (c) (3) (A) through (D), we conclude that reversal under the plain error doctrine is not warranted.

II

The defendant next claims that the court abused its discretion by denying his motion for an extension of time within which to begin making restitution payments. We are not persuaded.

We employ an abuse of discretion standard to this claim. "When reviewing claims under an abuse of discretion standard . . . great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness . . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did." (Internal quotation marks omitted.) *State* v. *Francis*, 338 Conn. 671, 679, 258 A.3d 1257, cert. denied, *Francis* v. *Connecticut*, U.S. , 142 S. Ct. 292, 211 L. Ed. 2d 136 (2021); see also See *State* v. *Doriss*, 84 Conn. App. 542, 548–49, 854 A.2d 48 (court has broad discretion in imposing sentence), cert. denied, 271 Conn. 922, 859 A.2d 581 (2004).

As previously stated, the court, at the December 14, 2018 sentencing hearing, ordered the defendant to make restitution payments of $400 per month beginning in February, 2019. On May 1, 2019, the defendant filed a motion for extension of time to begin making restitution payments. At a May 15, 2019 hearing on that motion, the defendant stated that he had not made any payments because the start date of February, 2019, did not provide him with sufficient time and that he has been trying to find ways to generate income in order to make the restitution payments. The court noted that the defendant failed to comply with the terms of probation and that it had stated at the sentencing hearing that if the defendant missed two consecutive payments, then the matter could be referred for a violation of probation. The court stated that further argument on the motion would be heard at the next court date in order to provide

the then self-represented defendant with time to provide appropriate documentation.

At a June 17, 2019 hearing,[4] the court denied the motion for an extension of time but ordered the defendant to start making restitution payments beginning on August 1, 2019. The court noted that, other than pursuing job prospects that were "highly unlikely" to materialize, the defendant did not immediately look for ways to generate income after having been sentenced in December, 2018, and that the defendant had a responsibility to find alternative ways to earn the funds to make the restitution payments. In light of the foregoing, including the extension of time to August 1, 2019, to begin making restitution payments, which date was six months after the original start date of February, 2019, we conclude that the court's denial of the motion for extension of time, was not an abuse of its wide discretion.

III

The defendant claims that the court violated his due process right to a fair and impartial trial when it questioned him and two of the state's witnesses, Howles and Pizzaro, at trial. The defendant acknowledges that his claim is unpreserved and seeks review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to

[4] The defendant was represented by counsel at this hearing.

demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40. The record is adequate for review and the claim, which alleges a violation of a fundamental right, is of constitutional magnitude. See, e.g., *State* v. *Swilling*, 180 Conn. App. 624, 633, 639, 184 A.3d 773 (claim that court violated defendant's right to due process by questioning witnesses was of constitutional magnitude), cert. denied, 328 Conn. 937, 184 A.3d 268 (2018).

We begin with the following principles. "Due process requires that a criminal defendant be given a fair trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. . . . In a criminal trial, the judge is more than a mere moderator of the proceedings. It is [the trial judge's] responsibility to have the trial conducted in a manner which approaches an atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding. . . . Consistent with [her] neutral role, the trial judge is free to question witnesses or otherwise intervene in a case in an effort to clarify testimony and assist the jury in understanding the evidence so long as [the trial judge] does not appear partisan in doing so. . . . One of the chief roles of the trial judge is to see that there is no misunderstanding of a [witness'] testimony. . . . A trial judge can do this in a fair and unbiased way . . . [and an] attempt to do so should not be a basis of error. . . . Whether or not the trial judge shall question a witness is within [her] sound discretion . . . [and] [i]ts exercise will not be reviewed unless [s]he has acted unreasonably, or, as it is more often expressed, abused [her] discretion. . . . The trial judge can question witnesses both on direct and cross-examination. . . . [I]t may be necessary to do so to clarify testimony as [the judge] has a duty to comprehend what a witness says . . . [and] to see that the witness communicates with the jury in an intelligible

manner. . . . While no precise theorem can be laid down, we have held that it is proper for a trial court to question a witness in endeavoring, without harm to the parties, to bring the facts out more clearly and to ascertain the truth . . . and [intervene] where the witness is embarrassed, has a language problem or may not understand a question. . . . Whe[n] the testimony is confusing or not altogether clear the alleged jeopardy to one side caused by the clarification of a [witness'] statement is certainly outweighed by the desirability of factual understanding. The trial judge should strive toward verdicts of fact rather than verdicts of confusion." (Citations omitted; internal quotation marks omitted.) *State* v. *Iban C.*, 275 Conn. 624, 651–52, 881 A.2d 1005 (2005). "Any claim that the trial judge crossed the line between impartiality and advocacy is subject to harmless error analysis." *State* v. *Burke*, 51 Conn. App. 328, 335, 723 A.2d 327 (1998), cert. denied, 248 Conn. 901, 732 A.2d 177 (1999).

Mindful of these principles, we first examine the court's questioning of Detective Howles and the defendant. Howles testified to the following on direct examination. He became involved in the matter as a result of Pizarro's November, 2014 complaint concerning the finances of the association. Following that complaint and upon examining the defendant's personal bank records, he discovered that the defendant had deposited into his personal account thirteen checks, totaling $47,931.60, which had been written from the association to the defendant and that the defendant had made withdrawals from that same account for expenses related to the condominium complex as well as for expenses that the defendant had admitted to Howles were personal, such as for gasoline, groceries, fast food, mortgage payments and cell phone bills. Howles also testified that the defendant's personal bank records showed that the only deposits into the defendant's bank account

were from the association, with the exception of approximately $1200 to $1300. He further explained that he only included in his calculation of the defendant's personal expenses those that could not possibly be related to the improvement of the condominium complex. The defendant had no questions for Howles. Thereafter, the court stated that Howles needed to "clarify a couple of things" and proceeded to elicit the following testimony from Howles: a phone call from the treasurer of the association prompted Howles' involvement; Howles did not recall when the defendant became the president of the association; Howles had examined the bank accounts of both the association and the defendant from January until November or December, 2014, during which time frame the defendant was the president of the association; the defendant had written checks from the association to his personal bank account in his role as the president of the association; approximately $1200 to $1300 was deposited into the defendant's personal banking account from sources other than the association; the defendant had written checks from the association to himself, and Howles included in his calculation of personal expenses only the withdrawals that could not be possibly related to expenses for the condominium complex.

We cannot conclude, on the basis of the record, that the court's questioning of Howles was inappropriate. The court stated that its questions were intended to clarify certain points in Howles' testimony, and the record appears consistent with this stated purpose. "Unlike an appellate court, the trial court is able to observe the testimony of witnesses firsthand and, therefore, is better able to assess the relative clarity—or lack thereof—of any particular testimony." *State* v. *Gonzalez*, 272 Conn. 515, 536, 864 A.2d 847 (2005). "[T]he trial judge is free to question witnesses or otherwise intervene in a case in an effort to clarify testimony and

assist the jury in understanding the evidence so long as [s]he does not appear partisan in doing so." (Internal quotation marks omitted.) *State* v. *Brown*, 56 Conn. App. 26, 29, 741 A.2d 321 (1999), cert. denied, 252 Conn. 927, 746 A.2d 790 (2000).

The defendant, who was the sole defense witness, testified that he became the president of the association in order to improve the association, that he used his personal bank account to fund projects for the association and for personal expenses, that he personally did work to improve the grounds of the condominium complex, that the association owed him $4558.09 for damage to his condominium unit that the association had been reimbursed through an insurance claim, that he wrote thirteen checks totaling $47,131.60 from the association to himself in 2014, and that he used $17,515.09 of that amount for personal expenses. Following the defendant's redirect testimony, the court, through its questions, elicited the following responses from the defendant: his bank account was "mixed, business and personal"; he began writing checks to himself from the association's account in February, 2014; the association's bank account was electronic and did not require a signature, but he signed the checks in order to cash them; the entire $47,931.60 that he deposited from the association's account to his personal bank account was spent to benefit the association and that he reimbursed himself $17,515.09 that he believed was owed to him, including $5000 in relation to a lawsuit against the association that he had filed and withdrew concerning an insurance payment to the association.

Relevant to our analysis, we also note that, during the self-represented defendant's narrative testimony on the third day of trial and outside the presence of the jury, the court warned the defendant that he had been told "time and time again" that he could not make comments or give his opinion of the evidence, that

he was including "a lot of irrelevant material" in his testimony and that the court did not see any good faith on his part. The court noted that the defendant had become disruptive in terms of how he chose to conduct himself.[5]

Under these circumstances, we cannot conclude that the court abused its discretion in intervening to clarify the defendant's testimony, particularly in light of his inclusion of irrelevant material in his testimony and his disruptive conduct. "It is appropriate for the trial judge from time to time to intervene in the conduct of a case. Thus, when it clearly appears to the judge that for one reason or another the case is not being presented intelligibly to the jury, the judge is not required to remain silent. On the contrary, the judge may, by questions to a witness, elicit relevant and important facts." (Internal quotation marks omitted.) *State* v. *Fernandez*, 198 Conn. 1, 11, 501 A.2d 1195 (1985). The court's questioning of the defendant, whose testimony lacked clarity, reflected a reasonable and impartial attempt to clarify his testimony to assure that the witness communicated to the jury in an intelligible manner. Such an attempt should not be a basis of error. See *State* v. *Gonzalez*, supra, 272 Conn. 535–36. "Whe[n] the testimony is confusing or not altogether clear the alleged jeopardy to one side caused by the clarification of a [witness'] statement is certainly outweighed by the desirability of factual understanding." (Internal quotation marks omitted.) Id., 536.

The defendant argues that the court's questions to him and to Howles related to testimony that was detrimental and central to his case. However, the fact that

[5] At the conclusion of the third day of trial, during which the defendant testified, the court concluded that the defendant had forfeited the right to continue to represent himself. The following day, however, the court vacated its ruling and permitted the defendant to continue to represent himself with standby counsel.

the court's questions may have drawn attention to the strength of the state's case does not render those questions improper. See *State* v. *Smith*, 200 Conn. 544, 550, 512 A.2d 884 (1986) (court's questioning of witness is not necessarily improper merely because it draws attention to strengths or weaknesses of party's case). The court's questions did not suggest anything about the credibility of any witnesses, did not advocate in favor of a particular verdict, or otherwise suggest that it believed or disbelieved any particular version of the events. See *State* v. *Swilling*, supra, 180 Conn. App. 644–45. Rather, the court impartially asked Howles and the defendant to restate certain portions of their testimony. Therefore, the questions served merely to clarify their testimony for the jury. See *State* v. *Gonzalez*, supra, 272 Conn. 537 ("[a court's] comments or questions for the purpose of clarifying . . . testimony are permissible and often necessary" (internal quotation marks omitted)), quoting *State* v. *Mack*, 197 Conn. 629, 641, 500 A.2d 1303 (1985).

Moreover, the court's questions did not prejudice the defendant because the relevant elicited facts were not truly in dispute. The defendant testified before being questioned by the court: "I took the $47,000 from the condominium complex. I deducted the $17,515.09 that I used for personal things, such as my mortgage, cable, and blah, blah, blah, blah, blah, blah. At the end of that, that leaves a balance of $30,416.51, which were used for Lincoln Park condominium basics. Therefore, it clearly illustrates that that account was being used for dual purposes. Even though, now, it's a major mistake, I realize that now." Furthermore, during its charge, the court, *Doyle*, *J.*,[6] issued the following curative instruction to the jury: "You should not be influenced by the

[6] It appears from the record that Judge Doyle charged the jury because Judge Crawford was unavailable. Neither party raises this as an issue on appeal.

court's actions during the trial in ruling on motions or objections by counsel, or in comments to counsel, or in questions to witnesses, or in setting forth the law in these instructions. You are not to take any actions by the court, either Judge Crawford or myself, as . . . any indication of our opinion as to how you should determine the issues of fact." "Our appellate courts have always given great weight to curative instructions in assessing claimed errors . . . especially in assessing a defendant's claim of prejudice." (Citations omitted; internal quotation marks omitted.) *State* v. *Brown*, supra, 56 Conn. App. 29–30.

Finally, the defendant argues that, in the court's questioning of Pizarro regarding the defendant's identity, it acted as an advocate for the state when it asked her to identify the defendant in the courtroom. During the prosecutor's redirect examination of Pizarro, the court engaged in the following colloquy with Pizarro:

"The Court: Okay. I just have a couple of questions . . . what I'm not clear on is: first of all, the person you refer to as the president, Mr. Rosario, the defendant, would you identify him for the record, please—that's not what I wanted to do. . .

"[Pizarro]: Yeah, the person I was identifying as the president is Mr. Rosario.

"The Court: Just a second—no, is that person in the courtroom?

"[Pizarro]: Yes, he is.

"The Court: All right. Would you identify him, please.

"[Pizarro]: Mr. Rosario, the defendant.

"The Court: I need—and you need to just describe something that he's wearing for the record.

"[Pizarro]: He's wearing a black suit with a burgundy tie.

"The Court: Okay. All right.

"[Pizarro]: It looks black.

"The Court: Thank you. Okay."

