RUDOLPH J. FIORILLO ET AL. *v.* CITY OF HARTFORD
(AC 42998)

Prescott, Alexander and Suarez, Js.

Syllabus

The plaintiffs, retired city firefighters, filed a motion for contempt alleging that the defendant city had violated a judgment of the trial court incorporating a settlement agreement in which the defendant had agreed to provide a health benefits package administered by A Co., and that the package would not change without the plaintiffs' written consent or a legislative mandate. The defendant thereafter replaced the plan administered by A Co. with a health insurance plan administered by C Co. and a prescription drug plan administered by V Co. The plaintiffs claimed that, by making this change, the defendant had diminished the health insurance benefits to which they were entitled pursuant to a collective bargaining agreement. Following a hearing on the contempt motion, the trial court concluded that the agreement was clear and unambiguous and that the defendant violated the judgment by changing the plaintiffs' health insurance plan administrators without their written consent. The court, however, denied the motion for contempt because all of the claims submitted by the plaintiffs under the C Co. plan were paid in a manner identical to the A Co. plan and, therefore, the court concluded that the defendant had not wilfully violated the judgment. On the plaintiffs' appeal and the defendant's cross appeal to this court, *held* that the trial court properly denied the plaintiff's motion for contempt: this court concluded that the trial court incorrectly determined that the defendant violated the agreement by changing the third-party administrators because the reference to the A Co. plan in the agreement was used to establish the health-care benefits to which the plaintiffs were entitled, the agreement did not state that a specific third party must administer those benefits in perpetuity, the defendant's agreement that it would not change or diminish the benefits that comprised the entire health-care package did not extend to the question of which entity would operate as a third-party administrator, and nothing in the agreement suggested that the parties intended to permanently establish a third-party administrator, accordingly, because the substance of the health-care package was not changed or diminished, the defendant could not be said to have violated the agreement and, therefore, there was no basis for a finding of contempt.

Argued September 16, 2021—officially released May 10, 2022

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford and transferred to the judicial district of New Britain, Complex Litigation Docket; thereafter, the court, *Cohn*, *J.*, rendered judgment in accordance with the parties' settlement agreement; subsequently, the court, *Hon. Henry S. Cohn*, judge trial referee, denied the motion for contempt filed by the named plaintiff et al., and the named plaintiff et al. appealed and the defendant cross appealed to this court. *Affirmed*.

Robert J. Williams, *Jr.*, for the appellants-cross appellees (named plaintiff et al.).

Alexandra Lombardi, deputy corporation counsel, with whom, on the brief, was *Demar Osbourne*, assistant corporation counsel, for the appellee-cross appellant (defendant).

Opinion

ALEXANDER, J. This appeal and cross appeal have their origin in a breach of contract action commenced in 1999 by a group of retired Hartford firefighters (original plaintiffs) regarding their health insurance benefits. The parties reached a settlement agreement in 2003 in which the defendant, the city of Hartford, agreed to provide the original plaintiffs with a health benefits package that included medical, prescription drug, and dental benefits listed in a plan from Anthem Blue Cross Blue Shield (Anthem). The agreement provides that this package would not change without the plaintiffs' written consent or a legislative mandate. The trial court, *Cohn*, *J.*, incorporated this settlement agreement into its July 15, 2003 judgment. In 2017, the plaintiffs[1] filed

[1] The plaintiffs who filed the motion for contempt were: Rudolph J. Fiorillo, Jr., Frederick E. Arnold, Ronald A. Beaucar, Wayne J. Bindas, Paul N. Brown, Frederick A. Caserta, Frank Casto, Kent A. Cavanaugh, Pete J. Coffey, Earl M. Cowell, Michelle Delaney, Stephen T. Donovan, Romeo H. Dube, Elaine

a motion for contempt, alleging that the defendant had violated the court's judgment by replacing and/or changing the health benefits package administered by Anthem to a Cigna administered health insurance plan and by altering the prescription drug plan. The plaintiffs alleged that these changes occurred without their written consent.

On January 24, 2019, the court determined that the defendant had violated the 2003 judgment by changing the health insurance plan administrator from Anthem to Cigna and the prescription drug plan administrator from Anthem to CVS. In its May 14, 2019 order, the court found, however, that the defendant was not in contempt because the evidence demonstrated that all of the insurance claims of the plaintiffs made under the Cigna plan had been paid in a manner identical to the Anthem plan and, therefore, that the defendant had not wilfully violated the 2003 judgment. The plaintiffs appealed and the defendant cross appealed.

On appeal, the plaintiffs claim that the court (1) improperly denied their motion for contempt and (2) effectively amended the 2003 judgment by incorporating the protocols submitted by the defendant.[2] In its cross appeal, the defendant contends that the court

J. Garrahy, William G. Graugard, Timothy F. Kelliher, Allan L. Lawrence, Joseph A. Michaud, Donald Moreau, Robert Neddo, Thomas O'Meara, Thomas Panella, Robert A. Pichette, Donald R. Rapoza, George M. Schreindorfer, Martin Scovill, Christopher M. Sears, Patrick C. Slattery, Kevin S. Sullivan, Garbriele P. Valente, Robert J. Williams, Sr., James G. Wisner, and their spouses, if applicable. At the time of the hearing on the contempt motion, the plaintiffs' counsel indicated that four individuals had withdrawn from the case, leaving a total of twenty-eight plaintiffs.

[2] On December 16, 2020, the plaintiffs moved to strike a portion of the defendant's reply brief as a cross appellant. On April 21, 2021, we denied the plaintiff's motion without prejudice but permitted it to be raised at oral argument. The plaintiffs' counsel briefly addressed this motion at oral argument. In light of our resolution of the plaintiffs' appeal and the defendant's cross appeal, we conclude that no further action is required with respect to this motion.

incorrectly determined that it violated the 2003 judgment. We agree with the claim raised in the defendant's cross appeal and conclude that the court incorrectly determined that it violated the 2003 agreement. In the absence of a violation of the settlement agreement, there was no basis for a finding of contempt. As a result of this conclusion, we need not address the claims raised in the plaintiffs' appeal, and affirm the judgment denying the motion for contempt.[3]

The record reveals the following facts and procedural history. On February 3, 1999, the original plaintiffs, a group of Hartford firefighters[4] who had retired from their employment with the defendant on or after January 1, 1993, commenced the present action. The complaint alleged that, prior to retiring, each of the original plaintiffs was a member of Local 760, International Association of Firefighters, AFL-CIO, CLC (union). The union and the defendant were parties to a collective bargaining agreement.[5] The original plaintiffs claimed that they were entitled to certain health care benefits upon retirement pursuant to their collective bargaining

[3] The plaintiffs' counsel acknowledged at oral argument that if we concluded that the trial court improperly had found a violation of the agreement, then the plaintiffs' contempt motion should have been denied.

[4] The original plaintiffs who filed the 1999 complaint were: Rudolph J. Fiorillo, Jr., Robert J. Arico, Michael Becker, Paul N. Brown, Pete J. Coffey, Earl M. Cowell, Brian V. Czarnota, Edward J. Delaney, Vincent R. Dicioccio, Frederick E. DiNardi, Jr., Stephen T. Donavan, Romeo H. Dube, Jr., Edward P. Garrahy, John A. Griffin, Dennis L. Haberman, Audabon Hill, Jr., Timothy F. Kelliher, Jr., Michael T. Kelly, Harry N. Kenney, John J. Kupstas, Thomas C. McMahon, Joseph A. Michaud, Donald Moreau, Wyatt Plona, Michael W. Raffalo, Donald R. Rapoza, F. Michael Sansom, Patrick C. Slattery, Robert J. Smith, Kevin S. Sullivan, Keith B. Victor, and Donald Weidt. At the October 22, 2018 hearing, the plaintiffs' counsel represented to the court that the 2003 settlement involved approximately eighty people.

[5] It is axiomatic that a collective bargaining agreement is a contract and its terms are interpreted by the principles of contract law. *Poole* v. *Waterbury*, 266 Conn. 68, 87–88, 831 A.2d 211 (2003); *D'Agostino* v. *Housing Authority*, 95 Conn. App. 834, 838, 898 A.2d 228, cert. denied, 280 Conn. 905, 907 A.2d 88 (2006).

agreement. They further alleged that the defendant violated the collective bargaining agreement by substituting, modifying and reducing their insurance benefits and coverages. The original plaintiffs sought a restoration of these health care benefits. In count two of the complaint, the original plaintiffs claimed that the defendant "substituted, modified and diminished health insurance benefits" on three additional occasions.

In 2003, the parties executed a settlement agreement, dated June 15, 2003, in order to resolve the 1999 action. Paragraph 2 of the settlement agreement requires the defendant to provide the original plaintiffs with certain medical benefits designated as "the Anthem Blue Cross Blue Shield Century Preferred with Point of Service RX Rider (the rider for a prescription drug card) as presently in place for Group Policy Number 000675-129 and the Full Service Dental Plan, Number 000671-126, including Riders A, B, C, D, and E [Anthem plan]. Said benefits, shall hereinafter be referred to as the 'entire health insurance package' and shall be deemed to be the entire health insurance package in effect at the . . . date of retirement." A copy of the entire health insurance package was attached and made part of the settlement agreement.

The settlement agreement stated that, for those retired firefighters who had reached the age of fifty-five, the defendant would provide the entire health care package at no cost. Upon reaching the age of sixty-five, the following occurred: "(A) In the event the [retired firefighter], his/her spouse, or a surviving spouse is eligible for Medicare Plans A and B, each of them will continue to receive the entire health insurance package, in a 'carve out.' There will be a coordination of benefits between it and Medicare (a [M]edicare 'carve out'). (B) In the event the [retired firefighter], his/her spouse, or a surviving spouse is not eligible for Medicare Plans,

each of them will continue to receive the entire health insurance package."

Paragraph 5 of the settlement agreement provides: "Except for the automatic inclusion of legislative mandates, the [defendant] agrees that it will not change or diminish in any way the entire health insurance package contained herein without the written consent of the [retired firefighter] or surviving spouse provided however, the plan is permitted to change for purposes of inclusion of new and improved medical procedures and medical procedures that replace obsolete medical procedures without the written consent of the [retired firefighter] or surviving spouse." On July 15, 2003, the court, following the parties' joint motion, incorporated the settlement agreement into its judgment.

On January 23, 2017, the plaintiffs filed a motion for contempt. In that motion, they alleged that, without their written consent, the defendant unilaterally had replaced and/or changed the Anthem plan with a Cigna insurance plan (Cigna plan). The plaintiffs claimed that the switch to the Cigna plan diminished the benefits to which they were entitled. The plaintiffs further claimed that the defendant unilaterally had altered the prescription drug plan, which resulted in a diminishment of the benefits of their entire health insurance package. The plaintiffs requested that the defendant be "cited to show cause why it should not be adjudged in contempt for the violation and punished therefore." The plaintiffs also specifically requested that the defendant be compelled to reinstate the Anthem plan, including the prescription drug program, or, in the alternative, to provide them with a health insurance package that was the equivalent to the Anthem plan, subject to their written consent.

Judge Cohn held a hearing on October 22 and October 23, 2018. The named plaintiff, Rudolph J. Fiorillo, Jr.,

testified that following his retirement in 1994, a dispute arose with the defendant regarding his health insurance benefits. As a result, he and others filed a lawsuit in 1999. In 2003, the parties entered into the settlement agreement to resolve the dispute. Fiorillo testified regarding his involvement in the drafting of the settlement agreement and his understanding of the specific wording used in the agreement.

Richard Pokorski, the defendant's benefits administrator, testified that the defendant was a self-insured entity. Accordingly, the defendant ultimately bore the financial responsibility for all of the medical, dental and prescription medication costs of the plaintiffs for claims covered by the entire health insurance package. Pokorski testified that the defendant utilized insurance carriers, such as Anthem or Cigna, as third-party administrators for their contracts with health-care providers and to facilitate the various payments. Pokorski further testified that he was part of a committee that made a recommendation to the defendant's city council and mayor to switch from Anthem to Cigna in order to save money with regard to its health-care costs. This recommendation was endorsed and executed by the defendant's city council and mayor.

On January 24, 2019, the court issued a memorandum of decision in which it set forth and applied the analytical framework for a contempt determination. See, e.g., *In re Leah S.*, 284 Conn. 685, 693–94, 935 A.2d 1021 (2007). The court determined that the defendant had violated the clear and unambiguous language of paragraphs 2 and 5 of the settlement agreement, which had been incorporated into the 2003 judgment, by changing from the Anthem plan to the Cigna and CVS plans. The court specifically noted that the plaintiffs did not provide written consent to these changes. With respect to the second part of the contempt inquiry, including a consideration of whether the violations were wilful

or excused by a good faith dispute or misunderstanding; see id., 694; the court noted that "[t]he determination of contempt thus depends on evidence on whether the Cigna plan is factually identical to the replaced Anthem plan. The [defendant] may also introduce evidence to show that it has taken sufficient steps to resolve any conflicts between the Anthem and Cigna policy terms. The plaintiffs may rebut the [defendant's] claims with their own evidence." The court then continued the hearing for further proceedings on May 13 and 14, 2019. After the subsequent proceedings, the court issued a second memorandum of decision. In that decision, the court noted that the defendant had represented that written protocols had been established to handle the plaintiffs' claims regarding the change from the Anthem plan to the Cigna plan. The defendant submitted these written protocols to the court.[6]

The written protocols provided that, in the event that one of the plaintiffs believed that a medical or prescription drug benefit had been denied improperly, or covered at an incorrect cost, the member could contact the defendant's benefit coordinator. With respect to medical and dental claims, the defendant's benefit coordinator would contact Cigna to ensure that the claim was processed correctly pursuant to Cigna's policies, and, if not, to correct any such error. If the claim was processed properly, the defendant's benefit coordinator would investigate and determine if the benefit previously was covered by Anthem and at what cost to that plaintiff. The written protocols specifically stated: "If [the defendant's benefit coordinator] learns that Cigna processed the claim inconsistently with how

[6] The defendant subsequently submitted a letter to the court indicating the defendant's corporation counsel had the authority to memorialize the written protocols and use them to resolve any disputes regarding the plaintiffs and their medical and prescription drug benefits, and did not require approval from any other entity of the defendant.

Anthem processed the claim previously, [the defendant's benefit coordinator] notifies [Cigna] . . . to have the claim reprocessed. Additionally, [the defendant's benefit coordinator] insists that Cigna complete an audit to learn whether any other similar past claims from anyone in the [plaintiffs'] group were processed incorrectly and, if so, to have them reprocessed correctly as well. Finally, the Cigna system is updated so that future claims of like kind will process correctly." The defendant's benefit coordinator would then inform the member of the plaintiffs of the adjustment.[7] A similar process was used for disputes with CVS regarding prescription drugs. The written protocols also set forth a time frame of five to ten business days for the defendant to issue a final response for medical claim disputes and three to five business days for prescription drug claim disputes.

The plaintiffs did not dispute the accuracy of the steps taken by the defendant with respect to the change, and the evidence established that all claims had been paid in identical fashion to the Anthem plan. Accordingly, the court determined that the defendant had not wilfully failed to comply with the 2003 judgment and, therefore, found that the defendant was not in contempt.[8] This appeal and cross appeal followed. Additional facts will be set forth as necessary.

Before addressing the specific claims and arguments of the parties, we first identify and set forth certain

[7] In the event that the claim had been processed in accordance with the Cigna plan and the past practices of Anthem, the defendant's benefit coordinator was required to inform the member of the plaintiffs' group that the claim had been denied correctly or that the billing was, in fact, correct.

[8] The court subjected its conclusion to the following: "By May 21, 2019, the corporation counsel [shall] supply the court with a statement of authority to present the protocol as an amendment to the previously entered 2003 judgment in this case. This statement may also attach a revised protocol that removes or amends references to specific personnel or websites." The court further directed the parties to report the "continued status of the case" during the week of August 5, 2019.

legal principles that guide and inform our analysis. We begin with those factors associated with a motion for contempt. "Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense." (Internal quotation marks omitted.) *Puff* v. *Puff*, 334 Conn. 341, 364, 222 A.3d 493 (2020). In the present case, the plaintiffs have set forth allegations of indirect, civil contempt. See, e.g., *Wethersfield* v. *PR Arrow, LLC*, 187 Conn. App. 604, 653 n.39, 203 A.3d 645 (indirect contempt involves conduct occurring outside of court's presence), cert. denied, 331 Conn. 907, 202 A.3d 1022 (2019); *Quaranta* v. *Cooley*, 130 Conn. App. 835, 841–42, 26 A.3d 643 (2011) (civil contempt is conduct directed against rights of opposing party and punishment is wholly remedial, serves only purposes of complainant and is not intended as deterrent to offenses against public); see generally *Edmond* v. *Foisey*, 111 Conn. App. 760, 769, 961 A.2d 441 (2008).

"[O]ur analysis of a judgment of contempt consists of two levels of inquiry. First, we must resolve 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. . . . This is a legal inquiry subject to de novo review. . . . 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. . . . A finding of indirect civil contempt must be supported by clear and convincing evidence. . . . [A] contempt finding is not automatic and depends on the facts and circumstances underlying it." (Internal quotation marks omitted.) *Scalora* v. *Scalora*, 189 Conn. App. 703, 726–

27, 209 A.3d 1 (2019); see also *Bolat* v. *Bolat*, 182 Conn. App. 468, 479–80, 190 A.3d 96 (2018).

Next, we consider the principles related to the interpretation of a settlement agreement that has been incorporated into a judgment of the court. "Because a stipulated judgment is in essence a contract . . . we interpret the stipulated judgment at issue . . . according to general principles governing the construction of contracts." (Citation omitted.) *Awdziewicz* v. *Meriden*, 317 Conn. 122, 129, 115 A.3d 1084 (2015); see also *Barnard* v. *Barnard*, 214 Conn. 99, 109, 570 A.2d 690 (1990); *McCarthy* v. *Chromium Process Co.*, 127 Conn. App. 324, 329, 13 A.3d 715 (2011).[9]

"A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and unambiguous, the contract is to

[9] We are mindful that our Supreme Court has distinguished a stipulated judgment from a contract. "Although a stipulated judgment has attributes of a private contract that merely memorializes the bargained for position of the parties . . . [t]he terms of [a stipulated judgment or consent] decree, unlike those of a simple contract, have unique properties. A consent decree has attributes of both a contract and of a judicial act. . . . Accordingly, [o]nce approved, the prospective provisions of the consent decree operate as an injunction. . . . The injunctive quality of consent decrees compels the court to: [1] retain jurisdiction over the decree during the term of its existence . . . [2] protect the integrity of the decree with its contempt powers . . . and [3] modify the decree should changed circumstances subvert its intended purpose." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Lime Rock Park, LLC* v. *Planning & Zoning Commission*, 335 Conn. 606, 625, 264 A.3d 471 (2020). None of these distinguishing features applies in the present case.

be given effect according to its terms. . . . Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [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]. . . .

"The determination as to whether language of a contract is plain and unambiguous is a question of law subject to plenary review. . . . A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." (Citations omitted; internal quotation marks omitted.) *Brochard* v. *Brochard*, 185 Conn. App. 204, 219–20, 196 A.3d 1171 (2018); see also *Connecticut National Bank* v. *Rehab Associates*, 300 Conn. 314, 318–19, 12 A.3d 995 (2011).

In the present case, the court concluded that the agreement was clear and unambiguous and that the defendant had violated paragraphs 2 and 5 of the agreement when it changed the plaintiffs' health benefits administrators from Anthem to Cigna and CVS without the written consent of the plaintiffs. Our resolution of the appeal and cross appeal requires us to address both of these conclusions.

With respect to the issue of whether the language of the settlement agreement was clear and unambiguous, we note that Fiorillo testified that he had been involved in the drafting of the agreement. He then discussed the intent behind the specific wording used in the settlement agreement and his understanding of that language. Specifically, Fiorillo stated that the language selected meant that Anthem could not be replaced with another plan without the plaintiffs' consent. The defendant's

counsel objected to this evidence only on the grounds of lack of foundation and the use of leading questions.

Fiorillo's testimony regarding his involvement and subjective intent with respect to the drafting and meaning of the settlement agreement constituted parol evidence. "The parol evidence rule is premised upon the idea that when the parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without . . . object or extent of such engagement, it is conclusively presumed, that the whole engagement of the parties, and the extent and manner of their understanding, was reduced to writing. After this, to permit oral testimony, or prior or contemporaneous conversation, or circumstances, or usages [etc.], in order to learn what was intended, or to contradict what is written, would be dangerous and unjust in the extreme. . . . The parol evidence rule does not of itself, therefore, forbid the presentation of parol evidence, that is, evidence outside the four corners of the contract concerning matters governed by an integrated contract, but forbids only the use of such evidence to vary or contradict the terms of such a contract. . . . Parol evidence offered solely to vary or contradict the written terms of an integrated contract is, therefore, legally irrelevant. When offered for that purpose, it is inadmissible not because it is parol evidence, but because it is irrelevant." (Citation omitted; internal quotation marks omitted.) *Medical Device Solutions, LLC* v. *Aferzon*, 207 Conn. App. 707, 728, 264 A.3d 130, cert. denied, 340 Conn. 911, 264 A.3d 94 (2021).

It is well established in our law that "parol evidence is not admissible where the agreement is clear and unambiguous. *HLO Land Ownership Associates Ltd. Partnership* v. *Hartford*, 248 Conn. 350, 357–58, 727 A.2d 1260 (1999). Only if the agreement is ambiguous may parol evidence be admitted, and then only if such evidence does not vary or contradict the terms of the

contract." (Internal quotation marks omitted.) *Grogan* v. *Penza*, 194 Conn. App. 72, 98 n.6, 220 A.3d 147 (2019) (*Bright, J.*, concurring in part and dissenting in part); see generally *Leonetti* v. *MacDermid, Inc.*, 310 Conn. 195, 211, 76 A.3d 168 (2013).

In their respective briefs on appeal, both parties take the position that the terms of the settlement agreement are clear and unambiguous. At oral argument before this court, the plaintiffs' counsel claimed, however, that the court found the agreement to be ambiguous as evidenced by the admission of parol evidence when it permitted Fiorillo to testify about the intent of the parties during the drafting of the settlement agreement. The plaintiffs' counsel further stated that an ambiguity existed because the parties disagreed as to whether the defendant could replace Anthem with Cigna as the third-party administrator. The defendant's counsel maintained that the agreement was clear and unambiguous. During rebuttal argument, the plaintiffs' counsel then returned to his original position and stated that the court had concluded that the agreement was clear and unambiguous.

The trial court expressly found the settlement agreement to be clear and unambiguous. The argument of the plaintiffs' counsel with respect to Fiorillo's testimony regarding the parties' intent and Fiorillo's understanding of the meaning of the settlement agreement is, therefore, misplaced. The fact that Fiorillo testified as to the intent of the parties, without a specific objection from the defendant's counsel, did not constitute a determination of ambiguity, express or implied, by the trial court. We emphasize that the parties' advancement of different interpretations does not necessitate a conclusion of ambiguous contract language. See *Konover* v. *Kolakowski*, 186 Conn. App. 706, 714, 200 A.3d 1177 (2018), cert.

denied, 330 Conn. 970, 200 A.3d 1151 (2019).[10] Finally, there is nothing to suggest or indicate that the trial court used, in any way, the portions of Fiorillo's testimony that consisted of inadmissible parol evidence in rendering its decisions, and we will not assume that the trial court improperly used such evidence. "In Connecticut, our appellate courts do not presume error on the part of the trial court." (Internal quotation marks omitted.) *Jalbert* v. *Mulligan*, 153 Conn. App. 124, 145, 101 A.3d 279, cert. denied, 315 Conn. 901, 104 A.3d 107 (2014). For these reasons, we conclude that the trial court correctly determined that the settlement agreement was clear and unambiguous.