This exchange is somewhat troubling. Although Pizarro had testified on direct examination about her concerns regarding "Mr. Rosario's" actions involving the association's finances, she did not, either in response to questioning by the prosecutor or the defendant, make an in-court identification of the defendant as the person she knew to be "Mr. Rosario." Thus, this was not a situation in which the court was clarifying a witness' prior ambiguous in-court identification of the defendant. See, e.g., *State* v. *Swilling*, supra, 180 Conn. App. 641–42 (no due process violation when court questioned victim as to whether "the person she had identified as the perpetrator of the crimes, and who was present in the courtroom, was the person she had previously identified as 'Mr. Swilling' " because court was clarifying victim's prior ambiguous in-court identification of defendant). The court's questions in the present case, however, when viewed in context of the entire trial, did not prejudice the defendant.[7]

A review of the record reveals that, during the defendant's questioning of the state's witnesses, he identified himself as the person whose conduct was at issue. During the defendant's cross-examination of Pizarro, which preceded the court's questioning of her, he asked: "On November 18, you called the police department to say

[7] The record does not reflect whether the court's questioning in this instance played a role in the defendant's decision to testify. Nevertheless, as we discuss, the record reflects that the defendant's identity was not in dispute at this point.

that I misappropriated $52,931.60." During his cross-examination of Loughlin, who also testified prior to Pizarro, the defendant inquired as to how Loughlin became the counsel for the association, and Loughlin explained, "[i]t was before I met you and it was [Pizarro], I think, called me and asked if I was interested. It was a call out of the—was it you who called?" The defendant responded, "[i]t was me." When the defendant further inquired as to whether Loughlin had any financial records of the association, Loughlin explained, "I do have that, that you generated as a summary of—" at which point the defendant interjected, "[t]hat I generated. But [what] I'm asking is something [independent] of me. . . ." During the defendant's recross-examination of Pizarro, the defendant identified himself as the individual who allegedly wrote checks in his own name from the association's bank account. He asked: "When was the first check that I wrote to myself?" Pizarro explained that it was sometime in 2014, and that she had provided the relevant information to the Waterbury Police Department. Tremaine Williams, a resident of the condominium complex, testified on direct examination that, in 2014, he had performed work in relation to the condominium complex and that his relationship with "Mr. Rosario" was positive until he received letters from Pizarro that the accounts of the association were not balanced. On cross-examination and in response to a question from the defendant regarding the status of their friendship prior to 2015, Williams responded: "[W]e were friends. I'm the one [who] voted you . . . wanted [you] to be president." The defendant then asked whether Williams worked for him in 2014, and Williams responded in the affirmative. In light of questions and responses such as these, we do not see how the judge's questioning of Pizarro regarding the defendant's identity could have improperly influenced the outcome of the proceedings.

For the foregoing reasons, we conclude that the defendant has failed to demonstrate that a constitutional violation exists that deprived him of a fair trial. Accordingly, his claim fails under *Golding*'s third prong.

The judgment is affirmed.

In this opinion the other judges concurred.

HOUSING AUTHORITY OF THE CITY OF NEW LONDON *v.* BRUCE STEVENS (AC 43471)

Alvord, Clark and Norcott, Js.

Syllabus

The plaintiff housing authority sought, by way of summary process, to regain possession of certain premises leased to the defendant tenant. The plaintiff served on the defendant a notice to quit possession of the premises alleging that the defendant's conduct constituted a serious nuisance under the applicable statute (§ 47a-15 (B) and (C)). Thereafter, the plaintiff commenced this summary process action by serving on the defendant a summons and complaint. The defendant filed an answer and special defenses alleging, among other things, that he was entitled to an accommodation because of his psychiatric disability. Subsequently, the defendant filed a motion to dismiss for lack of subject matter jurisdiction because the plaintiff had not issued a pretermination notice. The trial court rendered judgment of possession in favor of the plaintiff on the basis of the defendant's violation of § 47a-15 (C) and denied the defendant's motion to dismiss, from which the defendant appealed to this court. *Held*:

1. The trial court had subject matter jurisdiction over this summary process action: the notice to quit issued by the plaintiff, which complied with statutory requirements (§ 47a-23), provided the court with jurisdiction over the plaintiff's claims; moreover, given that the plaintiff alleged that the defendant's conduct constituted a serious nuisance, the plain and unambiguous language of § 47a-15 made clear that the plaintiff was not required to serve a pretermination notice on the defendant, and, therefore, the lack thereof did not deprive the court of subject matter jurisdiction; furthermore, the court did not need to reach the merits of whether the defendant's conduct did, in fact, constitute a serious nuisance in order to exercise jurisdiction over this action.
2. The defendant could not prevail on his claim that the court improperly rendered judgment for the plaintiff because his acts or omissions did

not constitute a serious nuisance within the meaning of § 47a-15 (C): although the defendant claimed that the court's decision relied on a subordinate, erroneous finding that the defendant had harassed another resident, the court did not make that finding and, instead, made clear that its decision in favor of the plaintiff was based on the condition of the defendant's apartment; moreover, the record supported the court's conclusion that the condition of the defendant's apartment constituted a serious nuisance because it presented an immediate and serious danger to the safety of the other tenants.

3. The defendant's claims that the trial court made clearly erroneous factual findings regarding whether the plaintiff reasonably accommodated him and that the court's findings were the result of implicit bias were not reviewable, the defendant having failed to brief the claims adequately: the defendant's briefs before this court were completely devoid of any legal analysis, as his argument mostly restated portions of the record, without providing any context or explanation of how those facts supported or related to his legal claims; moreover, the defendant failed to explain why either of the two authorities that he cited, an Iowa criminal case and an American Bar Association publication, were instructive in light of the facts of this case, or how the specific findings he challenged were relevant to the court's judgment.

Argued September 21, 2021—officially released January 4, 2022

Procedural History

Summary process action, brought to the Superior Court in the judicial district of New London, Housing Session at Norwich, and tried to the court, *Hon. Francis J. Foley*, judge trial referee; judgment for the plaintiff, from which the defendant appealed to this court. *Affirmed.*

John L. Giulietti, for the appellant (defendant).

Lloyd L. Langhammer, for the appellee (plaintiff).

Opinion

CLARK, J. In this summary process action, the defendant, Bruce Stevens, appeals from the trial court's judgment of possession rendered in favor of the plaintiff, the Housing Authority of the City of New London. The defendant claims that the court (1) lacked subject matter jurisdiction because the plaintiff failed to deliver to

the defendant a pretermination, or *Kapa*,[1] notice prior to commencing its summary process action against him, (2) improperly found that his conduct constituted a serious nuisance within the meaning of General Statutes § 47a-15 (C), and (3) made certain factual findings that are not supported by the evidentiary record. We affirm the judgment of the trial court.

The record reveals the following facts and procedural history that are relevant to our resolution of the defendant's appeal. In 2013, the defendant entered into a written lease with the plaintiff for an apartment in a public housing complex for persons with disabilities and the elderly. In 2019, the defendant, an individual with psychiatric disabilities, was hospitalized on several occasions. On March 26, 2019, the police escorted the defendant from his apartment to an ambulance that took him to the Pond House, which is a behavioral health unit located within the Lawrence and Memorial Hospital. An officer involved in that incident subsequently informed Avalon LeBlanc, the plaintiff's property manager, that, given what the officer had observed while escorting the defendant from the apartment, the apartment should be condemned. Later that day, LeBlanc and a maintenance worker entered the defendant's apartment. LeBlanc took photographs of the hallway adjacent to the defendant's apartment door and the interior of his apartment.

The next day, March 27, 2019, the plaintiff served on the defendant a notice to quit possession. The notice to quit indicated, among other things, that the defendant wilfully caused substantial destruction to his dwelling unit by ripping up tiles from the floor, rendering appliances inoperable, clogging the sink and toilet, and filling the apartment with trash and other debris that had left the unit uninhabitable, constituting a serious nuisance

[1] *Kapa Associates* v. *Flores*, 35 Conn. Supp. 274, 408 A.2d 22 (1979).

in violation of § 47a-15 (B). The notice to quit also alleged that the defendant's conduct presented an immediate and serious danger to the safety of other tenants, constituting a serious nuisance in violation of § 47a-15 (C), because the defendant had harassed another resident and dragged bags of trash down the stairs and through common areas, leaving behind a trail of food and other refuse.[2]

On April 17, 2019, the plaintiff commenced this summary process action by serving on the defendant a summons and complaint. The complaint alleged two claims sounding in serious nuisance, which were identical to the allegations in the notice to quit.[3] Thereafter, the defendant filed an answer and special defenses and a motion to dismiss. The motion to dismiss asserted, inter alia, that the acts alleged in the notice to quit did not constitute a serious nuisance and that the trial court consequently lacked subject matter jurisdiction because the plaintiff had failed to issue the pretermination notice required in summary process actions when an eviction is based upon grounds other than serious nuisance or another exception set forth in § 47a-15. The plaintiff filed a memorandum in opposition to the

[2] General Statutes § 47a-15 provides in relevant part: "Prior to the commencement of a summary process action, *except* in the case in which the landlord elects to proceed under sections 47a-23 to 47a-23b, inclusive, to evict based . . . on conduct by the tenant which constitutes a serious nuisance . . . the landlord shall deliver a written notice to the tenant specifying the acts or omissions constituting the breach and that the rental agreement shall terminate upon a date not less than fifteen days after receipt of the notice. If such breach can be remedied by repair by the tenant or payment of damages by the tenant to the landlord, and such breach is not so remedied within such fifteen-day period, the rental agreement shall terminate . . . . For the purposes of this section, 'serious nuisance' means . . . (B) substantial and wilful destruction of part of the dwelling unit or premises [or] (C) conduct which presents an immediate and serious danger to the safety of other tenants or the landlord . . . ." (Emphasis added.)

[3] The complaint also alleged five counts for breach of the lease agreement. On the morning of trial, however, the plaintiff withdrew those counts.

defendant's motion to dismiss. All matters, including the defendant's motion to dismiss challenging the court's subject matter jurisdiction, were consolidated for trial, which commenced on October 1, 2019.

At trial, Virginia Watrous, a resident in the building and the head of the tenants association, testified that she was sitting in her apartment at approximately 8 o'clock one evening when she heard an "ungodly noise by [her] door." When she got up to investigate the noise, she noticed that someone had slipped a floor tile under her apartment door. About forty-five minutes later, she observed that another tile was being pushed under her door. When she opened the door, she saw the defendant standing against the wall across from her apartment. She subsequently filed with the property manager a written complaint in which she claimed that the defendant had scared her during that incident.

LeBlanc, the plaintiff's property manager, testified about what she observed when she inspected the defendant's apartment. She also described thirteen photographs of the defendant's apartment, which were entered into evidence. LeBlanc stated that the defendant had thrown garbage in the hallway outside of his apartment. The trash was strewn about, the floor was wet, and bags of garbage impeded an exit, which presented a safety concern. According to LeBlanc, the interior of the apartment was filthy and had a very bad odor; something had been smeared all over the walls; dishes containing spoiled food were scattered throughout the apartment; there were piles of soggy bags of trash; rotting food and grease covered the oven, stove and kitchen walls, which presented a fire hazard; the kitchen sink was clogged and full of greasy, dirty water and dishes; the toilet was unusable because multiple household items had been stuffed into the bowl; and there was standing water on the bathroom floor. LeBlanc further testified that she had to step over bags

of garbage and there was no clear pathway through the apartment. The defendant's personal belongings were in disarray and were stacked four feet high in some places, "similar to . . . a hoarding situation." Additionally, the smoke alarms were inoperable because the batteries had been removed, floor tiles had been ripped up from the entryway to the kitchen, and the refrigerator was not working because the circuit breaker had been tripped. LeBlanc also testified that the defendant never submitted maintenance requests to report any of these issues.

The defendant testified at length about his physical and mental health issues. He claimed that he had picked up tiles that had come loose from his floor because he is diabetic and did not want to cut his feet. He only placed the tiles under Watrous' door to make a maintenance complaint.

On October 4, 2019, following the close of evidence, the court issued its memorandum of decision. With respect to count one of the plaintiff's complaint alleging a serious nuisance in violation of § 47a-15 (B), the court found that the plaintiff failed to prove that the defendant substantially or wilfully had destroyed part of his apartment and rendered judgment in favor of the defendant. With respect to the second count alleging a serious nuisance in violation of § 47a-15 (C), the court found that the condition of the apartment presented "an immediate and serious danger to the safety of other tenants of the building." Accordingly, the court rendered judgment of possession in favor of the plaintiff. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant's first claim is that, because his conduct did not constitute a serious nuisance within the meaning of § 47a-15 (C), the plaintiff's failure to serve

him with a pretermination notice deprived the court of subject matter jurisdiction. The plaintiff counters that no pretermination notice was required because the plaintiff had alleged that the defendant had created a serious nuisance within the meaning of § 47a-15 (C).[4] We agree with the plaintiff.

We begin by setting forth our standard of review and a brief overview of the statutory scheme that governs summary process actions. "[S]ummary process is a special statutory procedure designed to provide an expeditious remedy. . . . It enable[s] landlords to obtain possession of leased premises without suffering the delay, loss and expense to which, under the common-law actions, they might be subjected by tenants wrongfully holding over their terms. . . . Summary process statutes secure a prompt hearing and final determination. . . . Therefore, the statutes relating to summary process must be narrowly construed and strictly followed." (Internal quotation marks omitted.) *Bayer* v. *Showmotion, Inc.*, 292 Conn. 381, 388, 973 A.2d 1229 (2009).

"Pursuant to § 47a-15, before a landlord may proceed with a summary process action, *except in those situations specifically excluded*, the landlord must first deliver a [pretermination] notice to the tenant specifying the alleged violations . . . ." (Emphasis added; internal quotation marks omitted.) *Josephine Towers, L.P.* v. *Kelly*, 199 Conn. App. 829, 836, 238 A.3d 732, cert. denied, 335 Conn. 966, 240 A.3d 281 (2020). A pretermination notice provides the tenant with an opportunity to remedy the violations and avoid a summary eviction. *St. Paul's Flax Hill Co-operative* v. *Johnson*, 124 Conn. App. 728, 734–35, 6 A.3d 1168 (2010), cert. denied, 300 Conn. 906, 12 A.3d 1002 (2011). When a "landlord elects to proceed under sections 47a-23 to

[4] The plaintiff did not cross appeal the court's judgment against it on count one of its complaint alleging a serious nuisance under § 47a-15 (B).

47a-23b, inclusive, to evict based on . . . conduct by the tenant which constitutes a serious nuisance"; General Statutes § 47a-15; however, a pretermination notice is not required.. Section 47a-15 defines " 'serious nuisance' " in relevant part as "(B) substantial and wilful destruction of part of the dwelling unit or premises [or] (C) conduct which presents an immediate and serious danger to the safety of other tenants . . . ."