Next, we consider whether the defendant violated the terms of the settlement agreement. We iterate the relevant language from the settlement agreement. Paragraph 2 provides: "The [plaintiffs'] current medical benefits will be replaced with the Anthem Blue Cross Blue Shield Preferred with Point of Service RX Rider (the rider for a prescription drug card) as presently in place for Group Policy Number 000675-129 and the Full Service Dental Plan, Number 000671-126, including Riders A, B, C, D, and E. *Said benefits . . . shall be deemed to be the entire health* [*care*] *package* in effect at the [plaintiffs'] date of retirement." (Emphasis added.) Paragraph 5 of the agreement provides: "Except for the automatic inclusion of legislative mandates, the [defendant] agrees that it will not change or diminish in any way the entire health insurance package contained

[10] We also note that a determination of contempt requires, inter alia, an unambiguous court order. See *Bolat* v. *Bolat*, 191 Conn. App. 293, 297, 215 A.3d 736, cert. denied, 333 Conn. 918, 217 A.3d 634 (2019); see generally *Grogan* v. *Penza*, supra, 194 Conn. App. 98 (*Bright, J.*, concurring in part and dissenting in part) (ambiguous agreement would preclude finding of contempt). A conclusion of ambiguity with respect to the settlement agreement would place a substantial, and likely insurmountable, obstacle in the plaintiffs' way in their efforts to prevail on their contempt motion.

herein without the written consent of the [plaintiffs] . . . .''

The trial court concluded that the change from the Anthem plan to the Cigna and CVS plans constituted a change to the health insurance package contained in the settlement agreement and that, in the absence of written consent, this constituted a violation of the agreement incorporated into the court's 2003 judgment. We disagree with this conclusion of the trial court.

We emphasize that ''[*t*]*he intent of the parties as expressed in a contract is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction*. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage *where it can be sensibly applied to the subject matter of the contract*.'' (Emphasis added; internal quotation marks omitted.) *Prymas* v. *New Britain*, 122 Conn. App. 511, 517, 3 A.3d 86, cert. denied, 298 Conn. 915, 4 A.3d 833 (2010); see also *Barnard* v. *Barnard*, supra, 214 Conn. 109–10 (intention of parties is determined from language used interpreted in light of situation of parties and circumstances connected with transaction and not intention that existed in minds of parties); *Liberty Transportation, Inc.* v. *Massachusetts Bay Ins. Co.*, 189 Conn. App. 595, 603–604, 208 A.3d 330 (2019) (contractual language given rational construction based on its common and ordinary meaning as applied to subject matter). Furthermore, we presume that the parties to a contract did not intend to create an absurd result. *Grogan* v. *Penza*, supra, 194 Conn. App. 79, 220 A.3d 147 (2019).

In 1999, the original plaintiffs claimed that the defendant improperly had diminished the health insurance

benefits to which they were entitled pursuant to a collective bargaining agreement. The original plaintiffs and the defendant entered into a settlement agreement to resolve the dispute and this agreement was incorporated into the 2003 judgment of the court. The reference to the Anthem plan in the settlement agreement was used to establish the specific health care *benefits* to which the original plaintiffs were entitled. In other words, it constituted a reference to the place where a description of the specific benefits afforded to the original plaintiffs could be found. The agreement does not state that a specific third party must administer those benefits.

Following the settlement, the original plaintiffs were entitled to the medical and prescription drug insurance benefits contained in the Anthem plan designated 000675-129 with the point of service RX rider. Those benefits, coupled with the dental benefits set forth in the plan designated 000671-126, including Riders A, B, C, D, and E, comprised the "entire health insurance package" to which the original plaintiffs were entitled, effective August 1, 2003.

On the basis of the clear and unambiguous language used by the parties, we conclude that the settlement agreement intended to establish the particular medical, prescription drug and dental benefits to which the original plaintiffs are entitled but did not include a requirement that Anthem act as the third-party administrator in perpetuity. The defendant agreed that it would not change or diminish in any way the benefits that comprised the entire health care package without the written consent of the plaintiffs. The defendant's agreement to not change or diminish the benefits that comprised the entire health care package, however, did not extend to which entity operates as the third-party administrator over the entire health care package. Rather, the defendant was required to provide the original plaintiffs with

the benefits set forth and identified in the Anthem plan as of August 1, 2003.

The situation of the parties and the circumstances concerning the resolution of the 1999 action support our determination of the parties' intent. See, e.g., *Prymas* v. *New Britain*, supra, 122 Conn. App. 517. The original plaintiffs had alleged that the defendant diminished their benefits and coverages in violation of an existing collective bargaining agreement and sought a restoration of the health care benefits. There is nothing in the settlement agreement to suggest that the parties intended to permanently establish a specific third-party administrator. As previously noted, the defendant ultimately bore the responsibility for the payment of these medical, prescription drug and dental benefits. An absurd result would ensue if the settlement agreement was interpreted to require the defendant to remain bound forever to Anthem, even if that company elected to raise the costs to an unconscionable amount, or to prevent the defendant from changing to another third-party administrator that offered a better health insurance package at a lower cost. Likewise, a similar absurd result would occur if Anthem were to change its name or merge with another company, thereby relieving the defendant of its obligation to provide medical insurance benefits to this group, in the absence of additional, and possibly unsuccessful, legal proceedings. See, e.g., *Grogan* v. *Penza*, supra, 194 Conn. App. 79. For these reasons, we decline to interpret the language used in the agreement in the manner advanced by the plaintiffs. Instead, we conclude that, if the substance of the entire health care package, i.e., the medical, prescription drug, and dental benefits identified in the Anthem plan, is not changed or diminished in any way, then the defendant cannot be said to have violated the settlement agreement. The trial court, therefore, incorrectly determined that the change from the Anthem plan to the Cigna and

CVS plans constituted a violation of the agreement. Nevertheless, the court properly denied the plaintiffs' motion because, in the absence of a violation of the settlement agreement, there was no basis for a finding of contempt.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MATTHEW AVOLETTA ET AL.
(AC 43851)

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

Syllabus

The plaintiff state of Connecticut sought a judgment declaring that certain legislation (2017 Special Acts, No. 17-4), which authorized the defendants to proceed before the Claims Commissioner on their claim, previously filed in 2007 and that had been dismissed as untimely and barred on sovereign immunity grounds, constituted an unconstitutional public emolument in violation of article first, § 1, of the Connecticut constitution. In 2007, the defendants, a mother and her two sons, filed a notice of claim with the Claims Commissioner, seeking to recover damages from the state for the alleged violation of their federal and state constitutional rights to a free public education for the two sons in a safe school setting. The Claims Commissioner dismissed the claim for lack of subject matter jurisdiction on the ground that the claim addressed matters occurring more than one year prior to the date of the filing and, therefore, was filed outside of the statutorily (§ 4-148 (a)) prescribed one year time limit. The defendants sought review from the legislature pursuant to statute (§ 4-158 (a)), which approved a joint resolution that vacated the decision of the Claims Commissioner and authorized the defendants to institute and prosecute an action against the state, and the defendants subsequently commenced an action thereto. Thereafter, the trial court granted the state's motion to dismiss, reasoning that the joint resolution constituted an unconstitutional public emolument in violation of article first, § 1, of the Connecticut constitution. On appeal, this court affirmed the judgment of the trial court, holding that the defendants' claim was time barred by the one year statute of limitations set forth in § 4-148 (a), and that the joint resolution had failed to identify any compelling equitable circumstances or public purpose served by permitting the defendants to bring an untimely claim against the state. In 2013, the

defendants filed a second claim with the Claims Commissioner, alleging that they were harmed by the General Assembly's failure to articulate a public purpose in the joint resolution and sought to revive their 2007 schools claim and damages and other relief from the state for its subsequent negligence in failing to articulate a public purpose in the joint resolution (legislative negligence claim). The Claims Commissioner granted the state's motion to dismiss. The defendants again sought review from the legislature, which approved the special act that authorized the defendants to present their claims to the Claims Commissioner for injuries alleged to have accrued in 2006, reviving the defendants' 2007 schools claim. The state then instituted the declaratory judgment action. The defendants filed a counterclaim, alleging that the state's action violated their due process rights. The state moved to dismiss the defendants' counterclaim on the ground that it was barred by sovereign immunity. The state filed a motion for summary judgment, claiming that the special act constituted an unconstitutional public emolument, and that the defendants were collaterally estopped from arguing that their claims were timely or that there was a legitimate public purpose for permitting their untimely claims to proceed. The trial court granted the state's motions for summary judgment and to dismiss the defendants' counterclaim. On the defendants' appeal to this court, *held*:

1. The trial court properly granted the state's motion for summary judgment:

a. The trial court properly determined that the special act constituted a public emolument in violation of article first, § 1, of the Connecticut constitution as the defendants' schools claim was untimely filed outside of the prescribed one year time limit under § 4-148 (a), the claim could proceed only pursuant to valid special legislation that expressly identified a legitimate public purpose, and the special act did not serve a public purpose because it remedied a procedural default for which the defendants bore responsibility and authorized only the defendants to commence an action against the state for their alleged injuries, providing the defendants with an exclusive and private benefit, not generally available to the public; moreover, because the legislative negligence claim was brought within one year of the alleged injury accruing and, therefore, was timely filed, the proper statutory mechanisms to authorize the claim to proceed before the Claims Commissioner were §§ 4-158 (b) and the statute (§ 4-159 (b)) authorizing the legislature to vacate and remand a decision of the Claims Commissioner but those statutes were not referenced in the special act; furthermore, the special act exclusively referred to dates and injuries relevant to the schools claim and failed to reference the legislature's failure to articulate a public purpose in the joint resolution or correctly remand the schools claim to proceed before the Claims Commissioner, and, therefore, the plain text of the special act failed to indicate that the legislature intended to authorize the legislative negligence claim to proceed before the Claims Commissioner.

b. The defendants could not prevail on their claim that, in reviewing and remanding their schools claim pursuant to §§ 4-158, 4-159, and the applicable statute (§ 4-160) regarding waiver of immunity from liability, the General Assembly automatically and necessarily waived sovereign immunity as to their legislative negligence claim: to overcome the presumption of sovereign immunity, the defendants were required to show that the legislature, either expressly or by force of a necessary implication, statutorily waived the state's sovereign immunity, and, although the defendants sought legislative authorization to recover for the legislature's alleged negligence, the General Assembly's only action in response thereto was to enact the special act, which authorized the defendants to proceed before the Claims Commissioner on the schools claim; moreover, there was no indication that the legislature intended for the defendants to recover against the legislature for its own alleged negligence as the special act was silent as to the defendants' legislative negligence claim and there was no separate directive that remanded the legislative negligence claim to the Claims Commissioner or waived immunity to that claim.

2. The trial court properly dismissed the defendants' counterclaim on the ground that it was barred by sovereign immunity: the defendants' interpretation that, pursuant to § 4-160 (c), the General Assembly waived sovereign immunity for the defendants' counterclaim when the legislature remanded the schools claim to proceed before the Claims Commissioner was incorrect, as the waiver of § 4-160 (c) applied only to actions for money damages that the General Assembly had authorized against the state or claims that the General Assembly had remanded to the Claims Commissioner for further proceedings pursuant to § 4-159 and does not apply to separate declaratory judgment actions brought by the state challenging the constitutionality of special legislation; moreover, without a statutory waiver of sovereign immunity, the defendants could recover for money damages on their counterclaim only if they presented their counterclaim before the Claims Commissioner, and, because the defendants did not do so, their counterclaim could not proceed.

Argued January 11—officially released May 10, 2022

Procedural History

Action for judgment declaring unconstitutional a special act of the legislature that permitted the refiling of a certain claim by the defendants that previously had been dismissed, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the defendants filed a counterclaim; thereafter, the court, *Hon. Robert B. Shapiro*, judge trial referee, granted the plaintiff's motions for summary judgment

and to dismiss the defendants' counterclaim and rendered judgment thereon, from which the defendants appealed to this court. *Affirmed.*

Deborah G. Stevenson, assigned counsel, for the appellants (defendants).

Michael K. Skold, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, solicitor general, for the appellee (plaintiff).

Opinion

CRADLE, J. This appeal arises out of a long-standing dispute among the defendants, Joanne Avoletta, Peter Avoletta, and Matthew Avoletta,[1] and the plaintiff, the state of Connecticut, concerning the state's alleged failure to provide Peter Avoletta and Matthew Avoletta with a free public education in a safe setting. The defendants appeal from the summary judgment rendered by the trial court in favor of the state and from the judgment of dismissal of their counterclaim. As to the summary judgment, the defendants claim that the court improperly concluded that the special act authorizing their first claim to proceed before the Claims Commissioner (commissioner) constituted an unconstitutional public emolument in violation of article first, § 1, of the Connecticut constitution, and the General Assembly did not automatically waive the state's sovereign immunity as to the defendants' second claim by remanding their claim to the commissioner. As to the dismissal of the counterclaim, the defendants claim that the court erred in determining that their counterclaim was barred by sovereign immunity. We affirm the judgment of the trial court.

[1] Hereinafter, we refer to Joanne Avoletta, Peter Avoletta, and Mathew Avoletta, collectively, as the defendants, and individually by name where appropriate. Joanne Avoletta is the mother of Peter Avoletta and Matthew Avoletta.

The record before the court, viewed in the light most favorable to the defendants as the nonmoving party, reveals the following relevant facts and procedural history. On May 2, 2007, the defendants filed a claim with the commissioner alleging that the state failed to maintain the Torrington public schools in a safe and sanitary condition (2007 claim). Specifically, the defendants alleged that the middle and high school buildings contained water leaks, bacteria, mold, dampness, and poor indoor air quality, which caused and exacerbated Peter Avoletta's and Matthew Avoletta's respiratory diseases and conditions.[2] As a result of the poor building conditions, Joanne Avoletta enrolled Peter Avoletta and Matthew Avoletta in private schools and filed a claim with the commissioner seeking reimbursement from the state for the tuition and costs of their private education. Because the defendants' claim was not timely filed within the one year statute of limitations set forth in General Statutes § 4-148 (a),[3] the commissioner dismissed the claim for lack of subject matter jurisdiction.

The defendants subsequently sought legislative review of the commissioner's decision pursuant to § 4-148 (b).[4] In response, the General Assembly passed Substitute

[2] The defendants alleged that Peter Avoletta "suffers from irreversible lung disease" and Matthew Avoletta "suffers from chronic allergies and asthma."

[3] General Statutes § 4-148 (a) provides: "Except as provided in subsection (b) of this section and section 4-165b, no claim shall be presented under this chapter but within one year after it accrues. Claims for injury to person or damage to property shall be deemed to accrue on the date when the damage or injury is sustained or discovered or in the exercise of reasonable care should have been discovered, provided no claim shall be presented more than three years from the date of the act or event complained of."

[4] General Statutes § 4-148 (b) provides: "The General Assembly may, by special act, authorize a person to present a claim to the Office of the Claims Commissioner after the time limitations set forth in subsection (a) of this section have expired if it deems such authorization to be just and equitable and makes an express finding that such authorization is supported by compelling equitable circumstances and would serve a public purpose. Such finding shall not be subject to review by the Superior Court."

House Joint Resolution No. 11-34[5] (joint resolution), which vacated the commissioner's ruling and authorized the defendants to file a damages claim against the state in the Superior Court. Pursuant to the joint resolution, the defendants commenced an action against the state on May 14, 2012. See *Avoletta* v. *State*, Docket No. CV-12-5036221-S, 2013 WL 2350751 (Conn. Super. May 6, 2013) (*Avoletta I*). The state subsequently filed a motion to dismiss. Id., *1.

The court, *Sheridan*, *J.*, granted the state's motion to dismiss on the ground that the joint resolution was an unconstitutional public emolument in violation of article first, § 1, of the Connecticut constitution. Id., *9. The court found that the defendants' claim was untimely, noting that the defendants "were clearly aware of the school conditions far more than a year before the May 2, 2007 filing with the . . . commissioner." Id., *7. Accordingly, the court held that allowing the defendants "to file suit directly in this matter, when this court has determined that their action was untimely provides them a right unavailable to other parties. While the legislature need not enact a special act when vacating the . . . commissioner's dismissal of the matter, allowing a plaintiff with an untimely claim to circumvent § 4-148 (b) without any explanation or public purpose, constitutes a public emolument when the action is untimely." Id., *9. Thereafter, the defendants appealed to this court. See *Avoletta* v. *State*, 152 Conn. App. 177, 98 A.3d 839, cert. denied, 314 Conn. 944, 102 A.3d 1116 (2014) (*Avoletta II*).

[5] Substitute House Joint Resolution No. 11-34, § 2, provides in relevant part that "the decision of the . . . [c]ommissioner . . . ordering the dismissal of the claims against the state in excess of seven thousand five hundred dollars of [the defendants], is vacated and the [defendants] are authorized to institute and prosecute to final judgment an action against the state to recover damages as compensation for injury to person or damage to property, or both, allegedly suffered by the claimants as set forth in said claims."

In *Avoletta II*, this court affirmed the judgment of the trial court, holding that the defendants' claim was time barred by the one year statute of limitations set forth in § 4-148 (a), and that the joint resolution had failed to identify any compelling equitable circumstances or a public purpose served by permitting the defendants to bring an untimely claim against the state. Id., 192–95; see also General Statutes § 4-148 (b). Relying on *Morneau* v. *State*, 150 Conn. App. 237, 260–62, 90 A.3d 1003, cert. denied, 312 Conn. 926, 95 A.3d 522 (2014), this court determined that the joint resolution granted the defendants an exclusive and private benefit unavailable to the general public. *Avoletta II*, supra, 152 Conn. App. 192–95. The court proceeded to clarify that special legislation passed pursuant to § 4-148 (b), which seeks only to remedy a procedural default, such as failure to comply with a statute of limitations, will be upheld only in situations where the "state itself bears responsibility" for the procedural default. (Emphasis omitted.) Id., 194–95. Accordingly, this court held that the joint resolution was an unconstitutional public emolument. Id., 195.

On August 28, 2013, the defendants filed a second claim with the commissioner (2013 claim), seeking relief on two distinct grounds. First, the defendants sought to revive their 2007 claim for damages stemming from unsafe conditions at the Torrington public schools (Torrington schools claim). Second, the defendants alleged that they were harmed by the legislature's "gross negligence" in failing to articulate a public purpose in the joint resolution and neglecting to appropriately follow the statutory procedure to authorize such a claim (legislative negligence claim). The state moved to dismiss both claims, arguing that the defendants' claims were barred by res judicata, collateral estoppel, and legislative immunity. The commissioner granted the state's motion to dismiss on May 1, 2015.

Following the commissioner's order, the defendants again appealed to the General Assembly for legislative review. On June 13, 2017, the General Assembly passed No. 17-4 of the 2017 Special Acts (special act), authorizing the defendants to proceed before the commissioner "for injuries . . . alleged to have accrued on September 15, 2006 . . . ."[6] The commissioner subsequently issued a scheduling order requiring that the parties engage in discovery, file dispositive motions, and participate in a hearing on the merits of the defendants' claims.

On September 15, 2017, the state instituted the present action by filing a declaratory judgment action with

[6] Number 17-4 of the 2017 Special Acts provides: "(a) Notwithstanding the failure to file a proper notice of a claim against the state with the clerk of the Office of the Claims Commissioner, within the time limitations specified by subsection (a) of section 4-148 of the general statutes, Joanne Avoletta, Peter Avoletta, and Matthew Avoletta are authorized pursuant to the provisions of subsection (b) of section 4-148 of the general statutes to present their respective claims against the state to the Claims Commissioner. The General Assembly finds that there is a public purpose served by encouraging accountable state government through the full adjudication of cases involving persons who claim to have been injured by the conduct of state actors. The General Assembly further finds it just and equitable that the time limitations provided for in subsection (a) of section 4-148 of the general statutes be tolled in a case such as this, involving claimants who initially filed notice of their claims against the state with the Claims Commissioner on May 2, 2007, for injuries that are alleged to have accrued on September 15, 2006, which allegations, if viewed in a light most favorable to the claimants, provide notice to the state of their claims within the statute of limitations for injuries to their person. The General Assembly deems such authorization to be just and equitable and finds that such authorization is supported by compelling equitable circumstances and would serve a public purpose. Such claims shall be presented to the Claims Commissioner not later than one year after the effective date of this section.

"(b) The state shall be barred from setting up the failure to comply with the provisions of sections 4-147 and 4-148 of the general statutes, from denying that notice of the claims was properly and timely given pursuant to sections 4-147 and 4-148 of the general statutes and from setting up the fact that the claims had previously been considered by the Claims Commissioner, by the General Assembly or in a judicial proceeding as defenses to such claims."

the Superior Court, seeking a determination that the special act constituted an unconstitutional public emolument in violation of article first, § 1, of the Connecticut constitution.[7] The defendants subsequently filed a motion to dismiss on several grounds,[8] each of which was rejected by the court, *Robaina*, *J.*, and the motion was denied. The defendants then filed a motion to strike the complaint, which the court, *Dubay*, *J.*, denied.

On May 11, 2018, the state filed a motion for summary judgment. In its accompanying memorandum of law, the state claimed that (1) the special act constituted an unconstitutional public emolument and (2) the defendants were collaterally estopped from arguing that their claims were timely or that there was a legitimate public purpose for permitting their untimely claims to proceed.

The defendants subsequently filed an opposition, in which they distinguished and clarified the claims they had brought before the commissioner. With regard to the Torrington schools claim, the defendants argued that the state was responsible for their failure to comply with the one year statute of limitations set forth in § 4-148 (a). Specifically, the defendants contended that they had detrimentally relied on promises from state actors and, in particular, a directive from the attorney general to the Commissioner of Education to compel the Torrington school district to abide by state law. The defendants also claimed that the special act served a legitimate public purpose, namely to encourage accountability

[7] The state also filed a motion to stay the proceedings before the commissioner pending the court's resolution of the constitutionality of the special act.

[8] In the defendants' memorandum in support of their motion to dismiss, they alleged, inter alia, that (1) the court lacked personal jurisdiction over the defendants due to the state's insufficient service of process; (2) the court lacked subject matter jurisdiction because the commissioner had not yet issued a final judgment and was not joined as a party to the declaratory judgment action; (3) the state lacked standing to bring the declaratory judgment action; (4) the claim was not ripe for adjudication; (5) the state's

in state government through the full adjudication of cases involving persons who claim to have been injured by the conduct of state actors. As to the legislative negligence claim, the defendants clarified that they were harmed by the legislature's failure to articulate a public purpose in the joint resolution, which caused the dismissal of the 2007 claim, rather than the state's alleged failure to maintain the Torrington schools in a safe condition. They also contended that the legislative negligence claim was timely filed with the commissioner.

On July 27, 2018, the state submitted a reply brief in further support of its motion for summary judgment, wherein it argued, inter alia, that the plain language of the special act only attempted to revive the Torrington schools claim and, therefore, did not authorize the legislative negligence claim to proceed before the commissioner. Accordingly, the state contended that the legislative negligence claim was barred by res judicata, collateral estoppel, and legislative immunity.

On November 8, 2018, during the pendency of the state's motion for summary judgment, the defendants filed their answer, which included various special defenses and a counterclaim. The counterclaim alleged, inter alia, that the state's conduct in bringing the declaratory judgment action violated the defendants' due process rights under article first, § 1, of the Connecticut constitution.[9] The defendants sought relief in the form of (1) a dismissal of the declaratory judgment action; (2) a declaration that the state violated the defendants' due

claim was judicially estopped; and (6) the court's exercise of jurisdiction over the claim violated separation of power principles.

[9] Specifically, the defendants alleged, inter alia, that the state's filing of a declaratory judgment action (1) violated their rights by alleging that their claims were not timely filed; (2) violated the plain language of the special act; and (3) impermissibly interfered with the defendants' right to a fair hearing and their ability to recover under the special act.

process rights in bringing the action, that the legislature prejudiced the defendants by failing to articulate a public policy in the joint resolution, and that the 2013 claim was free to proceed before the commissioner; and (3) "legal, equitable, compensatory, nominative, actual, and/or punitive monetary damages, including but not limited to attorney's fees, interest, and costs . . . ." The state moved to dismiss the counterclaim on the ground that it was barred by sovereign immunity.

On October 16, 2019, the court, *Hon. Robert B. Shapiro*, judge trial referee, heard argument on the state's motion for summary judgment and on its motion to dismiss the defendants' counterclaim. On January 14, 2020, the court granted the state's motion for summary judgment. In its memorandum of decision, the court addressed both the Torrington schools claim and the legislative negligence claim. Regarding the former, the court held that the issue of whether the Torrington schools claim was timely filed was barred by the doctrine of collateral estoppel. Because the claim previously was held untimely, the court clarified that the claim could only proceed via special legislation passed pursuant to § 4-148 (b). The court then proceeded to analyze the constitutionality of the special act in light of our emoluments clause jurisprudence and determined that the defendants had failed to demonstrate a genuine issue of material fact that the special act served a legitimate public purpose. Accordingly, the court concluded that the special act constituted an unconstitutional public emolument.

As to the legislative negligence claim, the court found that the claim was timely filed in accordance with § 4-148 (a). The court held, however, that neither the plain text nor the legislative history of the special act indicated that the General Assembly intended for the defendants to proceed on the legislative negligence claim. Rather, the special act only authorized the defendants

to proceed before the commissioner on the untimely Torrington schools claim. Consequently, the court determined that the legislative negligence claim was barred by sovereign immunity.

On that same day, the court also granted the state's motion to dismiss the defendants' counterclaim. In its memorandum of decision, the court held that (1) the legislature, through the special act, did not statutorily waive the state's sovereign immunity with regard to the counterclaim; (2) the defendants failed to allege a constitutionally protected interest; and (3) the attorney general did not exceed his statutory authority in bringing the declaratory judgment action against the defendants. The court concluded, therefore, that the defendants' counterclaim was barred by sovereign immunity. This appeal followed.

I

The defendants first claim that the court erred in rendering summary judgment in favor of the state on the grounds that (1) the special act authorizing the Torrington schools claim was an unconstitutional public emolument and (2) the legislative negligence claim, which was not authorized by the plain language of the special act, was barred by sovereign immunity. With regard to the Torrington schools claim, the defendants contend that a genuine issue of material fact exists as to whether the General Assembly articulated a legitimate public purpose in the language of the special act. As to the legislative negligence claim, the defendants argue that, by reviewing the commissioner's dismissal of their claims, and by remanding the Torrington schools claim to the commissioner through the special act, the General Assembly necessarily waived sovereign immunity as to the legislative negligence claim. We are not persuaded.

We begin by setting forth the appropriate standard of review and relevant legal principles that guide our resolution of this appeal. Our review of a trial court's decision granting a motion for summary judgment is well established. "Practice Book § [17-49] requires that 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. A material fact is a fact that will make a difference in the result of the case. . . . The facts at issue are those alleged in the pleadings. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. . . . The party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. See Practice Book §§ [17-44 and 17-45]. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The test is whether a party would be entitled to a directed verdict on the same facts. . . . Our review of the trial court's decision to grant a motion for summary judgment is plenary." (Internal quotation marks omitted.) *Pascola-Milton* v. *Millard*, 203 Conn. App. 172, 179–80, 247 A.3d 652, cert. denied, 336 Conn. 934, 248 A.3d 710 (2021).

"The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law." (Internal quotation marks omitted.) *DaimlerChrysler Corp.* v. *Law*, 284 Conn. 701, 711, 937 A.2d 675 (2007). "The doctrine of sovereign immunity operates as a strong presumption in favor of the state's immunity from liability or suit. . . . [T]o circumvent the strong presumption of sovereign immunity in [an] action for monetary damages, the burden

is on the [claimant] to show that . . . the legislature, either expressly or by force of a necessary implication, statutorily waived the state's sovereign immunity . . . . In the absence of a statutory waiver of sovereign immunity, the [claimant] may not bring an action against the state for monetary damages without authorization from the . . . commissioner to do so. . . .

"When sovereign immunity has not been waived, the . . . commissioner is authorized by statute to hear monetary claims against the state and determine whether the claimant has a cognizable claim. . . . The . . . commissioner, if he [or she] deems it just and equitable, may sanction suit against the state on any claim which, in his [or her] opinion, presents an issue of law or fact under which the state, were it a private person, could be liable." (Citation omitted; internal quotation marks omitted.) *Avoletta II*, supra, 152 Conn. App. 183–84.

"Section 4-148 (a) sets forth the time frame in which a claimant must present a claim to the . . . [c]ommissioner. Specifically, that subsection provides that no claim shall be presented . . . but within one year after it accrues. Claims for injury to person or damage to property shall be deemed to accrue on the date when the damage or injury is sustained or discovered or in the exercise of reasonable care should have been discovered, provided no claim shall be presented more than three years from the date of the act or event complained of. . . .

"[Section 4-148 (b)] provides a legislative exception to the time frame for obtaining a waiver of sovereign immunity. The General Assembly may, by special act, authorize a person to present a claim to the . . . [c]ommissioner after the time limitations set forth in subsection (a) of this section have expired if it deems such authorization to be just and equitable and makes an

express finding that such authorization is supported by compelling equitable circumstances and would serve a public purpose." (Citation omitted; internal quotation marks omitted.) *Morneau* v. *State*, supra, 150 Conn. App. 255. "Although § 4-148 (b) provides that [s]uch finding shall not be subject to review by the Superior Court, special acts passed in this manner are subject to review nonetheless under the public emoluments clause contained in article first, § 1, of the state constitution." (Internal quotation marks omitted.) *Lagassey* v. *State*, 268 Conn. 723, 733, 846 A.2d 831 (2004).

"To prevail under article first, § 1, of our constitution, the state must demonstrate that the sole objective of the General Assembly is to grant personal gain or advantage to an individual. . . . If, however, an enactment serves a legitimate public purpose, then it will withstand a challenge under article first, § 1 . . . . Moreover, we conduct our review of [the special act] mindful that legislative enactments carry with them a strong presumption of constitutionality, and that a party challenging the constitutionality of a validly enacted statute bears the heavy burden of proving the statute unconstitutional beyond a reasonable doubt. . . .

"The scope of our review as to whether an enactment serves a public purpose is limited. [W]hat constitutes a public purpose is primarily a question for the legislature, and its determination should not be reversed by the court unless it is manifestly and palpably incorrect. . . . In determining whether a special act serves a public purpose, a court must uphold it unless there is no reasonable ground upon which it can be sustained. . . . Thus, if there be the least possibility that making the gift will be promotive in any degree of the public welfare . . . we are bound to uphold it against a constitutional challenge predicated on article first, § 1, [of the state constitution]. . . .

"In this regard, although a special act passed under § 4-148 (b) will undoubtedly confer a direct benefit upon a particular claimant, we have found a public purpose if it remedies an injustice done to that individual *for which the state itself bears responsibility*. . . . In such circumstances, the benefit conferred upon a private party by the legislature may be viewed as incidental to the overarching public interest that is served in remedying an injustice caused by the state. . . .

"By contrast, we have consistently held that legislation seeking to remedy a procedural default for which the state is not responsible does not serve a public purpose and, accordingly, runs afoul of article first, § 1, of the state constitution. . . . Thus, legislation cannot survive a constitutional challenge under article first, § 1, if it excuses a party's failure to comply with a statutory notice requirement simply because the noncompliance precludes consideration of the merits of the party's claim. . . . Similarly, where a special act has allowed a person named therein to bring a suit based upon a statutory cause of action that would otherwise be barred for failure to comply with a time limit specified in the statute, we have ordinarily been unable to discern any public purpose sufficient to sustain the enactment." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Kinney* v. *State*, 285 Conn. 700, 709–11, 941 A.2d 907 (2008).

A

On appeal, the parties agree that the Torrington schools claim was not timely filed within the one year limitation period set forth in § 4-148 (a).[10] Thus, the

[10] As we previously have stated, the court held that the issue of whether the Torrington schools claim was timely filed pursuant to § 4-148 (a) was barred by the doctrine of collateral estoppel. The defendants have not challenged that conclusion in their brief or at oral argument before this court. Rather, they stipulate in their brief that the Torrington schools claim was untimely filed.

Torrington schools claim can only proceed pursuant to valid special legislation that expressly identifies a legitimate public purpose. See General Statutes § 4-148 (b); *Kinney* v. *State*, supra, 285 Conn. 710. The defendants contend that the plain language of the special act articulates such a purpose and, therefore, authorizes their claim to proceed before the commissioner. In response, the state argues that the special act only remedies a procedural default for which the defendants bear responsibility and, consequently, bestows an exclusive, private benefit on the defendants in violation of article first, § 1, of the Connecticut constitution. We agree with the state.

There is no question that the General Assembly purported to articulate a legitimate public purpose in the plain text of the special act. Indeed, the special act explicitly states that "there is a public purpose served by encouraging accountable state government through the full adjudication of cases involving persons who claim to have been injured by the conduct of state actors" and "[t]he General Assembly deems such authorization [to proceed before the commissioner] . . . just and equitable and finds that such authorization is supported by compelling equitable circumstances and would serve a public purpose." Special Act 2017, No. 17-4, § 1. This language, however, does not end our inquiry. Instead, our Supreme Court has held that "a mere declaration within a particular special act that it serves the public interest is not enough." *Kelly* v. *University of Connecticut Health Center*, 290 Conn. 245, 259–60, 963 A.2d 1 (2009). "The legislature cannot by mere fiat or finding, make public a truly private purpose . . . . Its findings and statements about what is or is not public cannot be binding upon the court. . . . Therefore, the fact that the legislature stated that the special act served a public purpose does not change the pertinent inquiry for the court." (Citations omitted;

internal quotation marks omitted.) *Kinney* v. *State*, supra, 285 Conn. 712. Rather, we must determine whether the state conclusively demonstrated that the "sole objective of the General Assembly [was] to grant personal gain or advantage to [the defendants]." (Internal quotation marks omitted.) Id., 709.

Our resolution of this claim is guided by our Supreme Court's decisions in *Kinney* v. *State*, supra, 285 Conn. 700, and *Kelly* v. *University of Connecticut Health Center*, supra, 290 Conn. 245. In *Kinney*, the court invalidated a special act authorizing a claimant to override the one year time limitation set forth in § 4-148 (a) as an unconstitutional public emolument. *Kinney* v. *State*, supra, 713–16. Although the language of the special act explicitly stated that "such authorization would serve a public purpose by not penalizing a person who exhausts his or her administrative and judicial remedies before filing a claim against the state with the . . . commissioner," the court determined that the act's true purpose was to provide the claimant with an exclusive right not generally available to others similarly situated. Id., 706; see id., 714 ("[e]ven looking beyond the express statement of the public purpose in [the special act], however, we are hard pressed to conclude that there is a legitimate public purpose when the beneficial effect of the special act applies to no member of the public other than the plaintiff in this case for whom it grants a personal privilege" (footnote omitted)). Similarly, in *Kelly* v. *University of Connecticut Health Center*, supra, 260, the court struck down a special act that attempted to authorize the claimant to proceed before the commissioner despite the claim being time barred by § 4-148 (a). The special act provided that permitting the claim to proceed was "supported by compelling equitable circumstances and would serve a public purpose." Id., 248 n.4. Again, the court disagreed and invalidated the act on the ground that it "grant[ed] to the

[claimant] alone a personal right not generally available to others similarly situated, and serve[d] no public purpose." Id., 260.

Applying the foregoing legal principles to the present case, we conclude that the special act does not serve a legitimate public purpose and, therefore, is an unconstitutional public emolument. The special act specifically authorizes the defendants, and the defendants alone, to bring their untimely claim before the commissioner. Despite the statutory language that such authorization will "encourag[e] accountable state government," the special act does not permit similarly situated individuals to bring untimely claims against the state for money damages. Indeed, the special act's purported public purpose is belied by the special act's title and plain language, which identifies the defendants by name and individuates their claim against the state.[11] Accordingly, the General Assembly has bestowed the defendants with an exclusive, personal right, not generally available to the public, to bring suit based on a statutory cause of action that would otherwise be barred for failure to comply with a time limit specified in the statute.

The defendants argue that, even if the special act confers on them a direct benefit, a valid public purpose

[11] The special act is entitled "An Act Concerning The Claims Against The State of Joanne Avoletta, Peter Avoletta and Matthew Avoletta" and provides in relevant part that, "[n]otwithstanding the failure to file a proper notice of a claim against the state with the clerk of the Office of the Claims Commissioner, within the time limitations specified by subsection (a) of section 4-148 of the general statutes, *Joanne Avoletta*, *Peter Avoletta*, *and Matthew Avoletta are authorized pursuant to the provisions of subsection (b) of section 4-148 of the general statutes to present their respective claims against the state to the Claims Commissioner*." (Emphasis added.) The special act does not authorize any other claimants, or class of claimants, to override the one year statute of limitation set forth in § 4-148 (a) for injuries stemming from the conditions of the Torrington schools or, more generally, from the "conduct of state actors."

exists because the special act "remedies an injustice done . . . for which the state itself bears responsibility." (Emphasis omitted; internal quotation marks omitted.) *Kelly* v. *University of Connecticut Health Center*, supra, 290 Conn. 258; see also *Kinney* v. *State*, supra, 285 Conn. 711 ("[b]y contrast, we have consistently held that legislation seeking to remedy a procedural default *for which the state is not responsible* does not serve a public purpose" (emphasis added; internal quotation marks omitted)). The defendants contend that they were harmed by the state because, in passing the joint resolution, the General Assembly negligently failed to articulate a legitimate public purpose that would allow their claim to survive an emoluments clause challenge.[12] The defendants overlook, however, that any alleged negligence on the part of the legislature could not have caused their underlying procedural default in failing to bring a timely claim. Stated otherwise, the alleged injury caused by the legislature's failure to articulate a public purpose in the joint resolution accrued *after* the Torrington schools claim was untimely filed with the commissioner. Accordingly, the General Assembly was not

[12] At summary judgment, the defendants argued that both the executive branch and the legislative branch were responsible for their failure to timely bring the Torrington schools claim. Regarding the executive branch, the defendants alleged that they relied on (1) the attorney general's acknowledgment that the state had a duty to provide a safe school setting for the children; and (2) his directive to the Commissioner of Education to take appropriate corrective action, and that such reliance unjustly prevented them from bringing a timely claim against the state. As to the legislative branch, the defendants claimed that they were harmed by the General Assembly's failure to articulate a legitimate public policy in the joint resolution. In its memorandum of decision on the state's motion for summary judgment, the court addressed only the alleged harm caused by the executive branch, holding that any assurances that the defendants may have received from the attorney general did not foreclose the timely filing of the Torrington schools claim and, accordingly, did not amount to the kind of procedural default for which the state could be held responsible. On appeal, the defendants abandon the argument that the executive branch caused their untimely filing. Instead, the defendants focus solely on the legislature's purported failure to articulate a public purpose in the joint resolution.

responsible for the procedural default that the special act attempts to override.

Moreover, as the trial court aptly determined, there is no indication that the General Assembly intended to authorize the defendants to recover on the legislative negligence claim. Although the defendants sought legislative review of the commissioner's denial of both the Torrington schools and legislative negligence claims, the terms of the special act only permitted the defendants to bring suit for injuries caused by the alleged harmful school conditions. As previously discussed, the special act cites § 4-148 (b) as the exclusive statutory authority authorizing the defendants' claim to proceed before the commissioner. Section 4-148 (b) provides the General Assembly with the ability to authorize claims barred by the one year limitation period set forth in § 4-148 (a). By contrast, General Statutes § 4-158 (b)[13] or General Statutes § 4-159 (b)[14] authorize the legislature to review, vacate, and remand decisions of the

[13] General Statutes § 4-158 (b) provides: "Any person who has filed a claim for more than fifty thousand dollars may request the General Assembly to review a decision of the Claims Commissioner (1) ordering the denial or dismissal of the claim pursuant to subdivision (1) of subsection (a) of this section, including denying or dismissing a claim that requests permission to sue the state, or (2) ordering immediate payment of a just claim in an amount not exceeding thirty-five thousand dollars pursuant to subdivision (2) of subsection (a) of this section. A request for review shall be in writing and filed with the Office of the Claims Commissioner not later than twenty days after the date the person requesting such review receives a copy of the decision. The filing of a request for review shall automatically stay the decision of the Claims Commissioner."

Section 4-158 (b) was amended by the legislature in 2021. See Public Acts 2021, No. 21-91, § 4. That amendment has no bearing on this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[14] General Statutes § 4-159 (b) provides: "The General Assembly shall: (1) With respect to a decision of the Claims Commissioner ordering the denial or dismissal of a claim pursuant to subdivision (1) of subsection (a) of section 4-158: (A) Confirm the decision; or (B) Vacate the decision and, in lieu thereof, (i) order the payment of the claim in a specified amount, or (ii) authorize the claimant to sue the state; (2) With respect to a decision of the Claims Commissioner ordering the immediate payment of a just claim in an amount not exceeding thirty-five thousand dollars pursuant to

commissioner over claims that were *timely filed*. As we previously have stated, and as the defendants stipulate, the legislative negligence claim was brought within one year of the alleged injury accruing. Accordingly, the legislative negligence claim was timely filed for the purpose of § 4-148 (a), rendering §§ 4-158 (b) and 4-159 (b) the proper statutory mechanisms by which to authorize the claim to proceed before the commissioner. The special act, however, makes no reference to § 4-158 or § 4-159, despite the fact that the defendants explicitly cited both provisions in their appeal for legislative review from the commissioner's decision.

In addition, the special act exclusively refers to dates and injuries relevant to the Torrington schools claim. By its terms, the special act authorizes the defendants "pursuant to the provisions of subsection (b) of section 4-148 of the general statutes to present their respective claims against the state to the . . . [c]ommissioner . . . ." and that "[t]he General Assembly . . . finds it just and equitable that the time limitations provided for in subsection (a) of section 4-148 of the general statutes be tolled in a case such as this, involving claimants who initially filed notice of their claims against the state

subdivision (2) of subsection (a) of section 4-158: (A) Confirm the decision; (B) Modify the decision by ordering that a different amount be paid; or (C) Vacate the decision and, in lieu thereof, (i) order no payment be made, or (ii) authorize the claimant to sue the state; (3) With respect to a decision of the Claims Commissioner recommending payment of a just claim in an amount exceeding thirty-five thousand dollars pursuant to subdivision (3) of subsection (a) of section 4-158: (A) Accept the recommendation and order payment of the specified amount; (B) Modify the recommendation by ordering that a different amount be paid; or (C) Reject the recommendation and, in lieu thereof, (i) order no payment be made, or (ii) authorize the claimant to sue the state; or (4) With respect to a decision of the . . . [c]ommissioner pursuant to subdivision (1), (2) or (3) of subsection (a) of section 4-158, remand the claim to the Office of the Claims Commissioner for such further proceedings as the General Assembly may direct."

Section 4-159 (b) was amended by the legislature in 2021. See Public Acts 2021, No. 21-91. That amendment has no bearing on this appeal. In the interest of simplicity, we refer to the current revision of the statute.

with the . . . [c]ommissioner on May 2, 2007, *for injuries that are alleged to have accrued on September 15, 2006* . . . ." (Emphasis added.) See Special Acts 2017, No. 17-4, § 1 (a). By contrast, the special act makes no reference to the legislature's failure to articulate a public purpose in the joint resolution or correctly remand the Torrington schools claim to proceed before the commissioner. "[I]t is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so." (Citation omitted.) *Scholastic Book Clubs, Inc.* v. *Commissioner of Revenue Services*, 304 Conn. 204, 219, 38 A.3d 1183, cert. denied, 568 U.S. 940, 133 S. Ct. 425, 184 L. Ed. 2d 255 (2012). Accordingly, we find no indication in the plain text of the special act that the legislature intended to authorize the legislative negligence claim to proceed before the commissioner.

B

The defendants next claim that the General Assembly, by accepting the defendants' legislative appeal and remanding the Torrington schools claim to the commissioner, necessarily waived its sovereign immunity with regard to the legislative negligence claim as well. According to the defendants, the General Assembly was not required to specifically authorize the legislative negligence claim through the special act or some other action because the statutory process by which the General Assembly reviews, vacates, and remands decisions by the commissioner constitutes, by law, an implicit waiver of sovereign immunity. We are not persuaded.

"The principles governing statutory waivers of sovereign immunity are well established. [A] litigant that seeks to overcome the presumption of sovereign immunity [pursuant to a statutory waiver] must show that . . . the legislature, either expressly or by force of a

necessary implication, statutorily waived the state's sovereign immunity . . . . In making this determination, [a court shall be guided by] the well established principle that statutes in derogation of sovereign immunity should be strictly construed. . . . [When] there is any doubt about their meaning or intent they are given the effect which makes the least rather than the most change in sovereign immunity. . . . Furthermore, because such statutes are in derogation of the common law, [a]ny statutory waiver of immunity must be narrowly construed . . . and its scope must be confined strictly to the extent the statute provides. . . . Whether the legislature has waived the state's sovereign immunity raises a question of statutory interpretation." (Citation omitted; internal quotation marks omitted.) *Allen* v. *Commissioner of Revenue Services*, 324 Conn. 292, 299–300, 152 A.3d 488 (2016), cert. denied, U.S. , 137 S. Ct. 2217, 198 L. Ed. 2d 659 (2017).

This court previously has clarified that, "in order for a statute to waive sovereign immunity by force of necessary implication, it is not sufficient that the claimed waiver reasonably may be implied from the statutory language. It must, by logical necessity, be the only possible interpretation of the language. . . . Further, because ambiguous language in a statute is by definition susceptible to more than one reasonable interpretation . . . any ambiguity as to whether the statute waives sovereign immunity by force of necessary implication is not an ambiguity but, rather, an answer. . . . Simply stated, a statute cannot waive the state's sovereign immunity from suit by force of necessary implication when its language is ambiguous because, logically, such ambiguity forecloses the prospect that an implied waiver of sovereign immunity is the only possible interpretation of the [statutory] language. . . . Thus, unlike our typical process of statutory interpretation pursuant to General Statutes § 1-2z, when the meaning of the

statute cannot be ascertained from its plain and unambiguous language, we do not consult extratextual evidence to determine whether the legislature intended to waive sovereign immunity by force of necessary implication. . . . Instead, the existence of an ambiguity 'ends the inquiry,' and we must conclude that the state's immunity from suit has not been implicitly waived by the statute's language." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Jezouit* v. *Malloy*, 193 Conn. App. 576, 585–86, 219 A.3d 933 (2019).