In the present case, the notice to quit alleged that the plaintiff was terminating the defendant's tenancy because his conduct constituted a serious nuisance under § 47a-15 (B) and (C). The plain and unambiguous language of § 47a-15 makes clear that the plaintiff was therefore not required to issue the defendant a pretermination notice. It unequivocally provides that a pretermination notice is not required when the landlord seeks to evict, pursuant to §§ 47a-23 to 47a-23b, inclusive, based on circumstances constituting a serious nuisance. See *Cardinal Realty Investors, LLC* v. *Bernasconi*, 287 Conn. 136, 138 n.3, 946 A.2d 1242 (2008) ("[b]ecause the plaintiff alleged that the conditions in the defendant's room constituted a serious nuisance, the provisions of § 47a-15 requiring . . . a [pretermination] notice . . . did not apply"). When a landlord seeks to recover possession of leased property on the basis of a serious nuisance, "[a] landlord may simply serve a notice to quit alleging serious nuisance and, if appropriate, move to the next step." (Footnote omitted.) *Josephine Towers, L.P.* v. *Kelly*, supra, 199 Conn. App. 837.

Notwithstanding the plain language of § 47a-15, the defendant claims that, under the specific facts of this case, he was entitled to a pretermination notice and the lack thereof deprived the court of subject matter jurisdiction. His claim is premised entirely upon his contention that his conduct did not constitute a serious nuisance within the meaning of § 47a-15. The defendant,

however, mistakenly conflates the court's subject matter jurisdiction with the merits of the plaintiff's summary process claim.

"[B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *Housing Authority* v. *Rodriguez*, 178 Conn. App. 120, 126, 174 A.3d 844 (2017). "Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . ." (Internal quotation marks omitted.) *Hlinka* v. *Michaels*, 204 Conn. App. 537, 540–41, 254 A.3d 361 (2021).

"There is no doubt that the Superior Court is authorized to hear summary process cases; the Superior Court is authorized to hear all cases except those over which the probate courts have original jurisdiction. . . . The jurisdiction of the Superior Court in summary process actions, however, is subject to [certain] condition[s] precedent." (Citation omitted; internal quotation marks omitted.) *Presidential Village, LLC* v. *Perkins*, 332 Conn. 45, 56, 209 A.3d 616 (2019). "Our Supreme Court has stated that [a]s a condition precedent to a summary process action, proper notice to quit is a jurisdictional necessity. . . . Simply put, before a landlord may pursue its statutory remedy of summary process, the landlord must prove compliance with all of the applicable preconditions set by state and federal law for the termination of the lease." (Internal quotation marks omitted.) *Housing Authority* v. *Brown*, 129 Conn. App. 313, 317, 19 A.3d 252 (2011).

In general, the conditions that must be met prior to the commencement of a summary process action are

set forth in § 47a-23.[5] To invoke the court's subject matter jurisdiction over a summary process action, a landlord must therefore, at a minimum, prove compliance with § 47a-23, which requires a landlord seeking to terminate a lease or rental agreement for serious nuisance to deliver to the occupant or lessee a notice to quit possession. In contrast to a pretermination notice, which provides the tenant with an opportunity to remedy violations and does not terminate a tenancy, "service of a notice to quit possession pursuant to § 47a-23 is typically an unequivocal act terminating a lease agreement with a tenant." *St. Paul's Flax Hill Co-op* v. *Johnson*, supra, 124 Conn. App. 735. The notice to quit must be in writing, notify the tenant that the tenant must quit possession or occupancy of the premises on a specified date, include the address of the property, and state "the reason or reasons for the notice to quit possession or occupancy using the statutory language or words of similar import." General Statutes § 47a-23 (b).

[5] General Statutes § 47a-23 (a) provides in relevant part: "When the owner or lessor . . . desires to obtain possession or occupancy of any land or building, [or] any apartment in any building . . . and (1) when a rental agreement or lease of such property, whether in writing or by parol, terminates for any of the following reasons . . . (G) nuisance, as defined in section 47a-32, or serious nuisance, as defined in section 47a-15 . . . such owner or lessor . . . shall give notice to each lessee or occupant to quit possession or occupancy of such land, building, [or] apartment . . . at least three days before the termination of the rental agreement or lease, if any, or before the time specified in the notice for the lessee or occupant to quit possession or occupancy."

Section 47a-23 (b) prescribes the form of the notice to quit. It provides in relevant part that the notice shall be in a writing that substantially follows this template: "I (or we) hereby give you notice that you are to quit possession or occupancy of the (land, building, apartment . . .), now occupied by you at (here insert the address, including apartment number . . . as applicable), on or before the (here insert the date) for the following reason (here insert the reason or reasons for the notice to quit possession or occupancy using the statutory language or words of similar import, also the date and place of signing notice). . . ." (Internal quotation marks omitted.) General Statutes § 47a-23 (b).

It follows that, for purposes of determining whether it had subject matter jurisdiction over the plaintiff's summary process action, the court in the present case needed to determine only whether the notice to quit issued by the plaintiff complied with § 47a-23. The court did not need to reach the merits of whether the defendant's conduct did, in fact, constitute a serious nuisance in order to exercise jurisdiction over this action.

"[T]o establish subject matter jurisdiction, the court must determine that it has the power to hear the general class [of cases] to which the proceedings in question belong." (Internal quotation marks omitted.) *Lampasona* v. *Jacobs*, 209 Conn. 724, 728, 553 A.2d 175, cert. denied, 492 U.S. 919, 109 S. Ct. 3244, 106 L. Ed. 2d (1989). Although, in certain cases, "it is necessary to examine the facts of the case to determine whether it is within a general class that the court has power to hear"; id.; see, e.g., id., 730 (whether notice was proper required inquiry into defendant's status as resident of mobile home park to determine which summary process provision controlled); *Colonial Investors, LLC* v. *Furbush*, 175 Conn. App. 154, 165, 167 A.3d 987 (whether court lacked jurisdiction because notice to quit was defective for failure to state properly total rent owed required examination of facts), cert. denied, 327 Conn. 968, 173 A.3d 953 (2017); this is not such a case. The plaintiff commenced this summary process action on the grounds that the defendant's conduct constituted a serious nuisance within the meaning of § 47a-15 (B) and (C). Its notice to quit included the requisite language set forth in § 47a-23 (b), and the defendant did not claim that the notice to quit was otherwise defective in form or delivery. Accordingly, the plaintiff's undisputed compliance with the requirements of § 47a-23 provided the court with subject matter jurisdiction over the plaintiff's claims.

II

The defendant also claims that the court improperly rendered judgment for the plaintiff because his acts or omissions did not constitute a serious nuisance within the meaning of § 47a-15 (C). We disagree.

"[T]he existence of a nuisance generally is a question of fact, for which we invoke a clearly erroneous standard of review . . . ." (Internal quotation marks omitted.) *Sproviero* v. *J.M. Scott Associates, Inc.*, 108 Conn. App. 454, 467, 948 A.2d 379, cert. denied, 289 Conn. 906, 957 A.2d 873 (2008). "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. . . . Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Internal quotation marks omitted.) *Fairchild Heights, Inc.* v. *Dickal*, 118 Conn. App. 163, 169, 983 A.2d 35 (2009), aff'd, 305 Conn. 488, 45 A.3d 627 (2012).

Additionally, the trial court, "as the sole arbiter of credibility, is free to accept or reject, in whole or in part, the testimony offered by either party." (Internal quotation marks omitted.) *Housing Authority* v. *Brown*, supra, 129 Conn. App. 316. It is "the court's exclusive province to weigh the conflicting evidence [and] determine the credibility of witnesses . . . . Thus, if the court's dispositive finding . . . was not clearly erroneous, then the judgment must be affirmed. . . . The function of the appellate court is to review,

and not retry, the proceedings of the trial court." (Internal quotation marks omitted.) *Sullivan* v. *Lazzari*, 135 Conn. App. 831, 846, 43 A.3d 750, cert. denied, 305 Conn. 925, 47 A.3d 884 (2012).

The second count in the plaintiff's complaint alleged in relevant part that the defendant was "in violation of . . . § 47a-15 (C), which defines 'serious nuisance' as 'conduct which presents an immediate and serious danger to the safety of other tenants . . . .' Specifically . . . the defendant harassed another resident; this includes the defendant repeatedly placing a floor tile under [Watrous'] door and then confronting her when she questioned him about it. The defendant also dragged bags of trash from his apartment down two flights of stairs to the exterior of the building, trailing food and other refuse the entire way. These actions displayed by the defendant threaten the safety of other tenants . . . ."

The defendant claims that the court improperly found that his conduct was "an immediate and serious danger to the safety of the other tenants" because that finding relied upon a subordinate, erroneous finding that the defendant had harassed Watrous. The court never made any findings about whether the defendant harassed Watrous, however. Rather, in its memorandum of decision, the court merely summarized Watrous' testimony about the defendant placing tiles under her door. The court did not conclude that the defendant, in fact, harassed Watrous or that this conduct was essential to its finding that the defendant's conduct amounted to a serious nuisance under § 47a-15 (C). On the contrary, the court's decision makes clear that its finding in favor of the plaintiff on count two was based on the condition of the defendant's apartment, not the defendant's conduct toward Watrous.

The record supports the court's conclusion that the condition of the apartment constituted a serious nuisance because it presented an immediate and serious danger to the safety of the other tenants. In addition to the thirteen photographs of the defendant's apartment that were entered into evidence, the court heard from LeBlanc, who testified that there were piles of garbage and dishes with rotten food scattered throughout the apartment, both the sink and toilet were inoperable because they were clogged, and the oven and stove were covered in grease, which presented a fire hazard. There was ample evidence, therefore, to support the court's conclusion that the condition of the apartment was "squalid, unsanitary, and a public health threat to the other tenants," which presented an immediate and serious danger to the safety of the other tenants. Consequently, the court's finding that the defendant's conduct constituted a serious nuisance pursuant to § 47a-15 (C) was not clearly erroneous.

III

Although difficult to discern from his brief, the defendant also appears to challenge certain factual findings as clearly erroneous and claims, without support, that two of the court's findings indicate that the court was implicitly biased against him. We decline to review these claims because he did not adequately brief them.

The following additional procedural background provides the necessary context for consideration of the defendant's claims. After filing this appeal, the defendant filed a motion for articulation of the court's decision. Specifically, he sought articulation of the court's finding that the plaintiff had reasonably accommodated the defendant during the months of January through May, 2019. The court's finding in this respect apparently related to the defendant's special defense alleging that,

because of his disability, he was entitled to an accommodation by way of additional time to prepare for a reinspection of his apartment.[6] After the trial court denied the motion for articulation, the defendant sought review in this court. We granted review and ordered the court to articulate the factual and legal basis for its determination that the defendant was reasonably accommodated. The court issued its articulation on February 6, 2020, explaining that, although there was no evidence in the record that the defendant ever had requested a reasonable accommodation, the plaintiff nonetheless had attempted to accommodate the defendant.

On appeal, the defendant has not raised a claim under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (2018), or any other state or federal law or regulation affording protections to an individual with disabilities. Instead, he challenges as erroneous the court's finding that he was reasonably accommodated and claims that the court engaged in implicit bias against him as a person with disabilities. His briefs before this court, however, are completely devoid of any legal analysis. The defendant's argument mostly restates portions of the record, without providing any context or explanation of how those facts support or relate to his legal claims. The only authorities he cites are an Iowa criminal case discussing a defendant's request for an implicit bias jury instruction and an American Bar Association publication about implicit biases and disabilities. The defendant has failed to explain why either authority is instructive in light of the facts of this case or how the specific findings he challenges are relevant to the court's judgment.

[6] On April 2, 2019, six days after it served the defendant with the notice to quit, the plaintiff apparently attempted to deliver to the defendant a letter notifying the defendant that he had failed his apartment inspection on March 26, 2019, and that his apartment was scheduled for a reinspection on April 18, 2019.

Our appellate courts consistently have held that "[a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 803, 256 A.3d 655 (2021); see also *Kelib* v. *Connecticut Housing Finance Authority*, 100 Conn. App. 351, 353, 918 A.2d 288 (2007). Where a party cites no law and provides no analysis in support of a claim, we decline to review it. *State* v. *Holmes*, 176 Conn. App. 156, 185, 169 A.3d 264 (2017), aff'd, 334 Conn. 202, 221 A.3d 407 (2019). We therefore do not address the defendant's claims concerning whether he was reasonably accommodated or that the court's findings were the result of implicit bias.

The judgment is affirmed.

In this opinion the other judges concurred.

KLEBER GONZALO LOJA LASSO, ADMINISTRATOR (ESTATE OF LUIS ALBARO ORTEGA ORTEGA), ET AL. *v.* VALLEY TREE AND LANDSCAPING, LLC, ET AL.
(AC 43813)

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

Syllabus

The plaintiffs, the administrator of the estate of the decedent, O, and O's wife, C, sought to recover damages from the defendant G Co., a construction manager, for the wrongful death of O and for loss of consortium on behalf of C, in connection with the death of O as he was using an excavator to remove trees from certain premises. G Co. had been awarded a contract with the borough of Naugatuck for a project to renovate a high school. Subsequently, the building committee for the borough determined that additional borough funds could be used to remove trees near an upper parking lot that were adjacent to, but not a part of, the grounds where the high school renovation project was taking place. At the request of the building committee, G Co.'s project director solicited bids from two companies and went to the site to point

out trees that were flagged for removal by the building committee. The building committee then voted to award the tree removal work to the defendant V Co. O was an employee of V Co. The trial court granted G Co.'s motion for summary judgment as to the plaintiffs' claims, finding that there was no genuine issue of material fact that G Co. was not contractually obligated to have the control or responsibility for the supplemental work of overseeing any separate contractors, including V Co., and that there was no genuine issue of material fact that G Co. did not owe a duty to V Co. or its employees for the safety issues alleged in the complaint, and thus, did not owe a duty of care to O. *Held* that the trial court's determination that the provisions of the contract between G Co. and the borough did not give rise to a duty owed by G Co. to V Co. and its employees was legally and logically correct and supported by the language of the contract: the contract language was clear and unambiguous in the description of the project area, the extent of the project, and the work for which G Co. had the duty to perform, the court correctly determined that the plaintiffs, in their opposition to the motion for summary judgment, did not submit any admissible evidence demonstrating that G Co.'s responsibilities under the contract extended to the tree removal work, the plaintiffs' reliance on the representations made by G Co. in its bid, which was incorporated into the contract, was misplaced, as those representations related to G Co.'s responsibilities for work done within the area included for the renovation project, the tree removal work occurred in an area that was not within the scope of the project covered by the contract and the contractual language did not designate the tree removal work as part of G Co.'s management duties; moreover, the plaintiffs could not prevail on their alternative claim that G Co., through its actions, assumed a voluntary duty of care to O, and that its actions gave rise to a common-law duty to ensure safe workplace practices, as the plaintiffs failed to present any evidence of conduct on the part of G Co. demonstrating that it was in charge of the project to remove the trees or in any way directed the activities of the employees of V Co.; furthermore, C's loss of consortium claim necessarily failed because it was derivative of the negligence claim on which the court properly rendered summary judgment.