The defendants argue that, in reviewing their claims pursuant to §§ 4-158, 4-159, and General Statutes § 4-160, the General Assembly automatically and necessarily waived sovereign immunity as to their legislative negligence claim. In particular, the defendants rely on language set forth in § 4-160 (c), which provides in relevant part that "[i]n each action authorized by . . . the General Assembly pursuant to section 4-159 or 4-159a . . . [t]he state waives its immunity from liability and from suit in each such action and waives all defenses which might arise from the eleemosynary or governmental nature of the activity complained of [and] [t]he rights and liability of the state in each such action shall be coextensive with and shall equal the rights and liability of private persons in like circumstances."[15]

The defendants' claim requires us to review the legislative appeal process for claims against the state for money damages that have been dismissed or denied by the commissioner. As an initial matter, when the commissioner denies or dismisses a claim under § 4-158 (a) (1), the claimant may seek legislative review of the commissioner's decision under § 4-158 (b). On

[15] The legislature has amended § 4-160 (c) since the events underlying this appeal. See Public Acts 2021, No. 21-91, § 6. That amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

reviewing the claim, the General Assembly may either: (1) confirm the commissioner's decision; see General Statutes § 4-159 (b) (1) (A); (2) vacate the decision and either order payment or authorize the claimant to sue the state; see General Statutes § 4-159 (b) (1) (B); or (3) remand the claim to the commissioner for such further proceedings as the General Assembly may direct. See General Statutes § 4-159 (b) (4).

When the General Assembly authorizes a claim to proceed or remands it for further proceedings before the commissioner, § 4-160 (c) provides in relevant part that "*the claimant shall allege such authorization and the date on which it was granted*, except that *evidence of such authorization* shall not be admissible in such action as evidence of the state's liability. The state waives its immunity from liability and from suit in each such action and waives all defenses which might arise from the eleemosynary or governmental nature of the activity complained of. The rights and liability of the state in each such action shall be coextensive with and shall equal the rights and liability of private persons in like circumstances." (Emphasis added.)

Reading this statutory framework as a whole, we conclude that the General Assembly did not implicitly waive sovereign immunity with regard to the legislative negligence claim. First, it is clear from the plain language of § 4-159 that any action taken by the legislature in response to a request to review a claim cannot arise automatically by operation of law. Rather, each subsection requires the legislature to take some positive action indicating that it either (1) confirms the commissioner's decision; (2) vacates the decision and either orders payment or authorizes the claimant to sue; or (3) remands the claim to the commissioner for further proceedings as the General Assembly may direct. Second, § 4-160 (c) indicates that the claimant carries the burden

of "alleg[ing]" that the legislature authorized the claimant to proceed before the commissioner and the date on which such authorization was granted. Moreover, § 4-160 (c) provides in relevant part that "*evidence of such authorization* shall not be admissible in such action as evidence of the state's liability." (Emphasis added.) Read together, this language implies that the claimant must identify some action taken by the legislature that demonstrates "evidence of such authorization" for the claim to proceed before the commissioner. Allowing a claim to proceed where the legislature was silent would contradict the plain language of the statute.

In the present case, the special act was the only action taken by the General Assembly on review from the commissioner regarding either the Torrington schools claim or the legislative negligence claim. As we previously have stated, the special act was silent as to the legislative negligence claim, as well as the statutory provisions that provide the authority to remand the legislative negligence claim to the commissioner. There was no separate directive remanding the alleged legislative negligence claim to the commissioner or waiving immunity as to that claim. Permitting the defendants to proceed without any sort of indication from the legislature would contradict our law's strong presumption of sovereign immunity. See *Morneau* v. *State*, supra, 150 Conn. App. 253; id., 252–53 ("[w]here there is any doubt about its meaning or intent, we should give it the effect that makes the least rather than the most change in sovereign immunity . . . [n]othing can be taken by implication against the state" (citations omitted; internal quotation marks omitted)). This principle applies with particular force in the present circumstances, where the defendants seek legislative authorization to recover for negligence allegedly committed by the legislature undertaking a core legislative function. In the absence of any indication that the legislature

intended for the defendants to recover against itself for its own alleged negligence, the defendants' claim must fail. Accordingly, the state was entitled to judgment as a matter of law and the court correctly rendered summary judgment.

II

The defendants' second claim is that the court improperly dismissed their counterclaim on the ground that it was barred by sovereign immunity. Specifically, the defendants claim that the General Assembly, pursuant to §§ 4-158, 4-159, and 4-160, impliedly waived sovereign immunity as to the defendants' counterclaim by reviewing the defendants' claims and remanding the Torrington schools claim to proceed before the commissioner. We disagree.

As a preliminary matter, we set forth the appropriate standard of review and relevant legal principles that guide our disposition of this claim. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [decision to] grant . . . the motion to dismiss will be de novo. . . . [T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss." (Citation omitted; internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 346–47, 977 A.2d 636 (2009).

"Sovereign immunity relates to a court's subject matter jurisdiction over a case, and therefore presents a question of law over which we exercise de novo review. . . . In so doing, we must decide whether [the trial

court's] conclusions are legally and logically correct and find support in the facts that appear in the record. . . . [T]he sovereign immunity enjoyed by the state is not absolute. There are [three] exceptions: (1) when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity . . . (2) when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights . . . and (3) when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority. . . . For a claim [for money damages] made pursuant to the first exception, this court has recognized the well established principle that statutes in derogation of sovereign immunity should be strictly construed. . . . Where there is any doubt about their meaning or intent they are given the effect which makes the least rather than the most change in sovereign immunity." (Citations omitted; internal quotation marks omitted.) Id., 349–50.

On appeal, the defendants again claim that the General Assembly impliedly waived sovereign immunity, pursuant to §§ 4-158, 4-159, and 4-160, by reviewing and remanding the Torrington schools claim to proceed before the commissioner.[16] In particular, the defendants rely on language set forth in § 4-160 (c), which provides in relevant part, "[i]n each action authorized by . . .

[16] The defendants' counterclaim also sought declaratory and injunctive relief on the ground that the attorney general acted in excess of his statutory authority and violated the defendants' due process right to have their claims heard by filing the present declaratory judgment action. The court dismissed those claims as barred by sovereign immunity. The defendants have not raised those arguments on appeal or included them as grounds for relief in their brief to this court. Accordingly, we decline to review them. See *Morrisey-Manter* v. *Saint Francis Hospital & Medical Center*, 166 Conn. App. 510, 526–27, 142 A.3d 363, cert. denied, 323 Conn. 924, 149 A.3d 982 (2016).

the General Assembly pursuant to section 4-159 or 4-159a . . . the state waives its immunity from liability and from suit in each such action and waives all defenses which might arise from the eleemosynary or governmental nature of the activity complained of. . . .'' The defendants interpret this language to mean that the General Assembly, by remanding the Torrington schools claim to proceed before the commissioner, waived sovereign immunity for the defendants' counterclaim in this subsequent declaratory judgment action. We find this reading to be misguided.

Looking closely at the statutory language, § 4-160 (c)'s waiver applies only to *actions authorized by the General Assembly pursuant to §§ 4-159 and 4-159a*. Specifically, the waiver, by its terms, applies to suits for money damages that the General Assembly has authorized against the state; see General Statutes § 4-159 (b) (1) (B); or claims that the General Assembly has remanded to the commissioner for further proceedings. See General Statutes § 4-159 (b) (4). Section 4-160 (c) does not apply to separate declaratory judgment actions brought by the state challenging the constitutionality of special legislation. Accordingly, in order to recover money damages on their counterclaim against the state for its alleged due process violation in bringing the declaratory judgment action, the defendants must identify a separate statutory waiver of sovereign immunity permitting them to do so. See *Columbia Air Services, Inc.* v. *Dept. of Transportation*, supra, 293 Conn. 346–50. As we previously have stated, the only legislative action waiving sovereign immunity in the present case was the special act authorizing the defendants to proceed before the commissioner on the Torrington schools claim. In the absence of a statutory waiver of sovereign immunity, the only other avenue by which the defendants may recover for money damages on their counterclaim is to present their counterclaim before

the commissioner. See *Chief Information Officer* v. *Computers Plus Center, Inc.*, 310 Conn. 60, 96, 74 A.3d 1242 (2013) ("the defendant's failure to present its counterclaims for damages to the [c]laims [c]ommissioner and to obtain legislative permission to sue the department pursuant to § 4-160 prior to bringing its counterclaims deprives the trial court of subject matter jurisdiction over those counterclaims"); see also *Avoletta II*, supra, 152 Conn. App. 183. Because the defendants have not done so, there is no jurisdictional basis on which their counterclaim can proceed. Accordingly, we conclude that the defendants' counterclaim is barred by sovereign immunity.

The judgment is affirmed.

In this opinion the other judges concurred.

EMILY BYRNE *v.* AVERY CENTER FOR OBSTETRICS AND GYNECOLOGY, P.C.
(AC 43413)

Cradle, Clark and Harper, Js.

Syllabus

The plaintiff patient sought to recover damages from the defendant medical provider for injuries allegedly sustained as a result of, inter alia, the defendant's breach of its duty of patient confidentiality. Without the plaintiff's knowledge or authorization, in response to a subpoena duces tecum issued in connection with a paternity action filed in the Probate Court against the plaintiff by M, an individual with whom the plaintiff previously had a relationship, the defendant sent the plaintiff's medical records to the Probate Court. The records were placed in the Probate Court's public file for the paternity action and were accessed by M, who used the information contained therein to harass and threaten the plaintiff. Although the plaintiff had previously filed for bankruptcy and the bankruptcy court had granted the application of the appointed trustee of her estate to employ special counsel to pursue a claim against the defendant, the plaintiff commenced the action in her individual capacity. In response, the defendant admitted that it had breached its duty of confidentiality and was negligent in sending the plaintiff's records to the Probate Court but denied that it was the proximate cause of the

plaintiff's injuries. The plaintiff filed an offer of judgment, to which the defendant objected. Thereafter, the trial court granted the plaintiff's motion to join the bankruptcy trustee as a party plaintiff. The jury returned a general verdict in favor of the plaintiff and awarded her noneconomic damages. Thereafter, the trial court denied the defendant's motion for a new trial, to set aside the verdict and for remittitur, and it granted the plaintiff's motion for offer of judgment interest. On the defendant's appeal to this court, *held*:

1. The defendant failed to prove that it was harmed or that injustice resulted from the trial court's limiting of the scope of the testimony of K, the retired probate judge acting as the defendant's expert witness: although the trial court precluded K from opining with regard to the specific facts of the case or stating, as the defendant would have liked, that "it was extraordinarily abnormal for the Probate Court clerk to have placed the plaintiff's medical records in a public file," his testimony left no doubt that the clerk had mishandled the records; moreover, on the basis of the testimony that was allowed, the members of the jury were capable of determining whether the clerk's handling of the records was so extraordinary that it broke the chain of causation between the defendant's conduct and the plaintiff's injury.

2. Contrary to the defendant's claim, the trial court did not improperly permit the plaintiff to submit a claim for future emotional damages to the jury on the basis of a single, vague, speculative statement in a hearsay report:

   a. The trial court did not abuse its discretion when it admitted into evidence the psychological report written by the plaintiff's treating psychologist, B: because the report was written on B's stationary and was signed by B, there was a presumption that it was made in the ordinary course of business and was admissible as a business entry; moreover, contrary to the defendant's claim, the report was not inadmissible pursuant to statute (§ 52-174 (b)) for being prepared in anticipation of litigation because the defendant was in possession of the report when it deposed B and, therefore, had the opportunity to cross-examine B as to his opinions therein even though B was unable to testify at trial.

   b. The trial court properly submitted the plaintiff's claim for future noneconomic damages to the jury on the basis of the evidence presented at trial: there was evidence in the record, in addition to B's report, to support a showing of a reasonable probability of future or ongoing injury, including the testimony of the plaintiff, the testimony of a licensed clinical social worker who treated the plaintiff eight years after her medical records had been made public, and the length of time between the admitted negligence of the defendant and the return of the verdict; moreover, the fact that there was contrary evidence in the record from the plaintiff's other treating physicians regarding future injury was not a sufficient reason for the trial court to withhold its instruction on future noneconomic damages.

   c. The trial court did not abuse its discretion by denying the defendant's request to submit to the jury interrogatories distinguishing between past

and future damages: the request was untimely filed, as the defendant did not request such interrogatories until after the trial court had given the majority of its charge to the jury, and, pursuant to the applicable rule of practice (§ 16-22), written requests for jury interrogatories must be filed with the clerk of the trial court before the beginning of arguments.

3. The trial court's award of offer of judgment interest was not improper: pursuant to *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.* (297 Conn. 105), the offer of judgment was validated at the time the trustee was added as a party plaintiff; moreover, since *DiLieto*, neither the legislature nor the rules committee of the Superior Court has amended the statutes or rules governing the procedures applicable to offers of judgment when a bankruptcy trustee is substituted as a party plaintiff under the applicable statute (§ 52-109), despite our Supreme Court's express suggestion in *DiLieto* that they do so; accordingly, in making its award, the trial court properly followed our Supreme Court's holding in *DiLieto*.

Argued September 22, 2021—officially released May 10, 2022

Procedural History

Action to recover damages for, inter alia, the defendant's alleged negligent infliction of emotional distress, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Hon. Richard P. Gilardi*, judge trial referee, granted the plaintiff's motion to add Douglas J. Wolinsky, the bankruptcy trustee of her estate, as a party plaintiff; thereafter, the matter was tried to the jury before *Welch, J.*; verdict for the plaintiff; subsequently, the court, *Welch, J.*, denied the defendant's motion for a new trial, to set aside the verdict and/or for remittitur and rendered judgment in accordance with the verdict; thereafter, the court, *Welch, J.*, granted the plaintiff's motion for offer of judgment interest, attorney's fees and postjudgment interest, and the defendant appealed to this court. *Affirmed.*

Jeffrey R. Babbin, with whom were *James F. Biondo* and, on the brief, *Richard Luedeman* and *Diana M. Carlino*, for the appellant (defendant).

Bruce L. Elstein, for the appellee (plaintiff).

Opinion

CRADLE, J. In 2007, the plaintiff[1] Emily Byrne commenced this action against the defendant, Avery Center for Obstetrics and Gynecology, P.C., alleging that the defendant had breached its duty of patient confidentiality by responding to a subpoena duces tecum and negligently sending the plaintiff's medical records to the New Haven Regional Children's Probate Court (Children's Probate Court) without her knowledge and authorization. Before trial, the defendant admitted that it had breached its privacy policy and its agreement to keep the plaintiff's medical records confidential and had negligently mailed the records to the Children's Probate Court without her knowledge. The defendant contended at trial, however, that its actions were not the proximate cause of the plaintiff's injuries. The jury returned a verdict in favor of the plaintiff, and the trial court, *Welch*, *J.*, granted the plaintiff's motion for offer of judgment interest, attorney's fees, and postjudgment interest. On appeal, the defendant claims that the court improperly (1) limited the testimony of its expert witness; (2) admitted into evidence a medical report, charged the jury concerning future noneconomic damages, and denied its request for a jury interrogatory differentiating between past and future damages; and (3) granted the plaintiff's motion for offer of judgment interest pursuant to General Statutes (Rev. to 2005) § 52-192a.[2] We affirm the judgment of the trial court.

[1] Pursuant to a bankruptcy petition filed by the plaintiff in 2006, the bankruptcy trustee, Douglas J. Wolinsky, was made a party plaintiff in 2010. In this opinion, we refer to Byrne as the plaintiff and to Wolinsky as the trustee.

[2] General Statutes (Rev. to 2005) § 52-192a provides in relevant part: "(a) After commencement of any civil action based upon contract or seeking the recovery of money damages, whether or not other relief is sought, the plaintiff may, not later than thirty days before trial, file with the clerk of the court a written 'offer of judgment' signed by the plaintiff or the plaintiff's attorney, directed to the defendant or the defendant's attorney, offering to settle the claim underlying the action and to stipulate to a judgment for a sum certain. . . . Within sixty days after being notified of the filing of the

The following relevant facts and procedural history are set forth in our Supreme Court's earlier decision in *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 314 Conn. 433, 102 A.3d 32 (2014). "Before July 12, 2005, the defendant provided the plaintiff [with] gynecological and obstetrical care and treatment. The defendant provided its patients, including the plaintiff, with notice of its privacy policy regarding protected health information and agreed, based on this policy and on law, that it would not disclose the plaintiff's health information without her authorization.

'offer of judgment' and prior to the rendering of a verdict by the jury or an award by the court, the defendant or the defendant's attorney may file with the clerk of the court a written 'acceptance of offer of judgment' agreeing to a stipulation for judgment as contained in plaintiff's 'offer of judgment'. Upon such filing, the clerk shall enter judgment immediately on the stipulation. If the 'offer of judgment' is not accepted within sixty days and prior to the rendering of a verdict by the jury or an award by the court, the 'offer of judgment' shall be considered rejected and not subject to acceptance unless refiled. Any such 'offer of judgment' and any 'acceptance of offer of judgment' shall be included by the clerk in the record of the case.

"(b) After trial the court shall examine the record to determine whether the plaintiff made an 'offer of judgment' which the defendant failed to accept. If the court ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain stated in the plaintiff's 'offer of judgment', the court shall add to the amount so recovered twelve per cent annual interest on said amount, computed from the date such offer was filed in actions commenced before October 1, 1981. In those actions commenced on or after October 1, 1981, the interest shall be computed from the date the complaint in the civil action was filed with the court if the 'offer of judgment' was filed not later than eighteen months from the filing of such complaint. If such offer was filed later than eighteen months from the date of filing of the complaint, the interest shall be computed from the date the 'offer of judgment' was filed. The court may award reasonable attorney's fees in an amount not to exceed three hundred fifty dollars, and shall render judgment accordingly. . . ."

General Statutes (Rev. to 2005) § 52-192a was the subject of subsequent amendments in 2005, 2007 and 2011, none of which is applicable to the present case. See Public Acts 2011, No. 11-77, § 1; Public Acts 2007, No. 07-141, § 16; Public Acts 2005, No. 05-275, § 4. Of note, the 2005 amendment substitutes the term "offer of compromise" for the term "offer of judgment." Public Act 05-275. The 2005 amendment, however, is applicable to actions accruing on or after October 1, 2005, the date that the amendment took effect. Public Act 05-275. The plaintiff's cause of action in this case accrued prior to that date. We therefore refer to the offers in the present case as

"In May, 2004, the plaintiff began a personal relationship with Andro Mendoza, which lasted until September, 2004.[3] . . . In October, 2004, she instructed the defendant not to release her medical records to Mendoza. In March, 2005, she moved from Connecticut to Vermont where she presently lives. On May 31, 2005, Mendoza filed paternity actions against the plaintiff in Connecticut and Vermont. Thereafter, the defendant was served with a subpoena requesting its presence together with the plaintiff's medical records at the . . . Children's [Probate Court] on July 12, 2005. The defendant did not alert the plaintiff of the subpoena, file a motion to quash it or appear in court. Rather, the defendant mailed a copy of the plaintiff's medical file to the court around July 12, 2005. In September, 2005, [Mendoza] informed [the] plaintiff by telephone that he reviewed [the] plaintiff's medical file in the court file. On September 15, 2005, the plaintiff filed a motion to seal her medical file, which was granted. The plaintiff alleges that she suffered harassment and extortion threats from Mendoza since he viewed her medical records.[4] . . .

"The plaintiff subsequently brought this action against the defendant. Specifically, the operative complaint in the present case alleges that the defendant: (1) breached its contract with her when it violated its privacy policy by disclosing her protected health information without

offers of judgment in accordance with the applicable statutory language. All references to § 52-192a throughout this opinion are to the 2005 revision.

[3] "We note that the operative complaint in the present case alleges that the plaintiff discovered she was pregnant around the same time she terminated her relationship with Mendoza." *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 437 n.4.

[4] "We also note that, according to the operative complaint, Mendoza has utilized the information contained within these records to file numerous civil actions, including paternity and visitation actions, against the plaintiff, her attorney, her father and her father's employer, and to threaten her with criminal charges." *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 437 n.5.

authorization; (2) acted negligently by failing to use proper and reasonable care in protecting her medical file, including disclosing it without authorization in violation of General Statutes § 52-146o[5] and the [United States Department of Health and Human Services'] regulations implementing [the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. § 1320d et seq.]; (3) made a negligent misrepresentation, upon which the plaintiff relied to her detriment, that her medical file and the privacy of her health information would be protected in accordance with the law;[6] and (4) engaged in conduct constituting negligent infliction of emotional distress." (Footnotes added; footnotes omitted; footnotes in original; internal quotation marks omitted.) Id., 437–39.[7]

[5] General Statutes § 52-146o provides in relevant part: "(a) Except as provided in sections 52-146c to 52-146j, inclusive, sections 52-146p, 52-146q and 52-146s, and subsection (b) of this section, in any civil action or any proceeding preliminary thereto or in any probate, legislative or administrative proceeding, a physician or surgeon, licensed pursuant to section 20-9, or other licensed health care provider, *shall not disclose* (1) any communication made to him or her by, or any information obtained by him or her from, a patient or the conservator or guardian of a patient with respect to any actual or supposed physical or mental disease or disorder, or (2) any information obtained by personal examination of a patient, *unless the patient or that patient's authorized representative explicitly consents to such disclosure.* . . ." (Emphasis added.)

We note that the legislature made certain changes to § 52-146o subsequent to 2005 that are not relevant to the present appeal. See Public Acts 2013, No. 13-208, § 63; Public Acts 2011, No. 11-129, § 20. For the sake of simplicity, all references to § 52-146o within this opinion are to the current revision of the statute.

[6] The plaintiff withdrew her claim of negligent misrepresentation before trial.

[7] After the parties had conducted discovery, they filed cross motions for summary judgment. The defendant's motion for summary judgment addressed all four counts of the complaint. On April 7, 2011, the trial court, *Hon. Richard P. Gilardi*, judge trial referee, denied the defendant's motion for summary judgment with respect to the breach of contract and negligent misrepresentation counts because there were genuine issues of material fact. *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 327 Conn. 540, 547, 175 A.3d 1 (2018). With regard to the negligence and negligent infliction of emotion distress counts, the court treated the motion for sum-

On October 9, 2018, the defendant filed an amended answer wherein it admitted that it had breached its duty of confidentiality and admitted that it was negligent in sending the plaintiff's medical records to the Children's Probate Court without the plaintiff's authorization. The defendant, however, denied that its actions were the proximate cause of the plaintiff's injuries and damages.

The case was tried to a jury over several days in late November and early December, 2018. The crux of the

mary judgment as a motion to dismiss. Id., 544. The court agreed with the defendant that HIPAA does not provide a private cause of action and that HIPAA, therefore, preempted any Connecticut common-law action dealing with the confidentiality/privacy of medical information. Id., 544–45. The court dismissed those counts. Id., 547. The plaintiff appealed. See *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 436 n.3 (permission to appeal).

On appeal, our Supreme Court reversed the judgment of dismissal, concluding that, "if Connecticut's common law recognizes claims arising from a health care provider's alleged breach of its duty of confidentiality in the course of complying with a subpoena, HIPAA and its implementing regulations do not preempt such claims. . . . HIPAA and its implementing regulations may be utilized to inform the standard of care applicable to such claims arising from allegations of negligence in the disclosure of patients' medical records pursuant to a subpoena." Id., 458–59. The court remanded the case for further proceedings. Id., 463.

On remand, the defendant filed another motion for summary judgment with respect to the negligence and negligent infliction of emotional distress counts of the complaint on the ground that "no Connecticut court had ever recognized a common-law cause of action against a health care provider for breach of its duty of confidentiality" in responding to a subpoena. *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 327 Conn. 548. The trial court, *Arnold, J.*, agreed with the defendant that no Connecticut court had recognized a common-law privilege for communications between a patient and physicians and that recognition of such a cause of action is best addressed by the state's appellate courts or the legislature. Id. The plaintiff appealed once more. See id., 541 n.2 (permission to appeal).