Argued October 4, 2021—officially released January 4, 2022

Procedural History

Action to recover damages for the wrongful death of the named plaintiff's decedent as a result of the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Brazzel-Massaro*, *J.*, granted the motion for summary judgment filed by the

defendant O & G Industries, Inc., from which the plaintiffs appealed to this court. *Affirmed.*

Jeffrey I. Carton, for the appellants (plaintiffs).

Michael S. Lynch, with whom, on the brief, was *Nicole A. Carnemolla*, for the appellee (defendant O & G Industries, Inc.).

Opinion

HARPER, J. The plaintiffs, Kleber Gonzalo Loja Lasso, as administrator of the estate of the decedent, Luis Albaro Ortega Ortega (Ortega), and Marcia Del Lourdes Gualan Coronel (Coronel), appeal from the judgment of the trial court granting the motion of the defendant O & G Industries, Inc. (O & G), for summary judgment as to counts four and five of the revised complaint, which alleged claims against O & G for the wrongful death of Ortega pursuant to General Statutes § 52-555 and for loss of consortium on behalf of Coronel, who was married to Ortega at the time of his death.[1] On appeal, the plaintiffs claim that the court improperly granted the motion for summary judgment filed by O & G because (1) issues of material fact existed concerning O & G's responsibility for ensuring safe workplace practices with respect to certain tree removal work performed by the defendant Valley Tree and Landscaping, LLC (Valley Tree), and (2) the court erred in failing to find, pursuant to a construction contract between O & G and the borough of Naugatuck (borough), that O & G owed a duty of care to Valley Tree and, hence, to Ortega. The plaintiffs also claim that the court improperly rendered summary judgment as to Coronel's loss of consortium claim against O & G, which was derivative

[1] In the original complaint, Coronel also alleged claims as parent and natural guardian of her three minor children with Ortega for loss of parental consortium. After motions to strike those counts were filed, the plaintiffs did not object and agreed to withdraw the claims.

of the negligence claim against O & G. We disagree and affirm the judgment of the trial court.

The record before the court, viewed in the light most favorable to the plaintiffs, reveals the following relevant facts and procedural history. In 2011, O & G was awarded a contract with the borough to act as construction manager for a project to renovate Naugatuck High School in 2012 (renovation project). In 2015, the building committee for the borough determined that additional borough funds could be used to remove trees near an upper parking lot for aesthetic purposes and to improve the viewing of fields for sporting events. The parking lot and trees to be removed were adjacent to, but not a part of, Naugatuck High School grounds where the renovation project was taking place. Two members of the building committee viewed the site to determine which trees to remove, and those trees were flagged by the building committee members. At the request of the building committee, Joseph Vetro, O & G's project director, solicited bids from two companies and went to the site with representatives from those companies in order to point out the trees that were flagged for removal by the building committee. After the bids were submitted, the building committee voted to award the tree removal work to Valley Tree, issued a purchase order to Valley Tree for the tree removal work and sent an e-mail to the owner of Valley Tree accepting its bid. On December 16, 2015, Ortega was working for Valley Tree operating a mini excavator to remove trees from the upper parking lot area. The mini excavator had no door and there was no glass in the front and right-hand side windows. While performing that work, Ortega stood up to remove some branches near the right side window when the boom arm of the mini excavator suddenly came down, crushing him. He died as a result of the significant internal injuries he sustained in the accident.

In their revised complaint, the plaintiffs alleged in count four that "[t]he mini excavator operated by Ortega was in a dangerous and defective condition in that it was missing several protective window enclosures that were designed not to open, thereby preventing its operator, including Ortega, from accessing any area where the operator may come into contact with the boom arms of the mini excavator." The revised complaint further alleged that the protective window enclosures had been missing from the mini excavator for approximately one month prior to Ortega's accident and that, as a result, it was operated by Valley Tree in a hazardous condition. The revised complaint also alleged that O & G, in its role as construction manager, "oversaw the entire renovation project," and that, "[b]ecause of its role as construction manager, O & G had numerous duties, which include[d], but [were] not . . . limited to, the following: managing the construction; coordinating the construction; conducting daily or other periodic inspections of the renovation site to monitor conditions at the site; ensuring that the construction at the site was performed in a safe and proper manner; ensuring that contractors at the site performed their work in compliance with federal and/or Connecticut workplace safety standards and regulations; obtaining satisfactory performance from contractors at the site; notifying the owner of the property of any hazardous or dangerous conditions; assisting the owner of the property in arranging for contractors to actually perform the construction work; ensuring that contractors at the site are coordinated; monitoring the field activities of each contractor at the site; and recommending courses of action to the owner of the property with respect to failures in the performance of the contractors at the site."

According to the allegations of count four of the revised complaint, O & G was negligent, inter alia, in

failing (1) "to prevent Ortega from operating the mini excavator that was in a hazardous condition," (2) "to observe and detect that Valley Tree was performing its work in an unsafe and hazardous manner" and to stop Valley Tree from doing so, (3) to monitor the construction site and to secure a safe workplace, and (4) to exercise reasonable care in fulfilling its duties as the construction manager for the project. In count five of the revised complaint, Coronel, based on the same allegations in count four, alleged a claim against O & G for loss of consortium.

On October 2, 2018, following the completion of discovery, O & G filed a motion for summary judgment as to counts four and five of the revised complaint, claiming that "[a] wrongful death claim based on negligence against O & G . . . [could not] be maintained as a matter of law since . . . O & G owed no duty to the plaintiffs," and that no genuine issues of material fact existed. Specifically, in its memorandum of law in support of its motion for summary judgment, O & G claimed that "[t]he scope of [its] duties and obligations as construction manager for the work performed on the [renovation] project [was] limited to those [duties and obligations] set forth in its contract with the borough," and that it had no independent duty or obligation to perform tasks or services for the project apart from the duties and obligations set forth in the contract, which was devoid of any reference to the tree removal work performed by Valley Tree in the upper parking lot adjacent to the high school grounds. Moreover, O & G asserted that "there [was] no change order or other amendment [to its contract with the borough] that ever brought such work within [its] contractual scope of work."

In further support of its claim that it owed no legal duty to Ortega, O & G argued that (1) "[i]t [was] undisputed that the borough directly hired Valley Tree to

perform tree removal work in an area outside the contract limit line established in O & G's contract," (2) "O & G never exercised any dominion, rights or control over that area, nor did it ever contractually agree to oversee, direct, manage or supervise any of Valley Tree's work," and (3) "Valley Tree worked independently, utilizing its own equipment, machinery, manpower, and means and methods to perform the work contracted by the borough, completely outside O & G's scope of work." Finally, given its claim that the negligence count was insufficient as a matter of law, O & G argued that the loss of consortium claim, which was a derivative claim and not a separate cause of action, necessarily failed as well.

On December 17, 2018, the court, *Brazzel-Massaro*, *J.*, heard arguments on the motion for summary judgment. On January 9, 2020, the court issued a comprehensive memorandum of decision granting O & G's motion for summary judgment. In its decision, the court explained that "[t]he sole issue raised in opposition to the [motion for] summary judgment is whether the argument that the deposition testimony of various [borough] officials, the construction manager and the owner of Valley Tree, as well as the contract documents support a duty owed by O & G." In granting the motion for summary judgment, the court analyzed the contractual provisions, the actions of O & G in working on the renovation project, the deposition "testimony of the various officials of the [borough], the construction manager and the owner of Valley Tree . . . as to the implementation of the contractual provisions and the operation of the project by O & G," and "the circumstances surrounding the hiring of Valley Tree for removal of the trees, including the bidding, the award of the bid, and the actions thereafter in accordance with the contract."

The court ultimately concluded that "the plaintiffs have [presented] no evidence or testimony that would create a duty as to O & G or any of its employees because the facts demonstrate that there is no genuine issue of fact that (1) the area of the work by Valley Tree was not a part of the construction limit line defined for the contractual obligations of O & G; (2) the contract clearly defines and establishes the duties and responsibilities of O & G as the construction management group for the [renovation project]; (3) the tree removal work was not work included in the contract [to renovate] . . . Naugatuck High School; (4) O & G was not responsible to oversee the work of trade contractors who were not hired by them or for whom they did not enter into a change order with the borough or board of education and their representatives in accordance with the contract documents; (5) there were no change orders for any tree removal work or responsibilities entered into by O & G as part of the contract; (6) O & G did not amend the contract by its actions of following the request by the building committee and assisting them in walking the property with Valley Tree but [was] coordinating in accordance with the contract provisions; (7) the only coordination by O & G was the timing of the work by Valley Tree to fit within the timeline for completing the work and not interfering with the contractors doing work with O & G; and (8) the funding for the tree removal was not part of the budget under O & G's control that had been approved for the [renovation project]. The funds for the tree removal were from a separate account for supplemental work.

"Based upon the foregoing, there is no genuine issue of fact that O & G was not contractually obligated to have the control or responsibility for the supplemental work of overseeing any separate contractors, including Valley Tree, by change order or otherwise. Thus, there is no genuine issue of fact that . . . O & G has a duty

to Valley Tree or [its] employees for the safety issues alleged in the complaint." From the summary judgment rendered in favor of O & G, the plaintiffs appealed. Additional facts and procedural history will be set forth as necessary.

Before we address the plaintiffs' claims on appeal, we set forth the relevant legal principles and our well settled standard of review of a court's ruling on a motion for summary judgment. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . 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 [fact] 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." (Internal quotation marks omitted.) *Augustine* v. *CNAPS, LLC*, 199 Conn. App. 725, 728–29, 237 A.3d 60 (2020).

"[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." (Internal quotation marks omitted.) Id., 733. "Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Cuozzo* v. *Orange*, 178 Conn. App. 647, 655, 176 A.3d 586 (2017),

cert. denied, 328 Conn. 906, 177 A.3d 1159 (2018). "When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]." (Internal quotation marks omitted.) *Belevich* v. *Renaissance I, LLC*, 207 Conn. App. 119, 124, 261 A.3d 1 (2021).

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. . . . Contained within the first element, duty, there are two distinct considerations. . . . First, it is necessary to determine the existence of a duty, and [second], if one is found, it is necessary to evaluate the scope of that duty. . . . The issue of whether a duty exists is a question of law . . . which is subject to plenary review. . . .

"Issues of negligence are ordinarily not susceptible of summary adjudication but should be resolved by trial in the ordinary manner. . . . Nevertheless, [t]he issue of whether a defendant owes a duty of care is an appropriate matter for summary judgment because the question is one of law." (Citation omitted; internal quotation marks omitted.) *Goody* v. *Bedard*, 200 Conn. App. 621, 631, 241 A.3d 163 (2020). Moreover, "[a] duty to use care may arise from a contract . . . ." (Internal quotation marks omitted.) *Carrico* v. *Mill Rock Leasing, LLC*, 199 Conn. App. 252, 262, 235 A.3d 626 (2020).

In the present case, the court, in granting O & G's motion for summary judgment, examined the contractual provisions contained in the contract between O & G and the borough, and determined, on the basis of those provisions, that O & G did not owe a duty of care to Ortega. "Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact [subject to the clearly erroneous standard of review] . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary]." (Internal quotation marks omitted.) *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 403, 219 A.3d 801 (2019), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020), and cert. denied, 334 Conn. 911, 221 A.3d 446 (2020). To the extent that the plaintiffs' claims on appeal are directed at the court's interpretation of the contract between O & G and the borough, "our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) Id.

We first address the plaintiffs' claim that the court improperly determined that the contract between O & G and the borough did not give rise to a legal duty owed by O & G to Valley Tree and its employees. According to the plaintiffs, the contract "created an obligation for O & G to supervise and control Valley Tree's work," and its express terms compelled "the conclusion that O & G owed Valley Tree and its employees a duty of care." We are not persuaded.

In its thorough and well reasoned decision, the court first examined in great detail the contractual provisions at issue in determining the duties of O & G under its contract with the borough. Its findings in connection therewith can be summarized as follows. There were

two contractual documents that specified the parameters of the contract and the duties of O & G, which also contained provisions relating to safety, insurance and performance with respect to the renovation project. To determine the site for the work that was within the scope of the renovation project, the court also examined the site plan, which provided the footprint of the work for the renovation, as well as an outline of the property included within the project. The court explained that O & G "contends that the scope of the project which they were contracted to oversee as the construction management company did not include the area" where the tree removal was to be performed, which O & G claimed was "outside of the construction limits." The plaintiffs, on the other hand, relied on a proposal[2] that was submitted by O & G in its bid for the renovation project as defining the duties of the construction manager. The court, however, concluded that "contrary to the plaintiffs' contentions [the proposal] not change the duties set forth in the contract."

As the court explained: "The testimony and evidence clearly demonstrate that the area included in the . . . project for which O & G was the construction manager is restricted to the area in the site drawings," which does not include the area near the upper parking lot where the tree removal was performed. Although the

[2] In the proposal, O & G made the following representations: O & G's field "team will coordinate the efforts of all of the trade contractors and maintain a safe and secure worksite that does not disrupt the educational process of the Naugatuck High School"; "[i]t is our intent to deliver this project assuring a safe environment for all and with minimal disturbance to the educational function of the building"; "[w]e expect zero accidents and injuries on all of our projects [and] [a]ll of our safety planning is based upon this goal, and we actively encourage all workers on the site to participate and follow the safety guidelines"; "[e]veryone involved with O & G is responsible for preserving health and safety [and] [t]he success of this safety program depends on the full participation of every employee, subcontractor, manager and vendor"; and the project manager for O & G will "[c]oordinate and monitor safety and security programs as conditions dictate."

area where the trees were removed is owned by the borough, it was never considered part of the high school grounds, and, thus, "the tree removal work was scheduled for an area never within the project area noted by O & G and the borough. . . . The site plan does . . . outline the area to be renovated as part of the work that is managed by O & G. Nowhere on the plan is there a notation which includes the area for this tree removal as part of the work or project. Additionally, the contractual language, contrary to the plaintiffs' assertions, does not designate this work as part of the management duties of O & G."

With respect to the plaintiffs' claim that O & G, as the construction manager, was responsible for the safety of *all* contractors and subcontractors, the court found that the contract documents provide otherwise in that they "[reserve] the right [for the owner] to perform construction [and] operations related to the project with the owner's own forces, and to award separate contracts in connection with other portions of the project or other construction or operations on the site . . . ." (Internal quotation marks omitted.) On the basis of the contractual provisions, the court found that the parties "intended that there would be subcontractors outside of the work supervised by the construction manager and that would not be within the responsibility of O & G, but which may need to be 'coordinated' with the work that O & G did supervise. This interpretation is exactly the situation existing with the bid acceptance for the supplemental tree removal work by Valley Tree. Not only is this work not included within the scope of work defined in sections E and F of the [renovation] project, but the process of awarding the work to Valley Tree supports the position of O & G." The court, thus, found that "the borough could hire separate contractors as it did in this situation, and it would be responsible for supervising and directing the work, including jobsite

safety." That determination was supported by the deposition testimony of the business manager for the borough, who controlled the expenditures, that "the removal of the trees was not tied into the work by O & G," that it "wasn't part of the original scope of the project," that it "was added as an item to be part of the scope of the Naugatuck High School renovation project," and that it "was under the borough's project." (Internal quotation marks omitted.) The court found that the testimony of the business manager for the borough "confirmed that Valley Tree was hired directly by the borough." (Internal quotation marks omitted.) The court also relied on the deposition testimony of the owner of Valley Tree that he had received an e-mail or letter from the borough stating that the borough was hiring Valley Tree to remove the trees, that he understood that he was working for the borough, and that he did not receive any written approvals or directives from O & G.

Finally, in rejecting the plaintiffs' claim that O & G had a duty by virtue of its obligation to provide a safe work environment under the contract, the court stated: "Although the contract provides a clear duty for certain aspects of safety during the term of the [high school renovation] project and within the scope of the project and the site, this duty is defined by the contract and the site plan drawings. . . . The plaintiffs have expanded th[e] safety aspects of the work to include work outside of the physical boundaries of the proposed project and oversight which is not clearly set forth in the contract language." (Citation omitted.) The court, thus, found that the plaintiffs "espouse[d] an incorrect interpretation of [the deposition] testimony and the safety responsibilities of O & G." Ultimately, the court concluded that there was nothing in the contract that required O & G to "inspect the equipment or procedures

for contractors that were hired by the building committee to do work outside of the site, contract and [certain safety] proposals [submitted by O & G in its bid for the work]."

We conclude that the court's determination that the contract between O & G and the borough did not give rise to a duty owed by O & G to Valley Tree and its employees was legally and logically correct and supported by the language of the contract. After thoroughly examining the provisions of the contract, we agree with the court that they are "clear and unambiguous in the description, the extent of the project, and the work for which O & G [had] the duty to perform." Consequently, the court correctly determined that they simply did not support the plaintiffs' claims or suggested interpretation.

Because O & G, as the party moving for summary judgment, met its burden of proving the absence of any genuine issue of material fact as to the issue of whether the contract created a duty owed by O & G to Ortega, it was incumbent on the plaintiffs to present evidence demonstrating the existence of a disputed issue of material fact. See *Belevich* v. *Renaissance I, LLC*, supra, 207 Conn. App. 124. The court, however, found that the plaintiffs, in their opposition to the motion for summary judgment, did not submit any admissible evidence demonstrating that O & G's responsibilities under the contract extended to the tree removal work. We agree with the court's determination. The plaintiffs' reliance on the representations made by O & G in its bid, which was incorporated into the contract, to create a duty by O & G for the tree removal work is misplaced, as those representations related to O & G's responsibilities for work done within the area included in the renovation project, and the tree removal work occurred in an area that was not within the scope of the project covered

by the contract, nor does the contractual language designate the tree removal work as part of O & G's management duties.

The plaintiffs alternatively argue that O & G, through its actions, assumed a voluntary duty of care to Ortega. Specifically, the plaintiffs argue that O & G's actions gave rise to a common-law duty to ensure safe workplace practices and that the court erred in failing to address the existence of such a common-law duty. According to the plaintiffs, "O & G took upon itself to control and direct Valley Tree's work, and as a consequence thereof, owed a duty to Ortega."[3] Moreover, the plaintiffs claim that the court, in finding no duty, improperly decided issues of disputed fact. Specifically, they argue that because questions of fact existed as to the extent of O & G's control over Valley Tree, the motion for summary judgment should have been denied. We disagree.

In its memorandum of decision, the court found that, "[a]t the request of the building committee . . . Vetro . . . [O & G's] project director, contacted the two tree

[3] Specifically, the plaintiffs claim that "O & G directed Valley Tree's work in the following ways: [1] O & G told Valley Tree it was in charge of the overall high school project, as well as Valley Tree's piece of that project . . . [and] never disclaimed supervision; [2] O & G contacted Valley Tree to submit a bid and communicated with Valley Tree's principal during the bidding process; [3] O & G directed when Valley Tree should start its work and when the tree removal work had to be completed; [4] O & G directed Valley Tree as to which trees were to be removed and which trees were to remain; [5] O & G instructed Valley Tree how to dispose of the trees—by chipping them—and then to leave the chips in the surrounding woods; [and] [6] Vetro visited the upper parking lot on at least one occasion to compliment Valley Tree's work." According to the plaintiffs, those facts were consistent with a statement made by O & G in its proposal that it would "coordinate the efforts of all of the trade contractors and maintain a safe and secure worksite." (Internal quotation marks omitted.) The plaintiffs' claim, however, ignores the fact that the representation made by O & G in its proposal related solely to the work and area within the scope of the renovation project.

removal companies that were designated by the building committee as possible contractors for the proposals." As the court explained, when Vetro "walked the site with the contractors, Vetro simply showed the trees that had been flagged by the [two members of the building committee] . . . ." The court, therefore, rejected the plaintiffs' claim that "Vetro's actions of contacting the two companies for the tree removal bids, walking the site with the contractors and board members to designate the trees flagged for removal, and taking the bid documents back to the building committee extended the contractual work to be completed and the project area to include the tree removal within its responsibilities pursuant to the contract." Specifically, the court found that the plaintiffs' claim "ignore[d] the provisions in the contract [that] allow changes to work and responsibility," which outline a method for change to the original work set forth in the contract documents. Without any change orders or amendments to the contract, the court found that "[t]here [was] no evidence that the minor assistance provided by the construction manager was significant to change the terms of the contract," and that the plaintiffs were attempting to create a duty where none existed.

Although the court did not expressly reference whether a common-law duty existed, the court did address the substance of the plaintiffs' claim, namely, whether O & G exercised control over the work performed by Valley Tree and its employees sufficient to give rise to a duty of care owed to Valley Tree. The court explained that, the fact that Valley Tree was to coordinate its work with Vetro "did not involve O & G dictating to Valley Tree how, when, or where to do their work, but it was a simple coordination with O & G so the work would be completed before the fencing was installed by O & G. . . . O & G was still the overall general contractor and any work being done would

have to be coordinated with them." (Citations omitted.) In rejecting the plaintiffs' claim that, because Valley Tree interacted with Vetro only to schedule the work, O & G was responsible to inspect and oversee that work, the court stated: "O & G never relayed to Valley Tree that O & G was to be the final authority and controller for the work to be done by Valley Tree. The plaintiffs . . . in their opposition to the motion . . . [do] not include any admissible evidence placing O & G in charge of the tree removal project. . . . In fact, in performing the work it was clear that Valley Tree decided the location for its equipment, the work decisions for the brush to be cut, the trees that would get cut, how big the logs would be, what the order of tree removal would be, and the pulling back of brush to locate machinery. . . . None of these decisions were made by O & G and none were conveyed to Valley Tree by the construction manager. . . . Coordination of the various subcontractors does not create a responsibility for O & G to check the equipment for safety issues or to provide other safety amenities to the workers at Valley Tree. There is no contractual provision requiring that O & G coordinate or control the work of a contractor hired outside the parameters of the original contract.[4] The interpretation of the construction site limits

[4] The plaintiffs argue on appeal that their claim should not be limited to the geographic reach or precise terms of the contract because there is evidence that O & G did work outside the area of the renovation project and, at times, did work without requesting a change order. Specifically, they argue that O & G worked outside the construction limit line to install fencing and curbing near the upper parking lot area and, thereby, voluntarily assumed a duty of care over Valley Tree and its employees. We are not persuaded. The plaintiffs have presented no evidence demonstrating how O & G's work installing the fencing and curbing gave rise to a duty of care to Valley Tree and its employees for the work they performed in the upper parking lot. The fact that O & G did some work outside of the scope of the work set forth in the contract does not raise a genuine issue of material fact that it thereby voluntarily assumed a duty to Valley Tree or Ortega, especially in the absence of evidence that O & G exercised control over the work of Valley Tree and its employees, and that the outside work performed by O & G did not occur in the upper parking lot and was unrelated to the

and the work responsibilities of O & G does not support the plaintiffs' expansive interpretation of the contract." (Citations omitted; footnote added; footnote omitted.)

We agree with the court's analysis of this argument, which is supported by the record viewed in a light most favorable to the plaintiffs. On the basis of our review of the record, we conclude that the trial court properly determined that, in opposing the motion for summary judgment, the plaintiffs failed to present any evidence of conduct on the part of O & G demonstrating that O & G was in charge of the project to remove the trees or in any way directed the activities of the employees of Valley Tree. The plaintiffs, therefore, failed to meet their burden of demonstrating the existence of a genuine issue of material fact as to whether O & G controlled the work of Valley Tree and its employees, thereby giving rise to a duty of care owed to Ortega.[5] See *Shukis*

tree removal work for which Valley Tree was hired directly by the borough. Thus, even if, as claimed by the plaintiffs, O & G's responsibilities were not solely limited to those outlined in the contract, it was still incumbent on the plaintiffs to present some evidence demonstrating how the work performed by O & G outside of the contract gave rise to a duty of care to Valley Tree and its employees. Our review of the record simply does not support the plaintiffs' contention that there is a genuine issue of material fact that O & G assumed a duty to Valley Tree and its employees for the tree removal work in the upper parking lot.

[5] The plaintiffs' reliance on *Pelletier* v. *Sordoni/Skanska Construction Co.*, 264 Conn. 509, 825 A.2d 72 (2003), and *Van Nesse* v. *Tomaszewski*, 265 Conn. 627, 829 A.2d 836 (2003), is misplaced, as those cases are distinguishable from the present case. In *Pelletier*, our Supreme Court held that, although, as a general rule, "a general contractor is not liable for the torts of its independent subcontractors"; *Pelletier* v. *Sordoni/Skanska Construction Co.*, supra, 518; there are exceptions to that general rule, including when the general contractor "in the progress of the work assume[s] control or interfere[s] with the work" of the subcontractor. Id. Control means the "[p]ower or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee." Black's Law Dictionary (6th Ed. 1990) p. 329. *Pelletier* and *Van Nesse* both involved actions by an injured employee of a subcontractor against the general contractor. *Van Nesse* v. *Tomaszewski*, supra, 628; *Pelletier* v. *Sordoni/Skanska Construction Co.*, supra, 512–13. In *Pelletier*, our Supreme Court rejected the plaintiff's claim that the contract between the general contractor and the owner of the building under con-

v. *Board of Education*, 122 Conn. App. 555, 566, 1 A.3d 137 (2010) ("[a] party opposing a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue" (internal quotation marks omitted)).

On the basis of our thorough review of the record, we conclude that the court's determination, as a matter of law, that O & G did not owe a duty to Ortega concerning the safety issues raised in count four of the revised complaint was legally and logically correct. Accordingly, because the existence of a duty is an essential element of a negligence cause of action; see *Goody* v. *Bedard*, supra, 200 Conn. App. 631; the court properly granted O & G's motion for summary judgment as to count four of the revised complaint.

Finally, the plaintiffs claim that the court improperly rendered summary judgment in favor of O & G with respect to the loss of consortium claim alleged in count five of the revised complaint. Because the loss of consortium claim in count five is derivative of the negligence claim alleged in count four, on which the court properly rendered summary judgment in favor of O & G, the loss of consortium claim in count five necessarily must fail. Therefore, the court properly granted O & G's motion for summary judgment as to count five of the revised complaint as well.

The judgment is affirmed.