Our Supreme Court framed the issue on appeal as "whether a patient has a civil remedy against a physician if that physician, *without the patient's consent*, discloses confidential information obtained in the course of the physician-patient relationship." (Emphasis added.) Id., 550. The court recognized that " '[t]he principle of confidentiality lies at the heart of the physician-patient relationship,' " that "a cause of action for the breach of the duty of confidentiality in the physician-patient relationship by the disclosure of medical information is not barred by § 52-146o or HIPAA and that public

plaintiff's case was that the defendant's failure to notify her of the subpoena before sending her medical records to the Children's Probate Court was a substantial factor in causing her emotional harm. The plaintiff testified and presented testimonial and documentary evidence regarding Mendoza's harassment and lawsuits and her past and then current mental health history.

In its defense, the defendant contended that sending the plaintiff's medical records to the Children's Probate Court was not the proximate cause of her injuries. It argued that the Children's Probate Court mishandled the records and was the proximate cause of her injuries. The defendant also argued that the plaintiff's emotional distress was caused by Mendoza's harassment, communications, and lawsuits against her and her family.[8]

The jury returned a general verdict in favor of the plaintiff and awarded her noneconomic damages in the amount of $853,000.[9] On March 7, 2019, the defendant filed a motion for a new trial, to set aside the verdict and for remittitur on the grounds that the court improperly (1) admitted a report prepared by the plaintiff's expert into evidence because it was speculative and permitted the jury to consider an award of future damages, (2) instructed the jury on future noneconomic damages, and (3) failed to provide a verdict sheet that differentiated between past and future damages. The court denied the defendant's motion.

The plaintiff also filed a motion for offer of judgment interest, attorney's fees, and postjudgment interest, which the defendant opposed. The court granted the plaintiff's

policy, as viewed in a majority of other jurisdictions that have addressed the issue, supports that recognition." Id. The court reversed the judgment and again remanded the case for further proceedings. Id., 573.

[8] We note that the defendant did not file any special defenses to the plaintiff's complaint; nor did it serve an apportionment complaint on any third party.

[9] The plaintiff did not claim economic damages.

motion and awarded offer of judgment interest at the rate of 12 percent per annum, postjudgment interest at the rate of 8 percent per annum, and attorney's fees of $350. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the court improperly precluded its expert witness, retired probate judge Robert K. Killian, Jr., from testifying that "it was extraordinarily abnormal for the [Children's] Probate Court clerk to have placed the plaintiff's medical records in a public file accessible by Mendoza." The defendant argues that the court erred in precluding Killian's testimony "regarding the [Children's] Probate Court clerk's failure to follow normal, expected protocols for confidentiality with respect to the handling of the plaintiff's medical records." The defendant contends that, "because Probate Courts are expected not to make medical records public, [the defendant's] sending the records to the [Children's] Probate Court was not a proximate cause of their public disclosure to Mendoza." The defendant asserts that Killian's testimony in this regard was crucial to its challenge to causation and, thus, that the court's preclusion of it was highly prejudicial to its defense. We are not persuaded.

The following facts are relevant to our resolution of the defendant's claim. On March 23, 2018, the defendant disclosed Killian as an expert witness to testify on the issues of liability and causation, stating that Killian had been a Probate Court judge for more than thirty years and had served as chief judge and president judge of the Connecticut Probate Assembly. The defendant expected Killian to testify that (1) whether the plaintiff's records were mailed or hand delivered to the court made no difference as to how the clerk was to handle them; (2) in 2005, Probate Court procedures in general

required medical records to remain in the custody of the clerk under protective seal until the court ordered their release; (3) the Children's Probate Court clerk had mishandled the plaintiff's medical records by placing them in a publicly accessible file without a court order or the agreement of the parties; and (4) the clerk's mishandling of the records was the reason Mendoza gained access to the plaintiff's medical records.

On October 3, 2018, the plaintiff filed a motion in limine asking the court to preclude Killian from testifying that it was the clerk's mishandling of the plaintiff's medical records that proximately caused her injuries. The plaintiff first argued that the defendant had not made the Children's Probate Court an apportionment defendant and, therefore, the defendant should be precluded from blaming a nonparty for any negligence or harm caused to the plaintiff by the disclosure of her medical records. Second, the plaintiff noted that when she deposed Killian, he testified that Probate Court procedures are localized throughout Connecticut and that he had never presided at the Children's Probate Court in New Haven, where the plaintiff's records were mailed. Consequently, the plaintiff contended that Killian's proposed testimony was neither relevant nor accurate.

The parties appeared before the court, *Kamp*, *J.*, on October 11, 2018, to argue the plaintiff's motion in limine. In opposing the motion in limine, the defendant argued that it was not seeking to apportion liability but that Killian's testimony was to address the question of causation. In support of its position, the defendant argued that Killian's expert testimony was admissible under a general denial, citing *Bernier* v. *National Fence Co.*, 176 Conn. 622, 630, 410 A.2d 1007 (1979) for the proposition that facts inconsistent with the plaintiff's allegations that the proximate cause of her injuries was the defendant's negligence, whether sole or concurrent,

were admissible under a general denial. With respect to Killian's proposed testimony, Judge Kamp ruled: "[I]f I'm going to allow this, which I was inclined to allow you to do, it was only for the purpose of arguing that the conduct of your client was not a substantial factor under a proximate cause analysis because . . . you've admitted liability already. You've admitted that your conduct was negligent.

* * *

But I do think that you're entitled to make the break in causation argument, but you can't do it in a way that you're really seeking to apportion liability to [a] nonparty." Trial commenced before Judge Kamp on October 16, 2018, but a mistrial was declared on the basis of comments made by counsel during opening statements.

Trial commenced before Judge Welch on November 27, 2018. During its case, the defendant produced Killian as a witness and made an offer of proof as to his testimony. During the offer of proof, Killian testified in general as to statewide Probate Court procedures and policies and how medical records should be handled by the Probate Court clerk, whether mailed or hand delivered. He further testified that when the plaintiff's records arrived at the Children's Probate Court, the clerk should have taken custody of them and placed them in a sealed file. On cross-examination, Killian testified that, in 2005, there were no statewide written policies, procedures, manuals, rules, regulations, or directives that required a Probate Court to handle confidential records in a specific way.[10] Every Probate

[10] Killian testified that Probate Courts are to handle medical records pursuant to General Statutes § 45a-98b. General Statutes § 45a-98b provides in relevant part: "In any proceeding before a court of probate, the court may issue an order for the disclosure of medical information relevant to the determination of the matter before the court. . . . Any such medical information filed with the court shall be confidential."

Court had its own rules. Killian himself had never presided in the Children's Probate Court and had never spoken to the administrative judge or the clerk about the present case or the procedures that existed in that court in 2005. He also had no knowledge of how the plaintiff's records were handled by the clerk when they arrived in the Children's Probate Court in July, 2005.

Following the offer of proof, Judge Welch recognized Killian as an expert with regard to Probate Court policies and procedures in general but ruled that he could testify "on a very limited basis, in terms of the general probate rules or the general Probate Court procedures . . . not specific to this case."[11] Before Killian testified, the court instructed the jury as to the purpose of his testimony.[12]

We begin with the applicable standard of review. "[T]he motion in limine . . . has generally been used in Connecticut courts to invoke a trial judge's inherent discretionary powers to control proceedings, exclude evidence, and prevent occurrences that might unnecessarily

[11] Counsel for the defendant asked the court for clarification of its ruling. The following colloquy transpired:

"[The Defendant's Counsel]: I don't understand . . . part of your holding words said not specific to this case. . . . I just want clarification on that.

* * *

I'm going to ask him in general if . . . there was a policy of a court to get the records and simply put them into the file, generally speaking, would that be a good—

"The Court: He did not testify to that. He testified . . . we're going to testify as to the Probate Court procedures in general. . . . [H]e's testified to the fact that the Probate Court procedure is X. . . . And you're asking him, if you don't do that, then you're not following the procedure. It's implied. I'm not going to allow it in. . . . You're asking him to draw a conclusion that something . . . that he's already laid the fact."

[12] The court instructed the jury that the next witness was Killian, "a retired probate judge that will testify as to certain Probate Court . . . procedures in general. He is offered by the defense only to provide testimony as to the cause of the plaintiff's injuries. I remind you that the . . . Children's [Probate] Court and its staff are not parties to this action and are not liable to the plaintiff [for] any of her damages claimed in this action. The defendant has admitted liability. The testimony is being offered only on the issue of

prejudice the right of any party to a fair trial. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did. . . . Even when a trial court's evidentiary ruling is deemed to be improper, we must determine whether that ruling was so harmful as to require a new trial. . . . In other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful. . . . Finally, the standard in a civil case for determining whether an improper ruling was harmful is whether the . . . ruling [likely affected] the result. . . . Despite this deferential standard, the trial court's discretion is not absolute. Provided the defendant demonstrates that substantial prejudice or injustice resulted, evidentiary rulings will be overturned on appeal [when] the record reveals that the trial court could not reasonably conclude as it did." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 128, 956 A.2d 1145 (2008).

"Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . . [T]o render an expert opinion the witness must be qualified to do so and there must be a factual basis for the opinion."[13] (Internal quotation

proximate cause. I will instruct you further on proximate cause when I instruct you on the applicable law at the end of the case."

[13] The plaintiff does not dispute that Killian is an expert on Probate Court procedures.

marks omitted.) *State* v. *Fisher*, 342 Conn. 239, 269, 269 A.3d 104 (2022). "[A]n *expert witness is not ordinarily permitted to express an opinion on an ultimate issue of fact* which is to be decided by the trier of fact. . . . Experts can sometimes give an opinion on an ultimate issue where the trier, in order to make intelligent findings, needs expert assistance on the precise question on which it must pass." (Emphasis added; internal quotation marks omitted.) *State* v. *Pjura*, 68 Conn. App. 119, 122, 789 A.2d 1124 (2002).

In the present case, the defendant argues that Killian's testimony was offered with respect to the cause of the plaintiff's harm. Although the question of causation generally "belongs to the trier of fact because causation is essentially a factual issue"; (internal quotation marks omitted) *Alexander* v. *Vernon*, 101 Conn. App. 477, 485, 923 A.2d 748 (2007); the defendant claims that the court improperly prevented Killian from testifying that "it was extraordinarily abnormal for the [Children's] Probate Court clerk to have placed the plaintiff's medical records in a public file accessible by Mendoza" because that testimony was at the core of its theory that the mishandling of the plaintiff's records by the Children's Probate Court broke the chain of causation between the defendant's conduct and the plaintiff's injuries.

Even if we were to assume for the sake of argument that the court abused its discretion by limiting Killian's testimony, which we do not, we conclude that the defendant has failed to demonstrate that it was harmed or substantially prejudiced by the court's ruling and that an injustice has occurred. Our conclusion is predicated on our close reading of Killian's testimony before the jury.[14] Killian testified that he considered medical

[14] Killian testified that he had been a Probate Court judge for more than thirty years and had heard approximately 50,000 cases, including approximately 10,000 cases dealing with children and paternity matters. In addition, Killian had been a member of the Probate Assembly, a statutory body to which all probate judges are members, and had been a member of the

records to be confidential: "Any medical record, regardless of how it comes to the court, is a confidential record. . . . [I]t's usually received in an envelope marked confidential medical record, usually with a copy of a subpoena on top of it. And it would be put into a confidential file." He indicated that no person has access to the confidential file but that there is a public file that is available to the general public. "In virtually everything that happens in a Probate Court, at least every contested matter in the Probate Court, medical testimony, medical records are a component of the evidence that's presented to the court. So the securing of those records has always been something in which the court had a role. And the protection of those records, until they were properly admitted into evidence, was also the responsibility of the clerk and the court." If an envelope containing medical records arrived at the Probate Court without a subpoena or court order on the front of it, Killian stated that the envelope should not be opened until there is a determination of why the medical record came to the court, and then the judge determines what is to be done with the record.

Killian clarified that he was testifying as to "the manner in which evidence comes into a court in probate, whether it be medical or otherwise, pursuant to one of the several avenues by which it could come in, and I'm testifying by an implicit responsibility. If some piece of medical testimony falls from the sky . . . [and somebody brings] it to the Probate Court, the responsibility of the court [is] to . . . treat that as a confidential document."

executive committee of the Probate Assembly for approximately twenty-five years. At the time of trial, he was still a member of the Probate Court Rules Committee. All probate judges are subject to the continuing education requirements of the Probate Assembly, which include education about how a probate clerk is to handle confidential documents that are submitted to the Probate Court.

Killian acknowledged that there was no written Probate Court policy, procedure or directive in 2005. He indicated that the prescribed method for handling medical records filed with the Probate Court is "historic" and stated that the statute regarding medical records; see footnote 10 of this opinion, quoting General Statutes § 45a-98b; applies to any probate proceeding in the Superior Court or the Probate Court. Before medical records can be disclosed, the adverse party must have an opportunity to object. If the adverse party objects to the disclosure of the records, the judge must hold a hearing to determine whether the records are admissible.

In addition, Killian testified in response to a question from counsel: "I find it impossible to believe that you think a Probate Court that has a . . . medical record dumped on it is free to put it in a public file now, 2005, 2004, or the 1800s, when this whole process was initially instituted in the state of Connecticut. It's evidence . . . that is protected and it's evidence that is confidential. Once the court rules and it becomes evidence in the trial, then it goes into the public record, whether it's medical or otherwise, the exception being psychiatric information." "When an item comes into court, it is clearly identifiable as a medical record, but you don't know what process it went to, the response is not to put it in the public file. The response is to find out how it came into the court. The process is to find out whether you are properly in possession of that document. The clerk knows that he or she is the gatekeeper of the court. That's their responsibility. And if a document comes in and they don't know what it is or what to do with it, or it defies the rules that they have seen in the past for these types of documents, then their job is to go and talk either—if it's an assistant clerk, to talk to the clerk; if it's the clerk, talk to the judge. That's the

process and that's the process that's mandated for documents that come into a court going back a long time." In conclusion, Killian repeated that he had no doubt that medical records should be treated as confidential documents.

On the basis of our detailed review of Killian's testimony on direct and cross-examination and the court's jury charge, we conclude that it is not likely that the limitations the court imposed on Killian's testimony affected the outcome of the trial and, therefore, that the defendant was not prejudiced by the court's rulings. Although Killian did not opine with regard to the specific facts of this case or use the words "extraordinarily abnormal" with regard to the probate clerk's handling of the plaintiff's medical records, his testimony left no doubt that, pursuant to more than one hundred years of Probate Court policy and procedure, the clerk mishandled the records by placing them in the public file before being ordered to do so by the probate judge. Killian's testimony was detailed and specific. He spelled out the procedures a probate clerk should follow to protect the confidentiality of medical records that are received by the Probate Court, regardless of whose records they are or how they were delivered to the court.

There was evidence before the jury pursuant to the parties' stipulation that the defendant copied and mailed the plaintiff's medical records to the Children's Probate Court and that the records were placed in a publicly accessible file. Killian testified as to the manner in which medical records are to be handled in the Probate Court. Given the testimony that was allowed, the members of the jury were perfectly capable of determining whether the clerk's handling of the plaintiff's records was so "extraordinarily abnormal" that it broke the chain of causation between the defendant's conduct and the plaintiff's injury. We therefore conclude that the defendant was not harmed and no injustice resulted

from the court's limiting of the scope of Killian's testimony.[15]

II

The defendant next claims that the court permitted the plaintiff to submit a claim for future emotional damages to the jury on the basis of a single vague, speculative statement in a hearsay report that was inconsistent with other, uncontested medical evidence. The defendant argues that the court improperly (1) admitted a report prepared by the plaintiff's treating psychologist into evidence, (2) charged the jury on future emotional harm without sufficient evidence, and (3) denied the defendant's request to submit a jury interrogatory that distinguished past and future damages.[16] We are not persuaded by these claims.

[15] Although the defendant states in its brief that it is not claiming instructional error, it argues that the wording of the court's instruction was confusing, which made the court's limitation on Killian's testimony more harmful because it hindered the defendant's proximate cause defense. The defendant asserts that the court preliminarily had instructed the jury that the defendant had admitted liability and that Killian's testimony was being offered only on the issue of proximate cause. The defendant argues, however, that it did not admit liability; it admitted only that it was negligent, citing *Lodge* v. *Arett Sales Corp.*, 246 Conn. 563, 578, 717 A.2d 215 (1998), for the proposition that a negligent act, if not the proximate cause of the injury, does not impose legal liability on an actor.

The time for the defendant to raise this argument has passed. The defendant did not take exception to the court's instruction when the court could have cured the purported instructional confusion. See *Mauro* v. *Yale-New Haven Hospital*, 31 Conn. App. 584, 592, 627 A.2d 443 (1993) (reason for taking exceptions to charge is to alert court to possible error at time when court can correct it).

The defendant also argues, again without claiming instructional error, that the court failed to give the requested instruction that " 'each party has a right to assume, until he has reason to believe otherwise, that other actors will obey the rules of law and act reasonably and properly,' " and its position in the present case is that it expected the Children's Probate Court to handle the plaintiff's records properly. The defendant presented no evidence, however, that it was familiar with Probate Court practices or procedures concerning medical records when it sent the plaintiff's medical records to the Children's Probate Court.

[16] The plaintiff argues that our review of the defendant's challenge to the jury's verdict for future damages is barred by the general verdict rule. Because we affirm all of the court's challenged rulings concerning future

A

The defendant claims that the court improperly admitted into evidence the psychological report (report) written by the plaintiff's treating psychologist. We are not persuaded.

The following facts are relevant to the defendant's claim. In 2005, soon after the plaintiff learned that Mendoza had read her medical records, the plaintiff sought treatment from David Brosell, a psychologist. She saw Brosell from September, 2005, until August, 2008, and again early in 2010. In April, 2010, Brosell authored and signed a report at the request of the plaintiff's counsel with regard to his therapeutic work with the plaintiff. Brosell's initial diagnosis of the plaintiff's condition was adjustment disorder with anxiety and depression. After working with the plaintiff, Brosell changed the diagnosis to major depression, single episode, mild, and later added a diagnosis of post-traumatic stress disorder.

In 2010, the plaintiff disclosed Brosell as an expert witness along with his contemporaneous treatment records and the report. In September, 2010, the defendant's counsel deposed Brosell with respect to his treatment of the plaintiff and his report. At the time of trial in 2018, Brosell was retired and too infirm to testify. The defendant did not object to Brosell's treatment records being admitted into evidence but filed a motion in limine to exclude the report on the grounds that it was addressed to the plaintiff's counsel in preparation for litigation and that Brosell had assigned 75 percent

damages, we need not decide whether the defendant's untimely request for a jury interrogatory to distinguish the jury's verdict between past and future damages constitutes a proper request for a jury interrogatory that would preclude the application of the general verdict rule in this case. See *Garcia* v. *Cohen*, 335 Conn. 3, 12, 225 A.3d 653 (2020) (" 'where the court has denied a proper request for interrogatories . . . the general verdict rule does not apply so as to preclude appellate review of error relating to any ground upon which the jury may have rested its verdict and to which an appropriate interrogatory has been directed' ").

of the plaintiff's post-traumatic stress disorder diagnosis to the release of her medical records to Mendoza.[17] The defendant further contended that there was nothing in Brosell's treatment records to substantiate his conclusion with respect to the plaintiff's post-traumatic stress disorder.

The parties appeared before the court for a hearing on the motion in limine. Counsel for the defendant acknowledged that he had received Brosell's report prior to deposing him and that he deposed Brosell with regard to his treatment records and portions of his report. Counsel, however, did not question Brosell about

[17] Brosell's report stated in relevant part: "In this client's case, there [was] a long series of traumatic episodes (the filing of court cases, the sending of e-mails to various people associated with the client, the placing of a notice in the local newspaper, etc.) which had a cumulative effect upon the client. As these events subsided, the client reported some gradual easing of the anxiety related symptoms. When faced again with the evidence of these events having happened, there was again a rise in the symptoms. My expectation is that this pattern will continue, should the client be again faced with events similar to those which originally triggered the Posttraumatic Stress Disorder symptoms. I would also expect that, over time, there would be a gain in mastery over the anxiety reactions and a better ability to sense some control over events. I am not qualified to predict the existence and extent of a permanent disability beyond that. . . .

"Causal connection between the incident that is the subject of the lawsuit (Emily Byrne v. Avery Center for Obstetrics & Gynecology, P.C.) and [the plaintiff's] diagnosis

As stated above, in this case there was a series of traumatic episodes which had a cumulative effect upon the client and resulted in the development of Posttraumatic Stress Disorder. The incident which is the subject of this lawsuit is one of these. As such it played a significant part in the development of the client's symptoms of Posttraumatic Stress Disorder. What is significant about this particular incident is that it placed in the hands of a person who was engaging in a series of legal actions and other traumatizing actions against the client information which was felt by the client to be shaming, humiliating, and damaging to the client's reputation. This information was used by the person to whom the information was released in ways which the client experienced as traumatizing. As such it was the event that precipitated the client's seeking treatment. It is my opinion, based on a reasonable degree of medical certainty, that the release of the client's medical records was responsible for 75 [percent] of the client's experience of trauma and the development of Posttraumatic Stress Disorder."

his conclusions regarding the percentage of the plaintiff's post-traumatic stress disorder attributable to the release of her medical records or that the plaintiff may sustain future emotional damages due to post-traumatic stress. See footnote 17 of this opinion. Counsel indicated that he intended to cross-examine Brosell about those matters at trial. The defendant, therefore, claimed that it was at a disadvantage because Brosell was not able to testify at trial. The court found that the defendant's counsel had a copy of the report years earlier when he deposed Brosell and that Brosell's opinion was not a recent disclosure that disadvantaged the defendant. The court therefore denied the motion in limine as to Brosell's opinion that 75 percent of the plaintiff's post-traumatic stress disorder was due to the disclosure of her medical records. At trial, agreed on portions of Brosell's deposition testimony were read to the jury and his treatment records were admitted into evidence without objection. The report, with agreed on redactions, was submitted into evidence and published to the jury.

On appeal, the defendant argues that the report should not have been admitted into evidence because it was prepared for litigation, was inadmissible hearsay, and was eight years old. The plaintiff argues that the report was admissible because it met the requirements of General Statutes § 52-174 (b)[18] because Brosell had signed the report, citing *Bruneau* v. *Seabrook*, 84 Conn. App. 667, 854 A.2d 818, cert. denied, 271 Conn. 930, 859 A.2d 583 (2004).

[18] General Statutes § 52-174 (b) provides in relevant part: "In all actions for the recovery of damages for personal injuries . . . any party offering in evidence a signed report . . . for treatment of any treating . . . psychologist . . . may have the report . . . admitted into evidence as a business entry and it shall be presumed that the signature on the report is that of such treating . . . psychologist . . . and that the report . . . [was] made in the ordinary course of business. . . ."

As stated in part I of this opinion, "evidentiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice." (Internal quotation marks omitted.) *Stokes* v. *Norwich Taxi, LLC*, 289 Conn. 465, 489, 958 A.2d 1195 (2008). Our review of evidentiary rulings is limited to whether "the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) *S. A.* v. *D. G.*, 198 Conn. App. 170, 183, 232 A.3d 1110 (2020).

In *Bruneau*, the plaintiff, who was injured in a motor vehicle crash, offered a letter from her treating physician to her attorney into evidence. *Bruneau* v. *Seabrook*, supra, 84 Conn. App. 668–69. The trial court found that the letter was signed by the physician, was written on his letterhead, and was consistent with his treatment records. Id., 672. On appeal, the defendant claimed that the court had not properly interpreted § 52-174 (b) when it admitted the letter into evidence without fulfilling the business entry requirements of General Statutes § 52-180. Id., 670. This court concluded that the trial court properly had admitted the physician's letter into evidence, reasoning that "[o]ur Supreme Court has set forth the requirements for a report to be admissible pursuant to § 52-174 (b). [Section 52-174 (b)] permits a signed doctor's report to be admitted as a business entry. . . . [It] creates a presumption that the doctor's signature is genuine and that the report was made in the ordinary course of business. . . . Thus, once the statutory requirement that the report be signed by a treating physician is met, the evidence in that report is admissible and has the same effect as a business entry. . . . This statute serves the purpose of getting medical evidence before the jury in the absence of the treating physician." (Internal quotation marks omitted.) Id., 671.