In this opinion the other judges concurred.

struction, which charged the general contractor with certain safety and inspection responsibilities, created a duty owed by the general contractor to the plaintiff, concluding that the plaintiff was not a party to that agreement. *Pelletier* v. *Sordoni/Skanska Construction Co.*, supra, 530–31. In the present case, a general contractor-subcontractor relationship did not exist between O & G and Valley Tree, as the record demonstrated that Valley Tree was hired directly by the borough to do tree removal work, which was outside the scope and area covered by the contract between O & G and the borough for the high school renovation project, nor was Valley Tree a party to that

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(AC 44313)

Alvord, Prescott and Clark, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court granting the plaintiff's motion for contempt and ordering the sale of certain real property, namely, the former marital home. The parties' separation agreement, which was incorporated into the judgment of dissolution, provided, inter alia, that the defendant would pay to the plaintiff a property settlement of $2,580,000, in installments, to be secured with a mortgage deed in favor of the plaintiff against the former marital home. The plaintiff alleged that the defendant had failed to make certain of the installment payments. *Held*:

1. The trial court did not abuse its discretion in finding the defendant in contempt; the defendant conceded that he had defaulted on the payment obligations set forth in the separation agreement, stipulated to the amount owed, offered no evidence to support a finding that he was unable to comply with his payment obligations, and submitted a financial affidavit showing significant real and personal property assets that could be liquidated or financed to satisfy his payment obligations, thus, the court properly found that the defendant's failure to pay was wilful.
2. The defendant could not prevail on his claim that the trial court improperly ordered the sale of the former marital home: the court did not lack jurisdiction to enter the order as it did not alter the terms of the judgment of dissolution but, instead, fashioned a remedy appropriate to protect the integrity of the original judgment, as the separation agreement unambiguously tied the plaintiff's interest in the former marital home to the defendant's payment obligations; moreover, during the hearing on the plaintiff's motion for contempt, the defendant's counsel did not object to the plaintiff's request that the former marital home be sold; furthermore, the court's remedial orders setting the terms of the sale, including that the defendant sell the home with the assistance of a real estate broker, were justified and appropriately tailored to the defendant's violations and did not violate his right to due process, as the defendant had previously taken two years to attempt to sell the property, opposed selling it with a licensed real estate broker and listed it for a sale price that was significantly higher than its fair market value.

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contract. Moreover, the plaintiffs did not present any evidence in opposition to the motion for summary judgment showing that O & G had the authority to control, or interfered with, the work of Valley Tree.

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the court, *Danaher*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Shaban*, *J.*, granted the plaintiff's motion for contempt and entered a remedial order, and the defendant appealed to this court. *Affirmed*.

Roy S. Walzer, self-represented, the appellant (defendant).

Stephanie M. Weaver, for the appellee (plaintiff).

Opinion

ALVORD, J. In this marital dissolution action, the self-represented defendant,[1] Roy Walzer, appeals from the trial court's postdissolution judgment in favor of the plaintiff, Carol Walzer, finding the defendant in contempt. On appeal, the defendant claims that the court improperly (1) found that his admitted failure to make property settlement payments to the plaintiff in accordance with the dissolution judgment was wilful, and (2) ordered the sale of the former marital home.[2] We affirm the judgment of the court.

The following facts, as found by the court or as stipulated by the parties, and procedural history are relevant to this appeal. The marriage of the parties was dissolved by the court, *Danaher*, *J.*, on February 19, 2014. The parties' separation agreement (agreement), executed on the same date, was incorporated into the judgment

[1] Although the defendant is self-represented on appeal, he was represented by counsel at the time of the contempt hearing before the trial court.

[2] In his principal appellate brief, the defendant asserts four separate claims of error. For ease of discussion, we address certain claims together and in a different order than they appear in the defendant's appellate brief.

of dissolution. Article II of the agreement provides in part that the defendant would retain title to the real property located at 141 5 1/2 Mile Road in Goshen. Article IV of the agreement, titled "Cash to the [Plaintiff]," provides: "4. The [defendant] shall pay to the [plaintiff] as additional property settlement, Two Million, Five-Hundred Eighty Thousand ($2,580,000) Dollars, in installments as follows:

"4.1 One million dollars ($1,000,000) during calendar year 2014 as follows:

"1.) One hundred fifty thousand dollars ($150,000) on or before March 1, 2014;

"2.) Two hundred fifty thousand dollars ($250,000) on or before June 1, 2014;

"3.) Three hundred thousand dollars ($300,000) on or before September 30, 2014;

"4.) Three hundred thousand dollars ($300,000) on or before December 31, 2014;

"4.2 One Million, Five-Hundred and Eighty Thousand ($1,580,000) Dollars payable in quarterly installments over ten years beginning in 2015 as follows: On or before February 15, 2015, and every quarter of a year thereafter (on May 15, August 15, and November 15) for calendar years 2015, 2016, 2017, and 2018 the [defendant] shall pay to the [plaintiff] quarterly installments of forty two thousand five hundred dollars ($42,500) totaling $170,000 each year to the [plaintiff]. On or before February 15 and every quarter of a year thereafter (on May 15, August 15, and November 15) for calendar years 2019, 2020, 2021, 2022, 2023 and 2024, the [defendant] shall pay to the [plaintiff] quarterly installments of thirty seven thousand five hundred dollars ($37,500) totaling $150,000 each year to the [plaintiff].

"4.3 Said two million five hundred eighty thousand dollars ($2,580,000) shall be secured with a mortgage deed in the amount of two million five hundred eighty thousand dollars as provided in paragraph 4.1 above in favor of the [plaintiff] against the [defendant's] real property located at 141 5 1/2 Mile Road, Goshen, Connecticut [former marital home]. Said amount owed by the [defendant] to the [plaintiff] shall bear no interest. The [defendant] shall provide the [plaintiff] with legally sufficient evidence that he has title to said real property located at 141 5 1/2 Mile Road, Goshen, and that said real property bears no encumbrances other than the presently existing first mortgage in the amount of three million dollars owed to Hudson City Savings Bank. The [plaintiff] shall provide the [defendant] a yearly release for the amount that has been paid off by the [defendant]. If the [defendant] sells said real property at 141 5 1/2 Mile Road, Goshen, or otherwise wishes to substitute security to the [plaintiff] for his obligation herein, he shall provide sufficient substitute security to the [plaintiff] for any unpaid balance at that time."

On January 21, 2020, the plaintiff filed a motion for contempt. On August 19, 2020, the plaintiff filed a supplemental motion for contempt,[3] alleging that the defendant had failed to make property settlement payments as set forth in article IV of the agreement. Specifically, the plaintiff alleged that the defendant owed an arrearage of $10,000 at the time of her January 21, 2020 motion for contempt and that the defendant had not made any of the quarterly payments due on February 15, May 15, and August 15, 2020. With respect to the former marital home, the plaintiff alleged that it was the subject of two foreclosure actions. The plaintiff represented that

[3] In its memorandum of decision, the trial court noted that "[t]he second motion was necessary due to the coronavirus pandemic that closed the court in March, 2020, before the matter could be heard. The courts remained closed to normal operations for several months thereafter."

the defendant's counsel had indicated that the former marital home would be placed on the market for sale but that it was off the market. The plaintiff maintained that the defendant had overpriced the home when listing it in the past.

The plaintiff requested that the court find the defendant in contempt, order the defendant to pay all arrearages and current amounts owing, and order the former marital home be placed on the market for sale with a licensed broker and with a "realistic" listing price commensurate with other listings in the area. She further requested that, in the event an agreement establishing the listing price could not be reached, the listing broker mutually selected should set the price. The plaintiff requested sufficient substitute security for the amounts owed her under the dissolution judgment and sought attorney's fees.

On September 1, 2020, the court, *Shaban*, *J.*, held a hearing at which the parties were both represented by counsel. The defendant submitted a financial affidavit dated September 1, 2020. On September 28, 2020, the court issued its memorandum of decision. The court first found, in accordance with the parties' stipulation offered at the hearing, that the defendant owed an arrearage of $112,000.[4] The court then recited the following additional facts, to which the parties had stipulated. "The property distribution payments due the plaintiff were secured by a lien on the parties' marital home . . . . The fair market value of the property is

[4] In their appellate briefs, both parties represent that the defendant owed the plaintiff $112,500 at the time of the contempt hearing. Specifically, the defendant states: "As of August 19, 2020, the date upon which plaintiff filed the motion for contempt which is the subject of the instant appeal, the defendant owed to plaintiff $112,500, under the payment schedule contained in the agreement." The plaintiff states: "At the time of the hearing, three payments in 2020 for $37,500 were due, for a total of $112,500." Neither party, however, challenges on appeal the court's finding that the parties had stipulated to an amount owed of $112,000.

estimated to be $11,000,000. At the time of the agreement, there was a mortgage encumbering the property that now has a balance due of approximately $3,000,000. Following the mortgage is the plaintiff's lien securing the property settlement payments. The balance of the lien is presently $740,000. Subsequent to the filing of the plaintiff's lien, the defendant secured a second mortgage on the premises for approximately $3,000,000. Both mortgages are now under foreclosure. From 2018 to February, 2020, the defendant marketed the property for sale through a broker. The property had been listed at a price of $13,900,000. The defendant is now attempting to sell the property himself."

The court noted that, during the hearing, the defendant requested permission to market the property without professional assistance through November 1, 2020, and that, if he were unable to find a buyer, requested that he then be permitted to choose a broker and a " 'reasonable' " selling price. With respect to the listing price, the court referenced the defendant's position that "the unique premium nature of the property is such that a comparative analysis could not realistically be done by a broker." (Internal quotation marks omitted.) The court also noted the defendant's representation that there remained sufficient equity in the property to secure the payments due to the plaintiff and his offer to pay interest on any amount in arrearage.

The court found by clear and convincing evidence that the defendant had wilfully failed to make the payments due. It further found that the order was clear and unambiguous. Thus, the court found the defendant in contempt.

The court reviewed the defendant's financial affidavit, which revealed that the defendant had "significant real and personal property assets that could be used to make payment of the amounts due either through

financing or liquidation." Specifically, the court identified the defendant's full ownership in Litchfield Equities, Ltd., which owns two properties valued at $600,000 and $550,000 with no encumbrances. The court further noted that the defendant had identified on his financial affidavit personal property assets valued at $468,775, including an art collection, Oriental rugs, antiques, a wine cellar, furniture, tools, equipment, and miscellaneous items.

On the basis of the foregoing, the court ordered the defendant to bring current all payments due on or before November 15, 2020. The court ordered the former marital home "be immediately listed for sale through a mutually agreed upon licensed real estate broker. In the event the parties cannot agree on a broker, each shall select a broker of their choosing and the two brokers shall choose a third broker who shall market the property. The selection of the broker and the execution of a listing agreement shall be done within ten days of this order. The list price shall be set by the broker and the parties shall thereafter abide by the recommendations of the broker as to the frequency and amount of any alterations in the list price for the property. Any offer for purchase within 5 percent . . . of the list price shall be accepted by the parties."[5] This appeal followed.

I

We first address the defendant's claim that the trial court improperly granted the plaintiff's motion for contempt. Specifically, he contends that no evidence was presented that his failure to make property settlement payments in accordance with the dissolution judgment was wilful. The plaintiff responds that the record before

[5] The court also awarded the plaintiff attorney's fees and costs in the amount of $1009.30, and ordered the defendant to pay such amount on or before November 15, 2020.

the court, including the defendant's financial affidavit, which showed significant assets at his disposal and available to satisfy the judgment, was sufficient for the court to find that his nonpayment was wilful. We agree with the plaintiff.

The applicable principles of law and standard of review are well settled. "Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense. . . . Our review of a trial court's judgment of civil contempt involves a two part inquiry. [W]e first consider the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding. . . . Whether a party's violation was wilful depends on the circumstances of the particular case and, ultimately, is a factual question committed to the sound discretion of the trial court. . . . [T]his court will not disturb the trial court's orders unless it has abused its legal discretion or its findings have no reasonable basis in fact. . . . It is within the province of the trial court to find facts and draw proper inferences from the evidence presented. . . . [E]very reasonable presumption will be given in favor of the trial court's ruling, and [n]othing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference." (Citation omitted; internal quotation marks omitted.) *Giordano* v. *Giordano*, 203 Conn. App. 652, 656–57, 249 A.3d 363 (2021).

On appeal, the defendant does not challenge the court's conclusion that the order was clear and unambiguous, but he claims that the court improperly determined that his noncompliance with that order was wilful. Specifically, he argues that "[i]t is clear upon the facts of [his] financial affidavit that he had neither the income nor the liquid funds at the present time to pay the plaintiff the cash installments in accordance with the terms contained in the judgment," and that "[n]o evidence was presented that [his] failure to pay was wilful nor was wilfulness stipulated." He contends that his assets are illiquid and that "[n]o reasonable inference can be drawn or assumption made, therefore, on the issue of wilfulness or [his] prior and continuing efforts to assemble the funds to comply with the payment schedule in the agreement." We are not persuaded.

"To constitute contempt, a party's conduct must be wilful. . . . Noncompliance alone will not support a judgment of contempt. . . . [I]nability to pay is a defense to a contempt motion. However, the burden of proving inability to pay rests upon the obligor." (Internal quotation marks omitted.) *Kirwan* v. *Kirwan*, 187 Conn. App. 375, 393, 202 A.3d 458 (2019). "Whether [a party has] established his inability to pay the order by credible evidence is a question of fact. Questions of fact are subject to the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Because it is the trial court's function to weigh the evidence . . . we give great deference to its findings." (Internal quotation marks omitted.) *Afkari-Ahmadi* v. *Fotovat-Ahmadi*, 294 Conn. 384, 397–98, 985 A.2d 319 (2009).

In the present case, the defendant conceded that he had defaulted on the payment obligations set forth in article IV of the agreement, and he stipulated to the amount of the arrearage owed. The defendant offered no evidence at the hearing to support a finding that he was unable to comply with his payment obligations. To the contrary, as the trial court found, the defendant submitted a financial affidavit showing "significant real and personal property assets that could be used to make payment of the amounts due either through financing or liquidation." These assets included ownership of two properties valued at $600,000 and $550,000 with no encumbrances, and $468,775 in personal property including an art collection, Oriental rugs, antiques, a wine cellar, furniture, tools, equipment, and miscellaneous items.[6] In sum, the defendant's financial affidavit, which showed ample assets that could be liquidated or financed to satisfy his payment obligations, provided a basis for the court reasonably to infer that his failure to pay was wilful. His failure to utilize those assets to meet his court-ordered dissolution obligations does not insulate him from a finding of contempt.[7] Accordingly,

[6] We also note that the defendant's financial affidavit, filed on the date of the contempt hearing, reported a net weekly income of $2348.80. During oral argument before this court, the defendant was questioned regarding whether he was receiving income of approximately $2400 weekly at the time of the contempt hearing, and he responded that he was.