Like in *Bruneau*, Brosell's report was written on his stationery and was signed by him. Accordingly, there is a presumption that it was made in the ordinary course of business and, therefore, was admissible as a business entry. Although the defendant claims that there was insufficient evidence in Brosell's contemporaneous treatment records to support a claim for future damages, it does not claim that the report generally is inconsistent with Brosell's treatment records. The defendant objected to the admission of the report because, when deposing him, counsel chose not to question Brosell about certain opinions stated in the report. The court found that the report had been disclosed to the defendant eight years prior to trial and that the defendant had an opportunity to depose Brosell. In the intervening years, Brosell retired and was unable to testify at trial.

The defendant's claim that Brosell's report was not admissible in this case because it was prepared in anticipation of litigation is without merit. Although it is true that such reports *may under certain circumstances be inadmissible* under § 52-174 (b) if the objecting party is not afforded an opportunity to depose or cross-examine the author at trial; see *DeMaria* v. *Bridgeport*, 339 Conn. 477, 492–95, 261 A.3d 696 (2021); the defendant in the present case was in possession of the report when it deposed Brosell in 2010 and, therefore, did have an opportunity to cross-examine Brosell as to all of his opinions. Under these circumstances, the court did not abuse its discretion when it admitted Brosell's report as a full exhibit with the redactions to which the parties had agreed. See id., 492–93.

B

The defendant also claims that there was insufficient evidence for the court to submit the plaintiff's claim for future damages to the jury. We do not agree.

"[A] trial court should instruct a jury on [every] issue for which there is any foundation in the evidence . . . ." (Internal quotation marks omitted.) *Wasko* v. *Farley*, 108 Conn. App. 156, 169, 947 A.2d 978, cert. denied, 289 Conn. 922, 958 A.2d 155 (2008). To resolve the defendant's claim that there was insufficient evidence to submit the plaintiff's claim for future damages to the jury, we review the record, including the pleadings, the evidence, and the court's instructions. See, e.g., *Gaudio* v. *Griffin Health Services Corp.*, 249 Conn. 523, 532–43, 733 A.2d 197 (1999) (determining whether court properly denied motion to set aside verdict on ground of insufficient evidence); *Krondes* v. *Norwalk Savings Society*, 53 Conn. App. 102, 111–17, 728 A.2d 1103 (1999) (determining whether evidence was insufficient to warrant directed verdict).

The November 3, 2010 operative complaint alleges in relevant part: "As a result of [the defendant's] breach of its contractual obligations, the plaintiff has suffered damages including, but not limited to . . . [s]evere emotional distress, trauma, and anxiety, all of which [have] physically manifested in the form of headaches, severe depression, sleeplessness and nausea . . . ." At trial, the plaintiff claimed that the defendant's release of her medical records caused her emotional injury in the immediate aftermath of Mendoza's harassment and that she continues to suffer emotional distress. The court likewise instructed the jury that "the plaintiff seeks to recover noneconomic damages for each of the following type[s] of nonmonetary losses or injuries: mental and emotional suffering, loss or diminution of the ability to enjoy life's pleasures and permanent injury or loss of function." The court also instructed the jury as to the plaintiff's life expectancy. The defendant did not challenge the court's instructions.

In arguing that there was not sufficient evidence to submit the plaintiff's claim of future damages to the

jury, the defendant contends that the only evidence of future injuries is reflected in one sentence in Brosell's report where he opined that the plaintiff's post-traumatic stress disorder had eased with the passage of time but that she could experience the symptoms again "should [she] be again faced with events similar to those which originally triggered the Posttraumatic Stress Disorder symptoms." The defendant argues that damages for future or ongoing injury are available only on a showing of reasonable probability, not reasonable possibility, of the injury occurring and that the single sentence in Brosell's report was not sufficient to support a finding of reasonable probability.

In rejecting the defendant's challenge to the sufficiency of the evidence of the plaintiff's claim for future damages, the court noted Brosell's report, in addition to the testimony of Michele Reed, a licensed clinical social worker who treated the plaintiff in 2013,[19] and held that the evidence was sufficient for the court to instruct the jury on future noneconomic damages. In addition, the court cited the plaintiff's testimony in response to the question as to how she has been damaged by the release of her private health information by the defendant and its use by Mendoza against her. The plaintiff testified: "I mean, it's hard to describe all the emotional harm. I mean, it caused a lot of suffering, a tremendous amount of anxiety and hurt and sadness." Also, she testified that she "didn't go for medical care

[19] Reed was deposed and her testimony was read to the jury. Reed testified in part that the plaintiff was "worrying chronically and [experienced] lots of obsessive thinking." According to Reed, her symptoms were consistent with general anxiety disorder and post-traumatic stress disorder. With respect to "the post-traumatic stress disorder . . . she would have bad dreams and she also would avoid . . . if the lawyer called, if there was anything about lawyers in connection with this happening, she would want to avoid [that] because the anxiety would be incredible for her . . . ." Reed also described how, in the plaintiff's mind, the disclosure of her private health information became linked with her past trauma.

unless it was absolutely necessary to . . . . I was afraid that anything would be released, you know—I didn't feel—I no longer felt safe as a patient."

The court reasoned that, on the basis of the evidence presented, including the length of time from the admitted negligence of the defendant to the verdict, "[a] trier of facts can conclude, by inference, that an injury will be permanent even though there is no medical testimony expressly substantiating permanency." *Royston* v. *Factor*, 1 Conn. App. 576, 577, 474 A.2d 108, cert. denied, 194 Conn. 801, 477 A.2d 1021 (1984). "This principle is based on the recognition by Connecticut courts that jurors are able to evaluate for themselves the testimony of the plaintiff, as well as the nature and duration of the injury, the likelihood of its continuance into the future, and the lack of total recovery by the time of trial. . . . If a jury has the opportunity to appraise the condition of a plaintiff and its probable future consequence, an award of damages for permanent injury and for future pain and suffering is proper." (Citations omitted; footnote omitted.) *Parker* v. *Supermarkets General Corp.*, 36 Conn. App. 647, 650–51, 652 A.2d 1047 (1995).

The defendant further argues that there is tension between Brosell's report and evidence provided by her other treating physicians. The fact that there was contrary evidence in the record, however, is no reason for the court not to instruct the jury on future noneconomic damages. Factual disputes are issues for the trier of fact to determine. See *Martinez* v. *New Haven*, 328 Conn. 1, 8, 176 A.3d 531 (2018).

On the basis of our review of the record, we conclude that the court properly submitted the plaintiff's claim for future noneconomic damages to the jury on the basis of the evidence presented at trial.

C

The defendant also claims that the court abused its discretion when it denied its request to submit to the

jury interrogatories distinguishing past and future damages. We disagree.

"The power of the trial court to submit proper interrogatories to the jury, to be answered when returning [its] verdict, does not depend upon the consent of the parties or the authority of statute law. In the absence of any mandatory enactment, it is within the reasonable discretion of the presiding judge to require or to refuse to require the jury to answer pertinent interrogatories, as the proper administration of justice may require. . . . The trial court has broad discretion to regulate the manner in which interrogatories are presented to the jury, as well as their form and content." (Internal quotation marks omitted.) *Wilkins* v. *Connecticut Childbirth & Women's Center*, 176 Conn. App. 420, 430, 171 A.3d 88 (2017).

The record discloses that the court charged the jury on December 5, 2018. During the morning, prior to the luncheon recess, the court instructed the jury on the substantive law. The court reserved its instructions regarding the jury's duties on retiring for deliberations until after lunch. After the jury was excused, counsel for the defendant stated: "It's fortunate that we took that break there. One thing I forgot to mention this morning is I am requesting a jury interrogatory to separate out future and past emotional harm. If I don't . . . under a general verdict, I don't think I can contest the entry of evidence on future harm." The court reserved its decision but, following the luncheon recess, denied the defendant's interrogatory request.

The court addressed the present claim when ruling on the defendant's motion for a new trial and to set aside the verdict. In its memorandum of decision, the court noted that the defendant had requested the interrogatory after the court had given the majority of its

charge to the jury. The court cited Practice Book § 16-22, which requires that "written requests for jury interrogatories must be filed with the clerk [of the court] before the beginning of arguments or at such an earlier time as the juridical authority directs" and found that the defendant's request was untimely filed. We agree with the court that the defendant's request to submit an interrogatory regarding damages to the jury was not timely and, therefore, conclude that the court did not abuse its discretion by denying the defendant's request.

III

The defendant finally claims that the court improperly awarded the plaintiff offer of judgment interest by concluding that the addition of the trustee as a party plaintiff validated the plaintiff's April 30, 2009 offer of judgment as of October 6, 2010, the date on which the trustee became a party to this action. We disagree.

"The question of whether the trial court properly awarded interest pursuant to § 52-192a is one of law subject to de novo review." (Internal quotation marks omitted.) *Birkhamshaw* v. *Socha*, 156 Conn. App. 453, 512, 115 A.3d 1, cert. denied, 317 Conn. 913, 116 A.3d 812 (2015).

The following procedural history is relevant to this claim. On December 18, 2006, the plaintiff filed a Chapter 7 petition for bankruptcy relief in the United States Bankruptcy Court for the District of Vermont, and Wolinsky was appointed trustee of the bankruptcy estate that same day. On May 23, 2007, the bankruptcy court granted the trustee's application to employ special counsel for the bankruptcy estate to pursue a claim against the defendant. On October 4, 2007, the plaintiff alone, not the trustee, commenced the present action.

On April 30, 2009, pursuant to § 52-192a and Practice Book § 17-14, the plaintiff filed an offer of judgment in

the amount of $50,000. On May 1, 2009, the defendant filed an objection to the offer of judgment on the grounds that it was deficient and premature in that the plaintiff had failed to specify all damages known to her, to respond to the defendant's discovery requests for authorizations and the disclosure of experts, and to file a certification with the court that the plaintiff had provided the defendant with all documents supporting her damages. The defendant's objection was not adjudicated prior to the time the jury returned its verdict in 2018.

On September 3, 2010, the plaintiff filed a motion to add the trustee as a plaintiff pursuant to General Statutes § 52-108[20] and Practice Book §§ 9-18 through 9-20.[21] On September 17, 2010, the defendant filed a conditional objection to the motion to add the trustee as a party plaintiff, noting that a pretrial in the case was scheduled

[20] General Statutes § 52-108 provides: "An action shall not be defeated by the nonjoinder or misjoinder of parties. New parties may be added and summoned in, and parties misjoined may be dropped, by order of the court, at any state of the action, as the court deems the interests of justice require."

[21] Practice Book § 9-18 provides: "The judicial authority may determine the controversy as between the parties before it, if it can do so without prejudice to the rights of others; but, if a complete determination cannot be had without the presence of other parties, the judicial authority may direct that they be brought in. If a person not a party has an interest or title which the judgment will affect, the judicial authority, on its motion, shall direct that person to be made a party. (See General Statutes § 52-107 and annotations.)"

Practice Book § 19-19 provides: "Except as provided in Sections 10-44 and 11-3 no action shall be defeated by the nonjoinder or misjoinder of parties. New parties may be added and summoned in, and parties misjoined may be dropped, by order of the judicial authority, at any stage of the cause, as it deems the interests of justice require. (See General Statutes § 52-108 and annotations.)"

Practice Book § 19-20 provides: "When any action has been commenced in the name of the wrong person as plaintiff, the judicial authority may, if satisfied that it was so commenced through mistake and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff. (See General Statutes § 52-109 and annotations.)"

for October 13, 2010, and trial was scheduled to begin on October 27, 2010. The defendant stated in its objection that it did not object to adding the trustee as a party plaintiff as long as the plaintiff disclosed all relevant discovery as it pertained to the bankruptcy action and the current action. The court, *Hon. Richard P. Gagliardi*, judge trial referee, set the matter down for a hearing on October 6, 2010, and ordered the plaintiff to produce any and all documents pertaining to the bankruptcy. The motion to add the trustee was heard and granted at the October 6, 2010 hearing.

Following two separate appeals to our Supreme Court, the trial began in November, 2018. On December 5, 2018, the jury returned a verdict in favor of the plaintiff for $853,000 in noneconomic damages.

On December 7, 2018, the defendant filed a supplemental memorandum in support of its May 1, 2009 objection to the plaintiff's offer of judgment. In its supplemental objection, the defendant argued that the offer of judgment was invalid on its face for failing to comply with § 52-192a and Practice Book § 17-14A. The defendant further argued that the offer of judgment was not valid, as our Supreme Court only recently had recognized a cause of action sounding in tort against a health care provider in the event of an unauthorized disclosure of confidential information obtained in the course of a physician-patient relationship. On January 7, 2019, the plaintiff filed a motion for, inter alia, offer of judgment interest. On March 7, 2019, the defendant filed an objection to the plaintiff's motion for offer of judgment interest, arguing for the first time that the plaintiff's offer of judgment was invalid when filed because she was in bankruptcy at the time and, therefore, lacked standing to file the offer of judgment. The defendant also argued, inter alia, that the earliest date on which interest could accrue was the date on which the trustee was added.

On July 8, 2019, the court held a hearing on the plaintiff's motion for offer of judgment interest and the defendant's objection thereto.[22] On September 4, 2019, the court issued an order granting in part the plaintiff's motion for offer of judgment interest. In issuing the order, the court noted that on December 18, 2006, prior to the commencement of the present action, the plaintiff had filed for voluntary bankruptcy relief and Wolinsky had been appointed trustee of her bankruptcy estate. The trustee, however, was not made a party plaintiff until October 6, 2010. After concluding that the offer of judgment satisfied the requirements of § 52-192a, the court turned to the question of whether and when the offer of judgment became valid. Relying on our Supreme Court's holding in *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 297 Conn. 105, 998 A.2d 730 (2010), the court concluded that "the offer of judgment was not validated until the bankruptcy trustee was substituted as a party plaintiff, which occurred on October 6, 2010." As a result, the court awarded the plaintiff prejudgment interest at the rate of 12 percent, computed from October 6, 2010, the date the trustee was added as a party plaintiff, and $350 in attorney's fees.

On appeal, the defendant argues that the court improperly relied on *DiLieto* in concluding that the addition of the trustee as a party plaintiff validated the plaintiff's offer of judgment. In *DiLieto*, our Supreme Court held that the substitution of the bankruptcy trustee as the plaintiff retroactively validated the offers of judgment previously filed by Michelle DiLieto, one of the original plaintiffs, as of the date of substitution, such that interest began to accrue as of that date. *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 297 Conn. 111. In so holding, the court acknowledged that "DiLieto's offers of judgment were

[22] The defendant had filed additional postverdict motions that also were heard on that date, but they are not relevant to the issue before us.

invalid at the time she tendered them because . . . the cause of action belonged to her bankruptcy estate. Thus, if the defendants had attempted to accept the offers within thirty days, in the normal course, they would not have been binding on [the trustee], and, consequently, they would not necessarily have served to settle the action." Id., 154. The court nevertheless held that "interpreting [General Statutes] §§ 52-109[23] and 52-192a to relieve the defendants altogether of their obligation to pay offer of judgment interest would result in a windfall for them and, at the same time, unfairly penalize [the trustee], in contravention of both the punitive purposes of § 52-192a . . . and the remedial purposes of § 52-109." (Citation omitted; footnote added.) Id., 159.

Like DiLieto, the plaintiff in the present case erroneously filed this action on her own, without the trustee, and tendered an offer of judgment prior to the trustee's joinder in the case. As in *DiLieto*, the enforcement of the offer of judgment in the present case resulted in no actual prejudice to the defendant, who made a strategic decision not to accept the offer. See id., 158. Therefore, the present case is procedurally indistinguishable from *DiLieto*, and the punitive and remedial statutory purposes cited by our Supreme Court in *DiLieto* apply equally here.[24] The defendant does not argue to the contrary.

[23] General Statutes § 52-109 provides: "When any action has been commenced in the name of the wrong person as plaintiff, the court may, if satisfied that it was so commenced through mistake, and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff."

[24] The defendant concedes, and we agree, that the substitution of the bankruptcy trustee as a party plaintiff in *DiLieto*, versus the addition of the trustee in the present case, does not distinguish the present case from *DiLieto*. In support of that position, the defendant cites *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 320 Conn. 535, 133 A.3d 140 (2016), for the proposition that the addition or substitution of the trustee is permissible, in that either serves the same function of saving "an action [that] was commenced in the name of the wrong party, instead of the real party in

Indeed, at the July 8, 2019 hearing on the plaintiff's motion for offer of judgment interest and the defendant's objection to that motion, the defendant acknowledged that *DiLieto* resolved this issue in that a previously tendered invalid offer of judgment is "resurrected" when the trustee is added as a party to the action. Although counsel for the defendant posited that the court in *DiLieto* failed to consider the necessity of obtaining approval from the bankruptcy court for the trustee to settle a claim, he acknowledged to the trial court that it was bound to follow the holding of *DiLieto*.[25]

interest, whose presence is required for a determination of the matter in dispute." Id., 553. Our Supreme Court noted that the substitution or addition of parties is discretionary and intimated that they may be used interchangeably to achieve the desired remedial goal of ensuring that the proper parties are brought into the action. Id., 555 n.23. This court has explained: "Our rules of practice . . . permit the substitution of parties as the interests of justice require. General Statutes §§ 52-108, 52-109; Practice Book §§ [9-19 and 9-20] . . . . These rules are to be construed so as to alter the harsh and inefficient result that attached to the mispleading of parties at common law. . . . [Section] 52-108 and Practice Book § [9-19] provide that no action shall be defeated by the nonjoinder or misjoinder of parties. [Section] 52-109 and Practice Book § [9-20] allow a substituted plaintiff to enter a case [w]hen any action has been commenced in the name of the wrong person as plaintiff . . . . Both rules, of necessity, relate back to and correct, retroactively, any defect in a prior pleading concerning the identity of the real party in interest. In the context of analogous rules of federal civil procedure, it has been observed that [w]here the change is made on the plaintiff's side to supply an indispensable party or to correct a mistake in ascertaining the real party in interest, in order to pursue effectively the original claim, the defendant will rarely be unfairly prejudiced by letting the amendment relate back to the original pleading. . . . As long as [the] defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the action, his ability to protect himself will not be prejudicially affected if a new plaintiff is added . . . ." (Citations omitted; internal quotation marks omitted.) *Federal Deposit Ins. Corp.* v. *Retirement Management Group, Inc.*, 31 Conn. App. 80, 84–85, 623 A.2d 517, cert. denied, 226 Conn. 908, 625 A.2d 1378 (1993).

[25] At the July 8, 2019 hearing, the defendant began its opposition to the plaintiff's motion for offer of judgment interest by arguing that the offer of judgment was invalid because the trustee was not a party to the case when it was filed. In response to that argument, the court asked: "[D]oes *DiLieto* then take care of that, once the trustee's appointed?" Counsel for the defendant acknowledged: "If you have an offer of judgment that's invalid, it can

Despite its explicit agreement with the trial court that *DiLieto* was dispositive of this issue and that the court was bound to follow it, the defendant now argues that the trial court incorrectly relied on *DiLieto* in the present case in that it "ignored the second part of *DiLieto*'s holding and improperly applied the fact specific, first impression outcome in *DiLieto* to a 'future case,' contrary to *DiLieto*'s clear instruction." In so arguing, the defendant is referring to footnote 47 in *DiLieto*, in which the court stated: "To avoid any possible confusion in future cases . . . a party that is substituted as a plaintiff under § 52-109 shall either repudiate the original offer of judgment upon substitution, refile that original offer of judgment, or file a new offer of judgment, at that substituted plaintiff's discretion. It is true, of course, that, as a general matter, a plaintiff is permitted to file only one offer of judgment, which may be refiled in the same amount as many times as he or she chooses. . . . When, as in the present case, however, an offer of judgment has been filed by the original plaintiff and, thereafter, a new plaintiff is substituted into the case, we see no reason why the substituted plaintiff should be precluded from filing a new offer of judgment when that original offer of judgment was invalid when filed; in addition, the correct plaintiff should not be denied the opportunity to file his own offer of judgment, unfettered by the offer filed by the

be resurrected when it becomes valid. So when the trustee is appointed . . . it would relate to the date of the order granting the adding of the trustee as a party." Counsel for the defendant proceeded to argue that *DiLieto* failed to consider the fact that the trustee needs approval from the bankruptcy court to settle a case, and, therefore, the acceptance of an offer of judgment could not immediately settle a case as required by § 52-192a. Counsel for the defendant told the court, however: "I think if you follow *DiLieto*, which I think Your Honor has to follow, *DiLieto* says that you can—you can have an otherwise invalid offer of judgment . . . [and] once it becomes valid, it becomes valid. I still think there's a practical issue on how . . . it gets accepted under those circumstances. But clearly nobody accepted it under these circumstances."

incorrect plaintiff. Finally, we note that, in light of the issues raised by our resolution of this claim, the legislature and the rules committee of the Superior Court may wish to clarify the procedures applicable to offers of judgment when a plaintiff is substituted for the original plaintiff under § 52-109."[26] (Citations omitted.) *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 297 Conn. 159 n.47.

At no point throughout the lengthy pendency of this case before the trial court, did the defendant assert this argument, and, as noted in the preceding paragraphs, counsel for the defendant actually agreed, as do we, that, pursuant to *DiLieto*, the offer of judgment filed by the plaintiff was validated upon the addition of the trustee as a party plaintiff.[27] "It is a well settled principle of appellate review that a party cannot invite a trial court to take a position and then, after the court has adopted that position, claim error. This is because, if we were to endorse such behavior, we effectively would be sanctioning trial by ambush, which we have repeatedly stated we will not allow. [A] party cannot take a path at trial and change tactics on appeal." (Internal

[26] We note that this is the sole basis of the defendant's challenge to the trial court's adherence to *DiLieto* in this case. The defendant does not contend that *DiLieto* is legally or procedurally distinguishable from this case.

[27] The defendant also argues that interest on the offer of judgment should not have commenced until January, 2018, because, prior to that date, there did not exist a private cause of action for a violation of patient confidentiality. The defendant asserted this same argument before the trial court, but the trial court did not address it and the defendant, thereafter, did not seek an articulation of the court's silence on that claim. Because "[t]his court is unable to review claims that were not expressly addressed by the trial court"; *Miller* v. *Miller*, 124 Conn. App. 36, 40, 3 A.3d 1018 (2010); it is not properly before us now. We further note that, because "[a]n offer of judgment is an offer to settle the entire case, including claims both known and unknown, and both certain and uncertain"; (internal quotation marks omitted) *Blakeslee Arpaia Chapman, Inc.* v. *EI Constructors, Inc.*, 239 Conn. 708, 750, 687 A.2d 506 (1997); the defendant's claim that offer of judgment interest could not begin to run until our Supreme Court recognized the plaintiff's cause of action is unavailing.

quotation marks omitted.) *In re David B.*, 167 Conn. App. 428, 444, 142 A.3d 1277 (2016).

Even if the defendant had argued to the trial court that *DiLieto* does not apply to the present case because of the court's directive in footnote 47; see *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 297 Conn. 159 n.47; its reliance on footnote 47 is misplaced. Because that footnote is not necessary to the resolution of the claim presented in *DiLieto*, it is dictum on which we may not rely in resolving the claim presented in the present case. See *State* v. *Torres*, 85 Conn. App. 303, 320, 858 A.2d 776 ("Dictum is generally defined as [a]n expression in an opinion which is not necessary to support the decision reached by the court. . . . A statement in an opinion with respect to a matter which is not an issue necessary for decision. . . . Our Supreme Court has instructed that dicta have no precedential value." (Citation omitted; internal quotation marks omitted.)), cert. denied, 271 Conn. 947, 861 A.2d 1179 (2004).