[7] In his reply brief, the defendant argues: "Had plaintiff . . . made any effort whatsoever to support her claim of willfulness, by means of inquiry or evidence, or had the court below made any inquiry, there would be a record below. For example, gross income does not equal available funds to service defendant's . . . payment schedule and assets do not equal the ability to finance, which requires sufficient income to carry the debt. No such record exists. Without such record, there is no clear and convincing evidence upon which to base a finding of willfulness." Our Supreme Court previously has rejected arguments that the trial court was obligated to comb through the financial situation of the nonpaying party as being in conflict with "the well settled law of this state requiring the contemnor to demonstrate his or her inability to comply with a payment order." *Afkari-Ahmadi* v. *Fotovat-Ahmadi*, supra, 294 Conn. 398.

we conclude that the court properly found that the defendant's failure to pay was wilful and, consequently, did not abuse its discretion in finding the plaintiff in contempt.[8]

II

We next address the defendant's claim that the court improperly ordered the sale of the former marital home. He offers several arguments related to this claim. First, he argues that the court lacked jurisdiction to enter an order relating to the sale of the former marital home, on the basis that the order constituted an improper modification of the final property division. Second, he maintains that the court abused its discretion in issuing orders related to the sale of the former marital home. Specifically, he contends that "[t]he trial court had the discretion to order the defendant to pay the arrearage by a date certain which the trial court did order. But the court went far beyond that by ordering, in addition, that the defendant sell his residence through a real estate broker, inserting the plaintiff into the real estate broker selection process [and] the listing price determination process and ordering that a mathematically determined offer be accepted irrespective of the terms of the offer beyond price." Third, he argues that the terms of the sale ordered by the court violate his right to due process. We disagree.

[8] During oral argument before this court, the defendant represented that he neither had complied with the court's contempt remedial order that he bring current his payments by November 15, 2020, nor had filed a motion for a stay of that order. The defendant additionally represented that, although he had listed the former marital home for sale following the court's issuance of its memorandum of decision, the selection of the broker and the list price were both his decision. Although the defendant's actions subsequent to the court's issuance of its memorandum of decision on the plaintiff's motion for contempt are not before us in this appeal, we note that the defendant's admitted and continued failure to comply with the court's order may subject him to further remedial orders should the plaintiff elect to file a subsequent motion for contempt with the trial court.

We first set forth relevant principles of law and our standard of review. It is well settled that "[t]he court's authority to transfer property appurtenant to a dissolution proceeding rests on [General Statutes] § 46b-81. . . . Accordingly, the court's authority to divide the personal property of the parties, pursuant to § 46b-81, must be exercised, if at all, at the time that it renders judgment dissolving the marriage. . . . A court, therefore, does not have the authority to modify the division of property once the dissolution becomes final. . . .

"Although the court does not have the authority to modify a property assignment, a court, after distributing property, which includes assigning the debts and liabilities of the parties, does have the authority to issue postjudgment orders effectuating its judgment. . . . [I]t is . . . within the equitable powers of the trial court to fashion whatever orders [are] required to protect the integrity of [its original] judgment. . . . This court has explained the difference between postjudgment orders that modify a judgment rather than effectuate it. A modification is [a] change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter intact. . . . In contrast, an order effectuating an existing judgment allows the court to protect the integrity of its original ruling by ensuring the parties' timely compliance therewith. . . .

"If a party's motion can fairly be construed as seeking an effectuation of the judgment rather than a modification of the terms of the property settlement, this court must favor that interpretation. . . . Similarly, when determining whether the new order is a modification, we examine the practical effect of the ruling on the original order. . . . In order to determine the practical effect of the court's order on the original judgment, we must examine the terms of the original judgment as well as the subsequent order. [T]he construction of [an

order or] judgment is a question of law for the court . . . [and] our review . . . is plenary. As a general rule, [orders and] judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the [order or] judgment. . . . The interpretation of [an order or] judgment may involve the circumstances surrounding [its] making. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The [order or] judgment should admit of a consistent construction as a whole." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Lawrence* v. *Cords*, 165 Conn. App. 473, 482–85, 139 A.3d 778, cert. denied, 322 Conn. 907, 140 A.3d 221 (2016).

Relatedly, "[f]aced with a party in contempt of court, it is within the court's province to fashion appropriate remedial orders. Courts have in general the power to fashion a remedy appropriate to the vindication of a prior . . . judgment. . . . Having found noncompliance, the court, in the exercise of its equitable powers, necessarily ha[s] the authority to fashion whatever orders [are] required to protect the integrity of [its original] judgment." (Internal quotation marks omitted.) *Ciottone* v. *Ciottone*, 154 Conn. App. 780, 793–94, 107 A.3d 1004 (2015).

The defendant argues that because "[t]here is no provision in the judgment requiring [him] to sell his residence and the associated real property" but, rather, a payment schedule and "descending security provision," the court's order requiring the sale of the property and setting the terms of the sale are "not the mere technical implementation of the judgment." We conclude that the court's decision on the plaintiff's motion for contempt did not alter the terms of the judgment of dissolution but rather fashioned a remedy appropriate to protect the integrity of its original judgment.

The agreement incorporated into the judgment of dissolution provides that the amount owed the plaintiff under articles 4.1 and 4.2 of the agreement shall be "secured with a mortgage deed in the amount of two million five hundred eighty thousand dollars as provided in paragraph 4.1 above in favor of the [plaintiff] against the [defendant's] real property located at 141 5 1/2 Mile Road, Goshen, Connecticut." The parties, in agreeing to the provision, unambiguously tied the plaintiff's interest in the property to the defendant's payment obligations. The effect of this provision is to ensure that the plaintiff receives the installment payments owed to her under the terms of the dissolution judgment. In the event of the defendant's default in his installment payment obligation, the sale of the property is exactly what the agreement contemplated, in that the defendant's obligation could be satisfied either through foreclosure of the mortgage or through the court's contempt power.

Despite the first motion for contempt having been filed in January, 2020, the defendant remained in complete default on his quarterly installment payments more than eight months later at the time of the hearing in September, 2020. Thus, the defendant's continued default rendered strict adherence to the terms of the agreement impossible; see *Santoro* v. *Santoro*, 70 Conn. App. 212, 218, 797 A.2d 592 (2002) ("noncompliance on the part of the parties made strict adherence to the terms of the [decree] impossible" (internal quotation marks omitted)); and the court appropriately fashioned the remedy of sale to protect the integrity of the court-ordered dissolution agreement.

Moreover, we note that the defendant's counsel did not object, during the hearing on the motion for contempt, to the plaintiff's request that the former marital home be sold. To the contrary, he requested only that the court allow additional time for the defendant to

continue to market the property himself. Specifically, the defendant's counsel proposed: "[The defendant] just . . . wants eight more weeks to try to market this. And, then, he would like to be able to choose the broker and choose a reasonable selling price because, after all, [the plaintiff] is gonna get the cash that she gets in the settlement agreement, but he's trying to manage what he was left after the divorce. And, Your Honor, if—we will report to [the plaintiff] on November 1, who the broker is and the . . . listing price. And if [the plaintiff is] not in agreement with it we can . . . say we're gonna come back to court and argue the listing price and the broker." Thus, the defendant cannot now be heard to complain that the court erred in ordering the former marital home sold. See *Scalora* v. *Scalora*, 189 Conn. App. 703, 732–33, 209 A.3d 1 (2019) (declining to review claim that court erred in crafting arrearage payment schedule without obtaining evidence of ability to pay where parties had effectively invited court to focus on merits of motions without reference to current finances, as parties had not filed financial affidavits nor objected at time of orders that court had not considered their financial conditions).

As to setting the terms of the sale, we conclude that the court's remedial orders were justified and appropriately tailored to the violations and did not violate the defendant's right to due process. The record before the court included stipulations demonstrating the defendant's two year long undertaking to sell the property, his opposition to listing it with a licensed broker, and his listing of the property for sale at a price significantly higher than its fair market value, all of which provided a sufficient basis for the court to conclude that its remedial order needed to address the terms of the sale to ensure that the plaintiff would receive the sums owed to her. See *Behrns* v. *Behrns*, 124 Conn. App. 794, 821, 6 A.3d 184 (2010) (court's order prohibiting defendant

from encumbering assets without approval of court was not abuse of discretion where it was clear court believed order was necessary to secure defendant's debt to plaintiff); see also *Ciottone* v. *Ciottone*, supra, 154 Conn. App. 793 (rejecting claim that remedial orders deprived plaintiff of due process where orders were justified and appropriately tailored to violations). Accordingly, we conclude that the court did not improperly order the sale of the former marital home, abuse its discretion, or violate the defendant's right to due process.

The judgment is affirmed.

In this opinion the other judges concurred.

ANGHAM ZAKKO *v.* LAITH KASIR
(AC 44440)

Alvord, Alexander and Harper, Js.

Syllabus

The defendant appealed to this court from the trial court's order awarding, inter alia, $15,000 in attorney's fees to the plaintiff. Following the dissolution of the parties' marriage, the trial court granted the plaintiff's motion to open the judgment of dissolution as to financial matters only on the ground of mutual mistake in connection with the defendant's failure to disclose information related to a certain disability policy. Thereafter, the plaintiff filed a motion for pendente lite alimony and attorney's fees. During the hearing on the motion, the plaintiff submitted a financial affidavit that listed liabilities totaling $91,094, including $47,105 in outstanding loans from family members. In addition, evidence was presented as to whether the funds given to the plaintiff by her family members were loans or gifts and as to the plaintiff's access to nearly $30,000 in a bank account jointly held with her son. The trial court concluded that an award of $15,000 in attorney's fees to the plaintiff was warranted because, in light of her claimed debts, the plaintiff lacked ample liquid funds to pay for an attorney. In reaching its decision, the court raised, but did not resolve, the question of whether the funds from the plaintiff's family members constituted loans or gifts. *Held*:

1. The trial court abused its discretion in awarding the plaintiff attorney's fees; given the evidence before it, it was not reasonable for that court to conclude that the plaintiff lacked ample liquid funds to pay for her

attorney's fees after it expressly declined to determine whether the funds that the plaintiff received from family members were, in fact, loans.

2. The trial court, in making its award of attorney's fees, expressly relied on the clearly erroneous factual finding that the plaintiff had access to only $3000 in bank accounts, which undermined this court's confidence in that court's fact-finding process and, therefore, could not be deemed harmless error; although the plaintiff testified that she did not wish to withdraw funds from the account that she held jointly with her son, that did not negate the fact that she expressly testified that she had access to the nearly $30,000 in that account.

Argued November 15, 2021—officially released January 4, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Hon. Edward J. Dolan*, judge trial referee, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court granted the plaintiff's motion to open the judgment; subsequently, the court, *Abery-Wetstone, J.*, granted the plaintiff's motion for pendente lite alimony and attorney's fees and issued a certain order, and the defendant appealed to this court. *Reversed in part*; *judgment directed.*

David A. McGrath, for the appellant (defendant).

Opinion

ALVORD, J. In this domestic relations matter, the defendant, Laith Kasir, appeals from the trial court's order awarding, inter alia, $15,000 in attorney's fees to the plaintiff, Angham Zakko. The defendant claims that, in ordering him to pay attorney's fees, the trial court made a clearly erroneous factual finding and abused its discretion. We agree with the defendant and, therefore, reverse in part the judgment of the trial court.[1]

[1] The plaintiff did not file a brief in this appeal. On May 14, 2021, this court issued an order providing that this appeal would be considered solely on the basis of the defendant's brief and appendix, the record, and oral argument.

The following facts and procedural history are relevant to our resolution of this appeal. On April 5, 2016, the court, *Hon. Edward J. Dolan*, judge trial referee, rendered judgment dissolving the parties' marriage. The parties' separation agreement (agreement) was incorporated into the judgment of dissolution. The agreement divided the marital property and provided that the defendant would pay the plaintiff alimony.[2] On March 22, 2019, the plaintiff filed a motion to open the judgment, alleging that "the judgment was secured by fraud on the part of the defendant," or, in the alternative, "the judgment was obtained by the mutual mistake of the parties regarding the defendant's income and assets." In her memorandum of law in support of her motion, the plaintiff asserted that the defendant had failed to disclose information related to a MassMutual disability policy. After a hearing, the court issued an order opening the judgment of dissolution with respect to financial orders only on the basis of mutual mistake.[3]

On December 4, 2019, the plaintiff, acting in a self-represented capacity, moved "pursuant to Connecticut General Statutes after consideration of the parties' respective financial abilities and the criteria set forth in the General Statutes [for] a reasonable amount of attorney's fees to be determined by the court and to be able to supplement the request if additional legal work is required to reach a just and fair outcome as the [p]laintiff has been through unjust financial hardship with no fault of hers." On March 5, 2020, the court

[2] The agreement provided that the defendant would pay the plaintiff alimony of "30% of his gross earned income from work until such time as [the defendant] attains the age of 65. This is currently $1,142 a week. If, prior to attaining the age of 65, [the defendant] commences receiving Veteran's Disability Income, then [the defendant's] alimony obligation shall be reduced to 30% of his gross Veteran's Disability Income plus 30% of additional earned income, if any, he may have in addition to his Veteran's Disability."

[3] The defendant subsequently filed an appeal regarding the granting of the motion to open, which was dismissed for lack of a final judgment on July 22, 2020.

granted the motion, ordering the defendant to pay the "[p]laintiff $10,000 for attorney's fees within 30 days."

On September 8, 2020, the plaintiff filed a motion seeking pendente lite alimony and additional attorney's fees.[4] With respect to her request for attorney's fees, the plaintiff stated: "The [p]laintiff . . . hereby respectfully moves this respectful [c]ourt to award her . . . reasonable [a]ttorney's [f]ees pendente [l]ite to have the assistance of an attorney for the legal process to receive her rightful share of funds and to repair the inequitable unjust status."

Over the course of three days in October and December, 2020, the court, *Abery-Wetstone*, *J.*, held a remote hearing on the plaintiff's motion. On the first two days of the hearing, the plaintiff represented herself,[5] and, on the third day, she was represented by an attorney. During the hearing, evidence was presented as to, inter alia, the plaintiff's access to bank account funds jointly held with her son and whether funds given to the plaintiff by her family were loans or gifts.