Additionally, the defendant's proposed interpretation of footnote 47 is inconsistent with the court's holding in *DiLieto*, in that it suggests that the trustee must take some affirmative action to validate an offer of judgment that was filed prior to the trustee's addition to the case, whereas *DiLieto* holds that the previously filed offer of judgment is validated on the trustee's joinder. *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 297 Conn. 145, 159 n.47. The dissonance between the footnote and the holding of the court is further underscored by the language in the footnote suggesting that a trustee may repudiate an offer of judgment that was filed before he or she was brought into the case, which presupposes the validity of that offer of judgment. See id. The holding in *DiLieto* clearly rejected the notion that an offer of judgment filed prior to the joinder of the proper plaintiff was valid. Id., 154. Accordingly, any

reliance on footnote 47 would constitute a departure from the principles of stare decisis. See *Sepega* v. *DeLaura*, 326 Conn. 788, 798–99 n.5, 167 A.3d 916 (2017) ("While stare decisis is not an inexorable command . . . the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification. . . . Such justifications include the advent of subsequent changes or development in the law that undermine[s] a decision's rationale . . . the need to bring [a decision] into agreement with experience and with facts newly ascertained . . . and a showing that a particular precedent has become a detriment to coherence and consistency in the law . . . ." (Citation omitted; internal quotation marks omitted.)). Moreover, the court did not, in footnote 47, state that in future cases the substitution of a party would not validate a previously filed invalid offer of judgment. See *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 159 n.47. We therefore reject the defendant's invitation to interpret footnote 47 in a manner that would require us to depart from the principles of stare decisis. Instead, we interpret the footnote as a direction, rather than a mandatory requirement, to parties to take steps to avoid the uncertainty and confusion that might otherwise result if a substituted party fails to take some affirmative action with respect to a previously filed offer of judgment. That interpretation is consistent with the court's further invitation to "the legislature and the rules committee of the Superior Court . . . to clarify the procedures applicable to offers of judgment when a plaintiff is substituted for the original plaintiff under § 52-109." Id.

Finally, since *DiLieto* was decided, neither the legislature nor the rules committee of the Superior Court has amended the statutes or rules governing the procedures applicable to offers of judgment when a bankruptcy

trustee is substituted as a party plaintiff under § 52-109. "[T]he doctrine of stare decisis and the tenet[s] of statutory interpretation . . . [caution] against overruling case law involving our construction of a statute, if the legislature reasonably may be deemed to have acquiesced in that construction . . . ." *Peek* v. *Manchester Memorial Hospital*, 342 Conn. 103, 125–26, 269 A.3d 24 (2022). "[T]he legislature is presumed to be aware of the [courts'] interpretation of a statute and . . . its subsequent nonaction may be understood as a validation of that interpretation . . . ." (Internal quotation marks omitted.) *Dairyland Ins. Co.* v. *Mitchell*, 320 Conn. 205, 215, 128 A.3d 931 (2016). Because neither the legislature nor the rules committee has taken any action to clarify or modify the procedures at issue, despite our Supreme Court's express suggestion that they do so, we presume that the legislature approved of our Supreme Court's holding in *DiLieto*, and the trial court properly followed it.

The judgment is affirmed.

In this opinion the other judges concurred.

THEDRESS CAMPBELL *v.* MAURICE PORTER ET AL.
(AC 43753)

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

Syllabus

The plaintiff sought to recover damages from the defendants, a church and its pastor, P, and the city of Hartford and its police officer, J, in connection with his arrest by J for his alleged trespass at the church. The plaintiff had been a member of the church for several decades, but, after a dispute between the plaintiff and P, church leaders voted to dismiss the plaintiff from the church. Church leadership sent the plaintiff a letter notifying him of his dismissal and informing him that he was no longer allowed on the church premises. After the plaintiff received the letter from the church, he instituted a lawsuit challenging his dismissal. While the lawsuit was pending, the plaintiff attended a funeral at the church. After P called the police, J arrested the plaintiff for

criminal trespass in the first degree. That charge was later dismissed. The plaintiff revised his complaint in this action to set forth, inter alia, a claim against J and the city for J falsely arresting him without probable cause in violation of the applicable federal law (42 U.S.C. § 1983), a civil conspiracy claim alleging that all of the defendants had conspired to violate his civil rights in violation of the applicable federal law (42 U.S.C. § 1985 (3)), and a claim of intentional infliction of emotional distress against the church and P. The city and J filed a motion to strike the civil conspiracy claim, and the trial court granted that motion. In their answer and special defenses, the city and J pleaded several special defenses of immunity, including that J was entitled to qualified immunity because his conduct was reasonable under the circumstances. After trial, the jury returned a verdict for the city and J on the § 1983 claim. The jury returned a verdict for the plaintiff on the claim of intentional infliction of emotional distress and awarded him $30,000 in compensatory damages, but found that he was not entitled to punitive damages. The trial court rendered judgment in accordance with the jury's verdict. On the plaintiff's appeal to this court, *held*:

1. The evidence presented at trial was sufficient to support the jury's verdict for the city and J on the § 1983 claim, as the jury reasonably could have concluded that J had either actual or arguable probable cause to arrest the plaintiff for criminal trespass: prior to arresting the plaintiff, J had been told that the plaintiff had been warned numerous times not to return to the church, and the plaintiff admitted to J that he had received the letter telling him that he was banned from the church; moreover, although the plaintiff told J that he had a lawsuit with the church and that he and his family were longtime members, which the plaintiff argued provided J with exculpatory evidence, the jury could have credited J's testimony that the plaintiff never told him that he disputed the validity of his expulsion from the church in the lawsuit, such information would not undermine a reasonable conclusion that probable cause existed to arrest the plaintiff, and this was not a case where, even if J had investigated further, the plaintiff would have been exonerated, as any further investigation would result in the same facts that J already knew; furthermore, although the plaintiff argued that he believed he had a right to be at the church and that the funeral was open to the public, both of which constitute affirmative defenses to criminal trespass, the existence of a possible affirmative defense to a criminal charge is neither inconsistent with nor undermines the existence of probable cause in the absence of plainly exculpatory evidence, and the jury reasonably could have concluded that further investigation by J would not have conclusively established either of the claimed affirmative defenses.
2. The trial court properly granted the motion to strike the civil conspiracy claim filed by the city and J: the plaintiff's revised complaint failed to set forth any facts alleging an agreement of any type, explicit or implicit, between the four defendants, as required to establish a civil conspiracy;

moreover, an allegation that one defendant merely took action on the basis of a request of, and false information provided by, another defendant is, without more, insufficient to set forth a claim brought pursuant to § 1985 (3).

3. This court declined to review the plaintiff's claim that the jury erred when it failed to award him punitive damages on his intentional infliction of emotional distress claim despite returning a verdict for him on that count: the plaintiff failed to properly preserve this claim, as he never argued before the trial court that if the jury rendered a verdict for him on his intentional infliction of emotional distress claim, then he was necessarily entitled to an award of punitive damages; moreover, the plaintiff failed to object to, and, in fact, approved of, the verdict form as written and submitted to the jury, which left the question of whether to award punitive damages to the jury's discretion; furthermore, the plaintiff did not object to the trial court's instruction to the jury that it was not required to award punitive damages.

Argued November 30, 2021—officially released May 10, 2022

Procedural History

Action to recover damages for, inter alia, intentional infliction of emotional distress, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Hon. A. Susan Peck*, judge trial referee, granted the motion to strike filed by the defendant city of Hartford et al.; thereafter, the matter was tried to the jury before *Noble, J.*; verdict in part for the plaintiff; subsequently, the court, *Noble, J.*, rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Affirmed.*

Kirk D. Tavtigian, Jr., for the appellant (plaintiff).

Wesley S. Spears, for the appellees (named defendant et al.).

David R. Roth, with whom, on the brief, was *Aaron S. Bayer*, for the appellees (defendant city of Hartford et al.).

Opinion

BRIGHT, C. J. The plaintiff, Thedress Campbell, appeals from the judgment of the trial court rendered

after a jury verdict in part in favor of the defendants, Maurice Porter, the city of Hartford (city), Officer Omar Jones, and Shiloh Baptist Church (church).[1] On appeal, the plaintiff claims that (1) the jury erred in returning a defendants' verdict on his false arrest claim against Jones and the city, (2) the court erred in striking his civil conspiracy claim against all of the defendants, and (3) the jury erred in not awarding him punitive damages despite returning a plaintiff's verdict on his intentional infliction of emotional distress claim against Porter and the church.[2] We affirm the judgment of the trial court.

The following facts, as reasonably could have been found by the jury, and procedural history are relevant to this appeal. The plaintiff was a decades long member of the church. As a member of the church, he served on the church's board of trustees and as the church's property manager, led Sunday school services, became a deacon, and participated in the church's philanthropic efforts, among other acts of service to the church.

In 2014, the church appointed Porter as its new pastor. Initially, the plaintiff and Porter got along, but their relationship soon soured. Shortly after Porter took over as pastor, he removed the plaintiff from his role as the church's property manager because Porter had concerns about how the plaintiff was carrying out his duties. Thereafter, the plaintiff began questioning the validity of certain relocation expenses that Porter had claimed

[1] In his initial complaint, the plaintiff also named the Hartford Police Department (department) as a defendant. The plaintiff, however, withdrew his action against the department before trial. Accordingly, the department is not participating in this appeal, and all references to the defendants are to Porter, the city, Jones and the church.

[2] Porter and the church filed a motion to dismiss the plaintiff's appeal on the basis of untimeliness, lack of preservation, and because the plaintiff's notice of intent to appeal, filed after trial but before the court ruled on posttrial motions, referred to Jones and the city only, and did not include the church and Porter. The plaintiff filed an objection and argued therein that Porter and the church's motion to dismiss was untimely. This court denied the motion to dismiss.

for his move from South Carolina to Hartford. The plaintiff eventually sent an e-mail about Porter's relocation expenses to another member of the church, and that e-mail was later forwarded to Porter. Porter then held a meeting of the church's deacons, at which he read the plaintiff's e-mail aloud to those in attendance. Porter did not initially reveal who had written the e-mail, but the plaintiff, who was at the meeting, revealed himself as the author after the e-mail was read. One of the deacons then recommended that the plaintiff be removed as a deacon, at which point the plaintiff voluntarily resigned from that post.

After the e-mail incident, the plaintiff's relationship with Porter and the church worsened. Church leadership made repeated efforts to reconcile with the plaintiff, but those efforts were unsuccessful and, eventually, the church leaders made the decision to dismiss the plaintiff from the church. To that end, on February 2, 2016, church leadership sent the plaintiff a letter which stated in relevant part:

"Dear Brother Campbell,

"Please be advised that in accordance with Section 7.3, Dismissal of Members, of the Amended and Restated Constitution and Bylaws of [the church], its leadership has exercised rights granted to it under this provision and hereby has DISMISSED you from membership of [the church] for: continually disregarding the [c]hurch's authority and for creating contention and strife.

"Accordingly, pursuant to state law concerning trespassing, you are NOT allowed on any premises owned or operated by [the church] and you are not allowed to attend any function or activity held or hosted by [the church]. Any violation of this law will immediately be reported to the appropriate law enforcement authority and the appropriate civil remedy will be sought. You will only be allowed on any premises owned or operated

by [the church] or any function or activity held or hosted by [the church] provided you have sought and received written consent to do so. All requests for permission should be made to the church office in writing prior to whatever event you wish to attend and we will respond accordingly. . . .'' The letter was signed by Porter and Bradley Jones, the chairman of the deacons.

The letter was sent, in part, at the suggestion of Douglas Antuna, the faith based community service officer for the Hartford Police Department (department). In that capacity, Antuna served as the liaison between the department and the churches that are located in the city. While serving in that role, Antuna became aware of the fraught relationship between the plaintiff and the church, and, after he learned that the church had decided to dismiss the plaintiff as a member, Antuna suggested that the church draft a letter informing the plaintiff of his dismissal and telling him that he was no longer allowed at the church.

The plaintiff received the letter from the church, either by mail or hand delivery, but believed that it was invalid because he had not been dismissed in accordance with the church's bylaws. According to the plaintiff's understanding of the bylaws, the entire congregation was required to vote on the dismissal of a member, and church leadership alone did not have the power to dismiss a member, as it had attempted to do with the letter. The plaintiff then instituted a lawsuit against Porter and the church in an attempt to prevent the church from dismissing him.[3]

[3] More specifically, on April 26, 2016, the plaintiff filed a four count complaint against Porter and the church, alleging violations of his constitutional rights to free speech and freedom of religion, slander, intentional infliction of emotional distress, and negligent infliction of emotional distress. The plaintiff requested that an injunction be issued to prevent the church from dismissing him and also sought money damages. Porter and the church later filed an answer to the plaintiff's complaint. They also filed a counterclaim against the plaintiff, alleging counts of defamation, libel per se, intentional infliction of emotional distress, and negligent infliction of emotional distress.

While the plaintiff's lawsuit against Porter and the church was pending, and even though he disputed the church's authority to dismiss him as a member without a vote by the full congregation, the plaintiff stayed away from the church. This decision was driven in part by the plaintiff's concern that "even though I knew I was right, based on the church bylaws and the decisions that we had received, I didn't [want to] take a chance on going into the church for service and having a policeman come into the church . . . and escort me out of the

In July, 2016, the court held an evidentiary hearing in the matter on the plaintiff's request for injunctive relief. During the hearing, the court raised, sua sponte, the issue of whether it had subject matter jurisdiction to resolve that request given that the first amendment to the United States constitution generally prohibits state involvement in the internal doctrinal matters of religious organizations. The court heard argument from the parties on that issue in August, 2016. Then, in December, 2016, the court issued a memorandum of decision wherein it determined that it had subject matter jurisdiction to resolve the plaintiff's claim for an injunction. In that same decision, the court agreed with the plaintiff that, under the church's bylaws, church officials alone did not have the authority to dismiss members. Instead, the church's membership as a whole was the only body with such authority. The court, however, also concluded that the church had not yet had an opportunity to present evidence on whether a proper vote to expel the plaintiff had occurred. Given that, in March, 2017, the court held a second evidentiary hearing, at which the church conceded that its original dismissal of the plaintiff was not "an act expressly within the authority of" church leadership. By then, though, the church had held a formal meeting during which the congregation as a whole voted to dismiss the plaintiff from the church. On April 3, 2017, the court issued a second memorandum of decision, in which it concluded that the congregation's vote to dismiss the plaintiff "was a valid expression of the corporate body of the church." Accordingly, the court denied the plaintiff's request for injunctive relief. The plaintiff appealed that judgment to this court, and we dismissed the appeal for lack of a final judgment.

The plaintiff's nonconstitutional counts remained viable after the court's April 3, 2017 decision, and the plaintiff continued to litigate those claims. On January 28, 2019, after a bench trial, the court rejected the plaintiff's remaining claims. The court then rendered judgment for Porter on his negligent infliction of emotional distress counterclaim and awarded him $15,000 in damages. The plaintiff appealed that judgment to this court, and we affirmed. *Campbell* v. *Shiloh Baptist Church*, 201 Conn. App. 902, 239 A.3d 387 (2020).

church . . . .” On July 1, 2016, however, before there had been any resolution in his lawsuit challenging his dismissal, the plaintiff attended a friend’s funeral at the church. While the plaintiff was sitting in the church sanctuary and waiting for the funeral to begin, he was approached three separate times by different church leaders, each of whom reminded him that he was not allowed at the church without permission and told him that if he wanted to stay at the church for the funeral, he first needed to ask Porter for such permission. The plaintiff repeatedly declined to ask Porter for permission to attend the funeral because he believed that he had a right to be at the church, given his view that the letter dismissing him was invalid. The church leaders then told the plaintiff that if he was not going to ask for Porter’s permission, he needed to leave the premises. After the plaintiff ignored those requests, Andre McGuire, the church’s assistant pastor, informed him that if he remained at the church without permission, the police would be called. Despite that warning, the plaintiff still refused to leave.

Porter then called the police. He first called Antuna, but, because he was off duty at the time, Antuna told Porter to call the department, which he did. The department then dispatched Jones to the church. While Jones was en route, his supervisor told him that the church had been coordinating with Antuna regarding the plaintiff and that he should call Antuna for more information. Jones then called Antuna, who provided him with additional information about the conflict between the plaintiff and the church. Specifically, Antuna told Jones that the church had voted to dismiss the plaintiff as a member of the church and had given the plaintiff a letter telling him that he had been dismissed from the church and was no longer allowed there.

After he arrived at the scene, Jones spoke with McGuire,[4] who also explained that the church had voted to dismiss the plaintiff as a member and had sent the plaintiff a letter telling him that he had been dismissed and was no longer allowed at the church. McGuire further told Jones that church officials had repeatedly asked the plaintiff to leave the property but that he had ignored those requests. On the basis of this information, Jones determined that the situation constituted a "criminal trespass call."

Jones then asked the plaintiff to step outside,[5] which he did. He and the plaintiff had a brief conversation, during which Jones told the plaintiff that he had heard that the plaintiff had received a letter informing him that he was not allowed at the church. The plaintiff admitted to receiving the letter but told Jones that there was a pending legal case between him and the church.[6] The plaintiff also told Jones that he and his family were longtime members of the church. The plaintiff did, however, concede that several church officials had told him that day that if he did not get Porter's permission to be at the funeral then he could not be at the church and needed to leave. During this conversation, the plaintiff did not tell Jones that he disputed whether the church had the authority to dismiss him or provide any specific details about his lawsuit. Jones also did not ask for such information.

Jones then arrested the plaintiff for criminal trespass. A different officer arrived at the church and transported

[4] Jones testified at trial that he talked with Porter at the church. Porter, however, testified that he never spoke to Jones and that it was instead McGuire that Jones spoke with.

[5] Jones testified at trial that he asked an usher to direct the plaintiff to go into the foyer of the church, and that, from there, Jones asked the plaintiff to step outside. The plaintiff, however, testified that Jones came up to him while he was sitting in the sanctuary, tapped him on the shoulder, and ordered him to go outside.

[6] See footnote 3 of this opinion.

the plaintiff to the police station, where he was booked and released on his own recognizance. On September 2, 2016, the plaintiff filed a motion to dismiss the criminal trespassing charge, and that motion to dismiss was granted by the court on January 13, 2017.

On July 18, 2017, the plaintiff instituted the underlying action against the four defendants and the Hartford Police Department by way of a thirteen count complaint.[7] In October, 2017, the plaintiff filed a revised complaint that included two additional counts, bringing the total number to fifteen counts. The second count of the revised complaint alleged that the defendants had conspired to deprive the plaintiff of his civil rights in violation of 42 U.S.C. § 1985 (3).[8] The city and Jones moved to strike that count, arguing that the plaintiff had failed to allege sufficient facts to establish the existence of an agreement between the defendants regarding their intent to harm the plaintiff. The court, *Hon. A. Susan Peck*, judge trial referee, granted the motion to strike. The city and Jones then filed an answer and special defenses to the plaintiff's revised complaint. In addition to denying the plaintiff's allegations that they had engaged in any wrongful conduct, the city and Jones

[7] As noted in footnote 1 of this opinion, the plaintiff withdrew his action against the department before trial.

[8] Title 42 of the United States Code, § 1985 (3), provides in relevant part: "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

pleaded several special defenses of immunity, including that Jones was entitled to qualified immunity because his conduct "was reasonable under the circumstances."

Thereafter, the case went to a jury trial on three counts: false arrest, in violation of 42 U.S.C. § 1983[9] (count one) as to Jones and the city, and intentional infliction of emotional distress (count eleven) and slander per se (count fifteen) as to Porter and the church.[10] After a four day trial, the jury found for the city and Jones on the § 1983 claim. The jury also found for Porter and the church on the slander per se claim. On the intentional infliction of emotional distress claim, however, the jury found for the plaintiff and awarded him $30,000 in compensatory damages, but found that the plaintiff was not entitled to punitive damages because Porter and the church had not acted in reckless disregard of the plaintiff's rights. The court, *Noble*, *J.*, accepted the jury's verdict. Although Porter and the church filed motions to set aside the verdict and for a new trial, which the court denied, the plaintiff filed no posttrial motions challenging the jury's verdict. This appeal followed.[11]

[9] Title 42 of the United States Code, § 1983, provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . . ."

[10] The remaining counts were dispensed with in various ways. In response to a request to revise that was filed by the city and Jones, the plaintiff submitted a revised complaint that deleted count ten. The plaintiff later withdrew counts three, four, five, six, seven, eight, nine, twelve, and fourteen. As to count thirteen, the parties stipulated that the city was liable to indemnify Jones for any damages awarded to the plaintiff for which he would be responsible.

[11] Although Porter and the church never appealed or cross appealed from the judgment in favor of the plaintiff on the intentional infliction of emotional

Additional facts and procedural history will be set forth below as necessary.

I

The plaintiff claims that the jury erred by not returning a plaintiff's verdict on his § 1983 claim. Specifically, the plaintiff argues that there was insufficient evidence for the jury to have reasonably concluded that Jones had probable cause to arrest him. We are not persuaded.

We first address whether this claim was properly preserved for appellate review. Jones and the city argue that this court cannot consider the plaintiff's sufficiency of the evidence claim because the plaintiff never challenged the jury's verdict at trial through a motion for a directed verdict or any postverdict motions at all and, thus, the claim is unpreserved and unreviewable. Jones and the city further argue that we should not apply plain error review to this unpreserved claim because the plaintiff never requested such review in his initial brief.

Generally speaking, this court "shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial." Practice Book § 60-5. Both this court and our Supreme Court, however, have left open the question of whether a party in a civil case must file a motion to set aside the verdict in order to secure full appellate review of a sufficiency of the evidence claim. See *Thorsen* v. *Durkin Development, LLC*, 129 Conn. App. 68, 74 n.6, 20 A.3d 707 (2011) ("[w]e note . . . that the *Santopietro* [v. *New Haven*,

distress claim, they did file preliminary papers pursuant to Practice Book § 63-4 in this appeal, suggesting that they intended to pursue a cross appeal. In response, the plaintiff filed a motion to dismiss any possible cross appeal as untimely. This court ordered that it was unnecessary to rule on the plaintiff's motion because Porter and the church never actually filed a cross appeal. Thereafter, Porter and the church took no further action to pursue a cross appeal.

239 Conn. 207, 213 n.9, 682 A.2d 106 (1996)] court explicitly left open the question of whether a motion to set aside the verdict is essential to full appellate review of a claim of insufficiency of the evidence" (internal quotation marks omitted)); see also *Santopietro* v. *New Haven*, supra, 213 n.9. We need not resolve this question in the present case because we conclude that the plaintiff's claim fails on the merits. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 158 n.28, 84 A.3d 840 (2014) ("[r]eviewing an unpreserved claim when the party that raised the claim cannot prevail is appropriate because it cannot prejudice the opposing party and such review presumably would provide the party who failed to properly preserve the claim with a sense of finality that the party would not have if the court declined to review the claim").

We begin with the applicable standard of review and principles of law that guide our analysis. "A party challenging the validity of the jury's verdict on grounds that there was insufficient evidence to support such a result carries a difficult burden. In reviewing the soundness of a jury's verdict, we construe the evidence in the light most favorable to sustaining the verdict. . . . We do not ask whether we would have reached the same result. [R]ather, we must determine . . . whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict . . . . If the jury could reasonably have reached its conclusion, the verdict must stand." (Internal quotation marks omitted.) *Wager* v. *Moore*, 193 Conn. App. 608, 616, 220 A.3d 48 (2019); see also *Carrano* v. *Yale-New Haven Hospital*, 279 Conn. 622, 645, 904 A.2d 149 (2006) ("[i]t is not the function of this court to sit as the seventh juror when we review the sufficiency of the evidence" (internal quotation marks omitted)).