Throughout the first two days of the hearing, the plaintiff was admonished repeatedly for interrupting the court and the defendant's attorney.[6] On the second day of the hearing, the court explained to the plaintiff that "the next time you . . . interrupt [the defendant's attorney] or . . . me, I'm going to fine you $25." At one point, the court stated: "[N]o—you're interrupting

[4] At the hearing on this motion for additional attorney's fees, the plaintiff asserted that the earlier award of $10,000 was for the purpose of defending the appeal of the court's order opening the judgment, which was dismissed before the plaintiff filed a brief. See footnote 3 of this opinion. The plaintiff testified that she had $4000 remaining from the $10,000 award.

[5] At the start of the first day of the hearing, the plaintiff was represented by an attorney, who had filed a motion to withdraw. After a brief discussion on the motion, the court granted it.

[6] The court patiently reminded the plaintiff of the proper procedure and endured many interruptions before imposing any fines.

me again. Do you want more fines? Close your mouth please, and listen to what I'm saying. You really need to get a lawyer, because you are not able to control yourself in this court. You are not able to ask a question. You are not able to refrain yourself from testifying when you're supposed to be doing something else. You constantly interrupt both the Court and opposing counsel." The court continued: "I don't know what else to do to stop you from doing this. This behavior . . . is not acceptable in a court of law. You are in court, even though you're on video. You're expected to be respectful. You have been horribly disrespectful to [the defendant's attorney]. You have interrupted him time and time and time again. . . . This is not a conversation. This is a court of law. . . . There is no back and forth. And you keep interrupting me." By the end of the second day of the hearing, the plaintiff had incurred $325 in fines for interrupting.

On the third and final day of the hearing, during which only closing arguments were presented, the plaintiff was represented by an attorney. In his closing remarks, the plaintiff's newly appearing attorney orally requested $25,000 in attorney's fees.[7]

At the conclusion of the hearing, the court stated: "In [their] affidavits the husband reports $150,000 from [securities] and stock as opposed to the wife's $11,000. He has over $140,000 in bank accounts whereas the wife has barely $3000 in bank accounts. I'm not including retirement assets as liquid assets because she's only 55 and she would suffer significant penalty by withdrawing that. *She's also $91,000 in debt depending on who you believe—whether the loans from family are gifts or et cetera*. There's a great discrepancy in what they're

[7] Specifically, he stated: "I don't believe a specific request for [attorney's] fees was made by my client, but I would like to be clear on the record that I believe that a $25,000 award of [attorney's] fees is appropriate under the circumstances." There was no written motion filed by the attorney.

currently earning. Given the fact that the wife has been out of the work market for a significant period of time and given her age and perhaps staleness of her skills as an architect or draftsman, I'm finding that it's—her earning capacity has not been proven. She simply lacks the assets to pay an attorney. So what I'm going to do is order $15,000 in attorney's fees and pendente lite alimony in the amount of $470 per week. That's certainly not going to pay all of her expenses, but it should go in some way to assist her. And the $15,000 should be paid directly to counsel." (Emphasis added.) The court subsequently issued a written order reflecting the oral ruling.[8] This appeal followed.

On appeal, the defendant claims that the court improperly granted the plaintiff's motion for attorney's fees. He argues, inter alia, that the court abused its discretion in awarding attorney's fees because it "indicated that it was possible that those [funds from family members] were in fact gifts, without expressly making a finding either way" and, further, erred in relying on a clearly erroneous factual finding. We agree with the defendant.

We begin with the foundational understanding that "[i]t is well entrenched in our jurisprudence that Connecticut adheres to the American rule. . . . Under the American rule, a party cannot recover [attorney's] fees in the absence of statutory authority or a contractual provision. . . . On the basis of our decisional law, we believe that the theory and thrust of the American rule pertains to the assignment of fees and costs in the family law context as well. In that context . . . [t]he court may order either party to pay [attorney's fees] . . . pursuant to General Statutes § 46b-62, and how such

[8] The written order also provided that "[the defendant] shall pay [the plaintiff] $475/week in alimony" despite the fact that, during the hearing, the court ordered "pendente lite alimony in the amount of $470 per week." The minor discrepancy in the alimony award is not at issue in this appeal.

expenses will be paid is within the court's discretion. . . . We look, then, to the parameters of § 46b-62 to determine if the statute authorizes an award of fees to one party from the other on the basis that a party seeks judicial intervention after having failed to reach an agreement. In this inquiry, because the provisions of § 46b-62 are an exception to the common-law American rule, our teaching is that the statutory provisions must be narrowly construed." (Citations omitted; internal quotation marks omitted.) *Thunelius* v. *Posacki*, 193 Conn. App. 666, 680, 220 A.3d 194 (2019).

"In dissolution and other family court proceedings, pursuant to § 46b-62 (a), the court may order either [spouse] to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the equitable criteria set forth in [General Statutes] § 46b-82, the alimony statute." *Leonova* v. *Leonov*, 201 Conn. App. 285, 326, 242 A.3d 713 (2020), cert. denied, 336 Conn. 906, 244 A.3d 146 (2021). That statute provides in relevant part that the court "shall consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81 . . . ." General Statutes § 46b-82. "Section 46b-62 (a) applies to postdissolution proceedings because the jurisdiction of the court to enforce or to modify its decree is a continuing one and the court has the power, whether inherent or statutory, to make allowance for fees." *Leonova* v. *Leonov*, supra, 327.

Our Supreme Court has articulated "three broad principles by which these statutory criteria are to be applied. First, such awards should not be made merely because the obligor has demonstrated an ability to pay. Second, where both parties are financially able to pay

their own fees and expenses, they should be permitted to do so. Third, where, because of other orders, the potential obligee has ample liquid funds, an allowance of [attorney's] fees is not justified." *Turgeon* v. *Turgeon*, 190 Conn. 269, 280, 460 A.2d 1260 (1983).

"[A]n award of attorney's fees in a marital dissolution case is warranted only when at least one of two circumstances is present: (1) one party does not have ample liquid assets to pay for attorney's fees; or (2) the failure to award attorney's fees will undermine the court's other financial orders." *Ramin* v. *Ramin*, 281 Conn. 324, 352, 915 A.2d 790 (2007). In the present case, the court relied on the first basis in making its award, stating that the plaintiff "simply lacks the assets to pay an attorney."

The defendant contends that the court abused its discretion in awarding the plaintiff attorney's fees in light of its equivocal reference to the plaintiff's claimed debts without determining if the significant funds provided to the plaintiff by various family members constituted loans or regularly recurring gifts. We agree with the defendant.

At the outset, we set forth the applicable standard of review. "Whether to allow [attorney's] fees [pursuant to § 46b-62], and if so, in what amount, calls for the exercise of judicial discretion. . . . An abuse of discretion in granting [attorney's] fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did." (Internal quotation marks omitted.) *Pena* v. *Gladstone*, 168 Conn. App. 175, 186, 146 A.3d 51 (2016).

On her financial affidavit dated October 3, 2020, and submitted to the court on the first day of the hearing, the plaintiff listed liabilities totaling $91,094. Approximately one third of this amount, $35,763, was labeled credit

card debt. The plaintiff also listed, under "Other Consumer Debt," $47,105 in loan balances. Specifically, she included eight entries, each described as "[l]oan from family member" or "[l]oan from family members," and reported dates between 2016 and 2020 as when the funds were received. During the hearing, the defendant's attorney inquired as to which family members the funds came from. First, the defendant's attorney inquired regarding the "[l]oan from family member" dated 2016 in the amount of $27,000. The plaintiff testified that the funds came "from [her] brothers," but she was "not sure" which brother. The defendant's attorney also inquired about the "[l]oan from family members" dated 2018 in the amount of $13,000. The plaintiff recalled that her brother who lived in Florida wrote that check. As to the remaining funds, each approximately $1000, the plaintiff posited that they were provided by her son to help her pay her credit card debts. She testified that the only record she had of these monetary transactions with her family members was the checks themselves—there were no "promissory note[s]."[9] In addition, she testified that she had never made a payment on any of the purported loans, there were no repayment terms for any of the claimed loans, and, "at some point, this is going to be something I have to return."

During his closing remarks, the plaintiff's attorney argued that whether the funds from family members were loans or gifts was not relevant to the court's decision, stating: "I know there was some questioning about certainly the debt on her financial affidavit—whether those familial loans were indeed gifts. I don't think there's adequate proof before the Court on either count, but certainly I would say she's disclosed it under oath

[9] Aside from listing the funds as debts on her financial affidavit and testifying that they were loans, the plaintiff presented no evidence as to the nature of these funds.

as a debt, but she clearly has at least $45,000 in credit card debt." He further stated: "But the truth is . . . that you look at her debt and she's got $90,000, and whether it was a gift or a loan by the way from her family doesn't matter, she still needed it. She didn't use this to buy a new—a new car. She has a car from 2009. She didn't use it to buy new furniture, buy anything special for herself, or even to go, as she said to you a few times in testimony, to the eye doctor. Right?"

In response, the defendant's attorney argued that the funds provided by the plaintiff's family members were not loans but were, in fact, gifts because the plaintiff would not be asked to repay them. Further, he posited that "[i]t absolutely matters if they're gifts or loans. If they are loans then they belong on her financial affidavit in the debt section. And [the plaintiff's attorney] just told us we should really focus on this debt. And if they're gifts, not only do they not belong in the financial affidavit debt section, that's a misrepresentation, but they belong as regularly recurring gifts which should be considered as a source of income."

After the attorneys' closing arguments, the court stated, with respect to the plaintiff's financial resources to pay attorney's fees: "She's also $91,000 in debt depending on who you believe—whether the loans from family are gifts or et cetera."

"A determination of what constitutes ample liquid funds . . . requires . . . an examination of the total assets of the parties at the time the award is made." (Internal quotation marks omitted.) *Hornung* v. *Hornung*, 323 Conn. 144, 170, 146 A.3d 912 (2016). This requires consideration of "the total financial resources of the parties in light of the statutory criteria." (Internal quotation marks omitted.) *Miller* v. *Miller*, 16 Conn. App. 412, 418, 547 A.2d 922, cert. denied, 209 Conn. 823, 552 A.2d 430 (1988). Such an examination naturally

includes an examination of the debts and liabilities of the parties as an individual's assets are impacted by their debts. Indeed, when a party has some savings but many liabilities with payments due, the "ampleness" of their funds is impeded. Review of a party's liabilities is proper when determining whether a party has ample liquid funds for the purposes of § 46b-62 (a). See *Fitzgerald* v. *Fitzgerald*, 190 Conn. 26, 35, 459 A.2d 498 (1983) (comparing net liquid assets with liabilities to determine if there were ample liquid funds); see also *Weiman* v. *Weiman*, 188 Conn. 232, 237, 449 A.2d 151 (1982) (concluding that trial court did not abuse its discretion in awarding attorney's fees when party's liquid assets were needed to meet future needs and were, therefore, not ample); *Pena* v. *Gladstone*, 168 Conn. App. 141, 154, 144 A.3d 1085 (2016) (considering party's liabilities in determining whether party had ample liquid funds); *Kunajukr* v. *Kunajukr*, 83 Conn. App. 478, 488–89, 850 A.2d 227 (concluding that trial court did not abuse its discretion in awarding attorney's fees when plaintiff "was $43,000 in debt with only $5000 in her checking account, with her sole income being alimony in the amount of $640 per week"), cert. denied, 271 Conn. 903, 859 A.2d 562 (2004).

In the present case, we conclude that the court abused its discretion in awarding the plaintiff attorney's fees. Specifically, it was not reasonable for the court to conclude that the plaintiff lacked ample liquid funds after it expressly declined to determine whether the funds the plaintiff received from family members were, in fact, loans. The court, in reaching its decision, raised, without resolving, the material question of whether the $47,105—more than one half of the plaintiff's total claimed debt—constituted loans or gifts from family members. Indeed, although the plaintiff claimed that they were loans, she testified that she had never made a payment on any of the loans, including those dating

back to 2016, that there was no repayment schedule, and that she did not know to which of her family members she owed the money. Given the evidence before it, the court, having failed to determine the validity of the plaintiff's claimed debts while also referring to the plaintiff's debt as supporting its finding that she lacked ample liquid funds, abused its discretion in awarding the plaintiff attorney's fees.

We next address the defendant's contention that the trial court relied on a clearly erroneous factual finding in awarding the plaintiff attorney's fees. "The trial court's findings are binding on this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence in the record to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Buehler* v. *Buehler*, 117 Conn. App. 304, 317–18, 978 A.2d 1141 (2009). "Where . . . some of the facts found [by the court] are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous findings to see whether they were harmless, not only in isolation, but also taken as a whole. . . . If, when taken as a whole, they undermine appellate confidence in the court's fact finding process, a new hearing is required." (Internal quotation marks omitted.) *Zilkha* v. *Zilkha*, 180 Conn. App. 143, 179, 183 A.3d 64, cert. denied, 328 Conn. 937, 183 A.3d 1175 (2018).

In § IV C of her financial affidavit, titled "Bank Accounts," the plaintiff reported a Bank of America account with a current balance of $29,447. She identified the account as belonging to her son; she testified, however, that she had access to the funds in the account because it was a joint account.

Thus, the court's finding that the plaintiff had access to only $3000 in bank accounts is clearly erroneous. Although the plaintiff also testified that she did not wish to withdraw funds from the account she held jointly with her son, that does not negate the fact that she expressly testified that she had access to the nearly $30,000 in that account. The court's clearly erroneous finding as to the paucity of the plaintiff's liquid assets was important and material to its decision to award her attorney's fees. See *Zilkha* v. *Zilkha*, supra, 180 Conn. App. 179. This clearly erroneous finding, which the court expressly relied on in making its award of attorney fees, undermines our confidence in the court's fact-finding process and cannot be deemed to be harmless error. See id. Therefore, the court relied on a clearly erroneous factual finding in addition to abusing its discretion in awarding the plaintiff attorney's fees.

The judgment is reversed with respect to the award of attorney's fees to the plaintiff and the case is remanded with direction to deny in part the plaintiff's motion for pendente lite alimony and attorney's fees as to attorney's fees; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.