The plaintiff's § 1983 claim was based on his allegation that Jones falsely arrested him for criminal trespass in the first degree without probable cause. False arrest "is the unlawful restraint by one person of the physical liberty of another." (Internal quotation marks omitted.) *Outlaw* v. *Meriden*, 43 Conn. App. 387, 392, 682 A.2d 1112, cert. denied, 239 Conn. 946, 686 A.2d 122 (1996). To prevail on a claim of false arrest, the plaintiff must establish that the arrest was made without probable cause. See *Beinhorn* v. *Saraceno*, 23 Conn. App. 487, 491, 582 A.2d 208 (1990), cert. denied, 217 Conn. 809, 585 A.2d 1233 (1991). "Because probable cause to arrest constitutes justification, there can be no claim for false arrest where the arresting officer had probable cause to arrest the plaintiff." *Escalera* v. *Lunn*, 361 F.3d 737, 743 (2d Cir. 2004).

"Probable cause, broadly defined, comprises such facts as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe that criminal activity has occurred. . . . It is a flexible common sense standard that does not require the police officer's belief to be correct or more likely true than false. . . . Probable cause for an arrest is based on the objective facts available to the officer at the time of arrest, not on the officer's subjective state of mind. . . . [W]hile probable cause requires more than mere suspicion . . . the line between mere suspicion and probable cause necessarily must be drawn by an act of judgment formed in light of the particular situation and with account taken of all the circumstances. . . . The existence of probable cause does not turn on whether the defendant could have been convicted on the same available evidence. . . . Indeed, proof of probable cause requires less than proof by a preponderance of the evidence." (Citations omitted; internal quotation marks omitted.) *Washington* v. *Blackmore*, 119 Conn. App. 218, 221–22, 986 A.2d 356,

cert. denied, 296 Conn. 903, 991 A.2d 1104 (2010). "The determination of whether probable cause exists . . . is made pursuant to a totality of circumstances test." (Internal quotation marks omitted.) *State* v. *Days*, 89 Conn. App. 789, 803, 875 A.2d 59, cert. denied, 275 Conn. 909, 882 A.2d 677 (2005).

Moreover, when, as here, the defense of qualified immunity has been asserted, "the defending officer need only show arguable probable cause. . . . This is because at its heart, [t]he concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. . . . Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause . . . and in those situations courts will not hold that they have violated the [c]onstitution. . . . Therefore, in situations where an officer may have reasonably but mistakenly concluded that probable cause existed, the officer is nonetheless entitled to qualified immunity." (Citations omitted; internal quotation marks omitted.) *Caldarola* v. *Calabrese*, 298 F.3d 156, 162 (2d Cir. 2002); see also *Weyel* v. *Catania*, 52 Conn. App. 292, 296, 728 A.2d 512 ("[t]he defense of qualified immunity shields government officials from civil liability if . . . it was objectively reasonable for the official to believe that the conduct did not violate such rights" (internal quotation marks omitted)), cert. denied, 248 Conn. 922, 733 A.2d 846 (1999).

Jones arrested the plaintiff for criminal trespass in the first degree. General Statutes § 53a-107 (a) provides in relevant part that "[a] person is guilty of criminal trespass in the first degree when: (1) Knowing that such person is not licensed or privileged to do so, such person enters or remains in a building or any other premises after an order to leave or not to enter personally communicated to such person by the owner of the premises or other authorized person . . . ."

We now turn to the evidence presented to the jury regarding whether probable cause existed for Jones to arrest the plaintiff. Jones and the city rely on the following evidence. Before arriving at the church, Jones was told by Antuna that the church had given the plaintiff a letter telling him that he had been dismissed from the church and was no longer allowed on church property. McGuire reiterated this same information to Jones after he arrived at the church. McGuire also informed Jones that the plaintiff had been verbally warned numerous times, prior to Jones' arrival that day, not to return to the church. Further, when Jones spoke with the plaintiff before arresting him, the plaintiff admitted to receiving the letter telling him that he was banned from the church. The plaintiff also admitted to Jones that several church officials had told him that he needed to leave the premises if he was not going to ask Porter for permission to attend the funeral. Jones and the city argue that, based on this evidence, it was reasonable for Jones to believe that the plaintiff knew that he was not allowed at the church and that he had failed to obey repeated requests not to return from those with authority over the church premises. See General Statutes § 53a-107 (a) (1). Accordingly, there was sufficient evidence from which the jury reasonably could have concluded that Jones had either actual or arguable probable cause to arrest the plaintiff.

In response, the plaintiff argues that the evidence relied on by Jones and the city was insufficient evidence to support the jury's finding that probable cause existed for his arrest because the plaintiff told Jones that he had a right to be at the church, given (1) the pending lawsuit between him and the church, and (2) the fact that he and his family were longtime members. According to the plaintiff, this information provided Jones with possible exculpatory evidence and he was therefore required to investigate the plaintiff's version

of events before arresting him for trespass. Consequently, because Jones failed to do this additional investigating, which would have established that the plaintiff did not know that he was not allowed at the church, there could not have been probable cause for him to arrest the plaintiff. On the basis of our review of the record, and given our standard of review, we conclude that the plaintiff's claim fails.

First, the jury was not required to infer that because the plaintiff had a lawsuit with the church that meant that he was challenging his expulsion from the church. In fact, Jones testified that the plaintiff never told him that he disputed the validity of his expulsion from the church. It was for the jury to decide whether to credit Jones' testimony on this issue. See *Micalizzi* v. *Stewart*, 181 Conn. App. 671, 691, 188 A.3d 159 (2018) ("[i]t is the [jury's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses" (internal quotation marks omitted)). Furthermore, the fact that the plaintiff and his family had been longtime members of the church did not require that the jury infer that the plaintiff still must be welcome there. The jury was free to accept the evidence it heard that the plaintiff, although having been a longtime member, had been expelled and told that he was no longer welcome at the church.

Second, even if Jones had been told or could have inferred that the plaintiff was challenging his expulsion, such information would not undermine a reasonable conclusion that probable cause existed to arrest the plaintiff. Police are often confronted with conflicting information, and an officer's decision to rely on information that is disputed does not mean that there is no probable cause for the arrest. For example, in *Curley* v. *Suffern*, 268 F.3d 65, 68–70 (2d Cir. 2001), the plaintiff brought a § 1983 claim for false arrest against the defendant village and several officers after he was arrested

following a barroom brawl at Mugg's Pub, an establishment in which he was a part owner. When the defendant officers arrived at Mugg's Pub, they were given two different stories about the plaintiff's participation in the brawl. Id., 69. The plaintiff told the officers that he was trying to break up the fight when he accidentally hit the victim, but the victim told the officers that the plaintiff had "punched him in the arm and thrown an ashtray at him." Id. Despite these two different versions of events, the police arrested the plaintiff and charged him with assault, resisting arrest, obstructing governmental administration, and disorderly conduct. Id., 68. After the assault charge was dismissed, the plaintiff's criminal case went to trial where he was acquitted by the jury on the remaining counts. Id. He then sued the village and the officers who arrested him for false arrest in violation of his civil rights by arresting him without probable cause. The United States District Court for the Southern District of New York granted a motion for summary judgment in favor of the defendants. Id. On appeal, the United States Court of Appeals for the Second Circuit held that there was sufficient probable cause for the plaintiff's arrest, even in light of the conflicting factual accounts. Id., 70. This was so because probable cause for an arrest exists even when an officer is presented with different stories from the arrestee and the alleged victim. Id. Thus, an arresting officer is not required to disprove an arrestee's version of events before arresting him. Id. The court further held that probable cause existed despite the officer's failure to conduct a more thorough investigation into the plaintiff's story, because "[o]nce a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest." (Internal quotation marks omitted.) Id.

In the present case, like in *Curley*, neither the plaintiff's version of events nor Jones' failure to investigate

the plaintiff's story negates the fact that Jones had probable cause to arrest the plaintiff based on what Antuna, McGuire, and the plaintiff himself told Jones regarding whether the plaintiff was allowed at the church. See id.; see also *Martinez* v. *Simonetti*, 202 F.3d 625, 634 (2d Cir. 2000) ("[P]olice officers, when making a probable cause determination, are entitled to rely on the victims' allegations that a crime has been committed. . . . They are also entitled to rely on the allegations of fellow police officers." (Citation omitted.)). Further, "[i]t would be unreasonable and impractical to require that every innocent explanation for activity that suggests criminal behavior be proved wrong, or even contradicted, before an arrest warrant could be issued with impunity. . . . It is up to the factfinder to determine whether [an arrestee's] story holds water, not the arresting officer." (Internal quotation marks omitted.) *Dubinsky* v. *Black*, 185 Conn. App. 53, 68, 196 A.3d 870 (2018).

The plaintiff is correct that officers may not wholly ignore information that they receive from suspects and that probable cause will not exist when minimal further investigation would have exonerated the suspect. See *Kuehl* v. *Burtis*, 173 F.3d 646, 650–51 (8th Cir. 1999). That, however, is not the case here, where the jury was presented with evidence from several witnesses, including the plaintiff, that Jones was repeatedly told that the plaintiff (1) was not supposed to be at the church unless he had prior permission from Porter that he refused to seek, (2) knew that he was not otherwise supposed to be there, and (3) had ignored orders by church officials to leave because he did not otherwise have permission to be there. See id., 650 (weight of all evidence must be analyzed when determining if probable cause exists). Furthermore, this is not a case where, had Jones investigated further, the plaintiff would have been exonerated. Instead, any further investigation by

Jones would have resulted in the same facts that he already knew, namely, that the church had purported to dismiss the plaintiff as a member and had banned him from church property, and that the plaintiff was aware of his banishment but disagreed with it. See id. ("[a]n officer need not conduct a 'mini-trial' before making an arrest"). Therefore, the fact that the plaintiff provided Jones with a different version of the facts and his rights than that which had been conveyed to him by Antuna and McGuire does not necessitate a conclusion that the evidence was insufficient to support the jury's finding that probable cause existed for his arrest.

Finally, we are not persuaded by the plaintiff's argument that it was unreasonable for the jury to conclude that Jones had probable cause to arrest him because (1) the plaintiff believed that he had a right to be at the church and (2) the funeral was open to the public. Both of these factual contentions constitute affirmative defenses to criminal trespass. See General Statutes § 53a-110 ("[i]t shall be an affirmative defense to prosecution for criminal trespass that . . . (2) the premises, at the time of the entry or remaining, were open to the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or (3) the actor reasonably believed that . . . he was licensed to [enter or remain in the premises]"). The existence of a possible affirmative defense to a criminal charge is neither inconsistent with nor undermines the existence of probable cause, in the absence of plainly exculpatory evidence, for an arrest on that charge. The United States Court of Appeals for the Second Circuit has recently explained: "To be sure, we have held that an 'officer's failure to investigate an arrestee's protestations of innocence generally does not vitiate probable cause,' *Panetta* [v. *Crowley*, 460 F.3d 388, 396 (2d Cir. 2006)], as '[i]t is up to the factfinder to determine whether a defendant's story holds water, not the

arresting officer,' *Krause* [v. *Bennett*, 887 F.2d 362, 372 (2d Cir. 1989)]. But we have also consistently held . . . that 'an officer may not disregard plainly exculpatory evidence.' *Panetta* [v. *Crowley*, supra], 395." *Washington* v. *Napolitano*, 29 F.4th 93, 107 (2d Cir. 2022); see also *Painter* v. *Robertson*, 185 F.3d 557, 571 n.21, 572 (6th Cir. 1999). In *Painter*, the United States Court of Appeals for the Sixth Circuit discussed when alleged affirmative defenses should play a role in the probable cause determination, stating: "[W]here a reasonable police officer would conclusively know that an [arrestee's] behavior is protected by a legally cognizable affirmative defense, that officer lacks a legal foundation to arrest that person for that behavior. . . . In all other cases, the merits of an alleged affirmative defense should be assessed by prosecutors and judges, not policemen." (Citation omitted.) *Painter* v. *Robertson*, supra, 571 n.21. In the present case, the jury reasonably could have concluded that further investigation by Jones would not have conclusively established either of the claimed special defenses to a charge of criminal trespass.

In sum, on the basis of the evidence introduced at trial, the jury reasonably could have concluded that Jones had either actual or arguable probable cause to arrest the plaintiff for criminal trespass. Accordingly, the evidence was sufficient to support the jury's verdict for the city and Jones on the § 1983 claim.

II

The plaintiff next claims that the court erred in striking the civil conspiracy count in his revised complaint.[12] We are not persuaded.

We first set forth our standard of review and the applicable law. "The standard of review in an appeal

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

challenging a trial court's granting of a motion to strike is well established. A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. As a result, our review of the court's ruling is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Citation omitted; internal quotation marks omitted.) *Donar* v. *King Associates, Inc.*, 67 Conn. App. 346, 349, 786 A.2d 1256 (2001).

In the second count of his revised complaint, the plaintiff alleged that all of the defendants conspired, in violation of 42 U.S.C. § 1985 (3), to violate his civil rights. As for the underlying facts supporting his claim, the plaintiff incorporated into the second count the factual allegations he pleaded in his first count alleging his § 1983 claim for false arrest. The plaintiff alleged, relevant to his conspiracy claim, that the church and Porter "falsely informed the [Hartford Police Department] that the plaintiff was trespassing and sought [his] removal from the church and his arrest and criminal prosecution." The plaintiff further alleged that Jones "[i]n response to [the church and Porter's] request . . . [and] without undertaking any investigation . . . arrested the plaintiff . . . ." The city and Jones moved to strike the § 1985 (3) count because the complaint failed to allege facts showing a conspiratorial purpose among the defendants. The court agreed, holding that the plaintiff failed "to set forth specific facts alleging an 'agreement between the [defendants] to inflict a wrong against or injury upon another . . . .' "

On appeal, the plaintiff argues that the revised complaint sufficiently alleged his § 1985 (3) claim because it "explicitly alleged and necessarily implied [facts] . . . that the defendants maliciously conspired" to violate the plaintiff's civil rights. He also argues that the complaint alleged acts taken in furtherance of the conspiracy in that Porter and the church were "working together" with Jones and the city as evidenced by Jones "simply accepting false information without doing any investigation . . . ." We are not persuaded.

"In order to state a conspiracy claim under 42 U.S.C. § 1985 (3), a plaintiff must show: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. . . . A § 1985 (3) conspiracy must also be motivated by some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action." (Citation omitted; internal quotation marks omitted.) *Cine SK8, Inc.* v. *Henrietta*, 507 F.3d 778, 791 (2d Cir. 2007). Further, to maintain an action for civil conspiracy, "the plaintiff must provide some factual basis supporting a meeting of the minds, such that [the] defendants entered into an agreement, express or tacit, to achieve the unlawful end." (Internal quotation marks omitted.) *Chen* v. *Zhao*, 799 Fed. Appx. 16, 19 (2d Cir. 2020).

The plaintiff's complaint, even when read broadly, wholly fails to set forth any facts that allege a conspiratorial agreement between the four defendants. With regard to the specific actions that the defendants allegedly took in concert, the complaint states only that Porter and the church falsely reported that the plaintiff was trespassing and that, "[i]n response," Jones arrested

the plaintiff without conducting any investigation. These allegations, however, make no mention of any *agreement* between the defendants to inflict harm or injury upon the plaintiff, as is required to establish a civil conspiracy. See *Chen* v. *Zhao*, supra, 799 Fed. Appx. 19. In fact, the word "agreement" is not mentioned once in the entire complaint and there are also no facts alleged that would support the conclusion that an agreement of any type, explicit or implicit, existed between the four defendants. An allegation that one defendant merely took action based on a request of, and false information provided by, another defendant is, without more, insufficient to set forth a § 1985 (3) claim that the defendants had reached an agreement to engage in illegal conduct. Accordingly, because the facts alleged in the complaint do not sufficiently support an action for a § 1985 (3) civil conspiracy, the court did not err in striking that claim.

III

Finally, the plaintiff claims that the jury erred when it failed to award him punitive damages on his intentional infliction of emotional distress claim, despite returning a verdict for him on that claim. Specifically, the plaintiff argues that because the jury found Porter and the church liable for the intentional infliction of emotional distress, the jury must have also determined that Porter and the church had engaged in outrageous conduct and, thus, the plaintiff was entitled to punitive damages. We conclude that this claim was not properly preserved and, therefore, decline to review it.

We begin by setting forth the legal principles relevant to our determination of whether a claim properly was preserved for appellate review. "It is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial. . . . [O]nly in [the] most exceptional

circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party. . . . [See] Practice Book § 60-5 ('court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial'). [T]he determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court [and the opposing party] on reasonable notice of that very same claim." (Citation omitted; internal quotation marks omitted.) *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 454–55, 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).

The following additional procedural history is relevant to this claim. Prior to the start of jury deliberations, the court and all of the parties agreed to submit a single verdict form to the jury. With regard to punitive damages, the verdict form asked: "Do you find that [the] plaintiff proved that [the] defendants acted in reckless disregard of [the] plaintiff's rights and therefore that [the] plaintiff is entitled to punitive damages?" The plaintiff never argued before the court that if the jury returned a verdict for the plaintiff on his intentional infliction of emotional distress claim, he was necessarily entitled to an award of punitive damages. Nor did the plaintiff request that the question of whether to award punitive damages be left to the court, if the jury returned a verdict for the plaintiff. Instead, with the

plaintiff's agreement, the question of whether to award punitive damages on that claim was left to the jury's discretion.[13]

The plaintiff's counsel conceded at oral argument before this court that he had reviewed and approved the verdict form before it was submitted to the jury. He further conceded at oral argument that he never objected to the verdict form as drafted. He also never requested that the form be changed to say that if the jury found for the plaintiff on the intentional infliction of emotional distress claim then it was required to award him punitive damages. Finally, the plaintiff did not object during the trial when the court instructed the jury: "The law does not require you to award punitive damages. It is instead a matter for your sound discretion."

Given the plaintiff's failure to challenge in the trial court the verdict form or jury instructions, and, in fact, his agreement with the form as written and submitted to the jury, we conclude that the plaintiff's challenge on appeal to the jury's verdict regarding punitive damages was not preserved. Accordingly, we decline to review this claim. See Practice Book § 60-5.

The judgment is affirmed.

In this opinion the other judges concurred.

WILLIS CAVANAGH *v.* JOSEPH RICHICHI, COTRUSTEE, ET AL.
(AC 44344)

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

Syllabus

The plaintiff sought a partition by sale, pursuant to statute (§ 52-500 (a)) of certain real property in which he and the defendants each held an

[13] We note that this is consistent with Connecticut law. See *Kenny* v. *Civil Service Commission*, 197 Conn. 270, 277, 496 A.2d 956 (1985) ("[t]he extent to which exemplary damages are to be awarded ordinarily rests in the discretion of the trier of the facts" (internal quotation marks omitted)).

ownership interest. Between the years 2001 and 2019, the defendants B, G, and N Co. invested hundreds of thousands of dollars for the upkeep, maintenance, and improvement of the waterfront property to support a marine based business and also paid all of the real estate taxes on the property. The trial court found that the plaintiff and the defendants M and P had been passive owners and had minimal interests in the property as compared to B, G, and N Co. and determined that the equitable distribution of the minimal interests of the plaintiff and M and P to B, G, and N Co. in exchange for just compensation would better promote the relative interests of the parties. Thereafter, the court accepted an appraisal of the fair market value of the property and awarded the plaintiff one third of that amount, reduced by a credit to B, G, and N Co. for certain investments in the property and a set off for the real estate taxes paid. The court declined to award the plaintiff compensation for B, G, and N Co.'s use and occupancy of the property. On the plaintiff's appeal to this court, *held*:

1. The trial court did not abuse its discretion in calculating its award of just compensation to the plaintiff: contrary to the plaintiff's argument, the court was not prohibited from crediting B, G, and N Co. for the costs of improvements to the property in the absence of an agreement with the plaintiff to share the cost of those improvements as there was no marital relationship among the parties; moreover, the plaintiff provided no authority for his assertion that the court was required to calculate the amount of credit to B, G, and N Co. on the basis of the amount of their expenditures for improvements rather than the extent to which those expenditures enhanced the fair market value of the property; furthermore, the court reasonably considered in its calculation the market value of the property, the plaintiff's interest in the property, and the costs and labor associated with the improvements, maintenance and repairs made by B, G, and N Co. during their occupancy of the property and found that much of the investment between 2000 and 2009 was necessary for the property to be useable and, thus, that these expenses benefited all the co-owners of the property.
2. The trial court did not abuse its discretion in declining to award the plaintiff compensation for B, G, and N Co.'s use and occupancy of the property: the plaintiff failed to prove the reasonable value owed to him by B, G and N Co.; the court's finding that the testimony of the plaintiff's real estate valuation expert as to the fair market rental value of the property was not credible was fully supported by the evidence, including the expert's use of a fair market value of the property that differed from the court approved appraisal, the expert's determination of the fair market rental value as if the plaintiff and B, G, and N Co. were the landlord and tenants under a long-term ground lease rather than analyzing comparable rentals, and the failure of the expert's analysis to consider the actual condition of the property, although it assumed a maritime commercial use of the property.

Argued January 3—officially released May 10, 2022

Procedural History

Action for the partition of certain of the parties' real property, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant New NRB #3 Corporation et al. filed a counterclaim; thereafter, Patrick D. McCabe, cotrustee of the Hillard E. Bloom Revocable Trust, was substituted for the named defendant; subsequently, the case was tried to the court, *Heller*, *J.*; judgment for the defendant New NRB #3 Corporation et al. on the complaint and on the counterclaim, from which the plaintiff appealed to this court. *Affirmed.*

Douglas J. Varga, for the appellant (plaintiff).

Joseph DaSilva, *Jr.*, with whom, on the brief, was *Marc J. Grenier*, for the appellees (defendant New NRB #3 Corporation et al.).

Opinion

CLARK, J. In this partition action, the plaintiff and counterclaim defendant, Willis Cavanagh (plaintiff), appeals from the judgment of the trial court ordering an equitable distribution of the property located at 120 Water Street in Norwalk (property). The trial court found that the plaintiff's interest in the property was minimal and ordered him to quitclaim his undivided one-third stake in the property to the defendants and counterclaim plaintiffs Robert Bloom and John Gardella, in their capacity as cotrustees of the Norman R. Bloom Revocable Trust, and to New NRB #3 Corporation (New NRB) (collectively, defendants), for just compensation.[1] On appeal, the plaintiff claims that the trial

[1] Joseph Richichi and Leslie Miklovich, in their capacity as cotrustees of the Hillard E. Bloom Revocable Trust, were codefendants and cross claim defendants in the underlying action. During the pendency of the action, Richichi passed away, and Patrick D. McCabe succeeded Richichi as cotrustee of the Hillard E. Bloom Revocable Trust. The trial court concluded that McCabe and Miklovich, as cotrustees of the Hillard E. Bloom Revocable Trust (Hillard Bloom Trust cotrustees), also had a minimal interest in the subject property and ordered them to quitclaim their undivided one-sixth

court erred in calculating the just compensation owed to him by (1) finding that the defendants were entitled to a credit of one third of the amount that they paid for improvements to the property, and (2) failing to award him any compensation for the defendants' use and occupancy of the property. We affirm the judgment of the trial court.

We begin by setting forth the relevant facts, as found by the trial court, in addition to the procedural history in this matter. The property is a 0.7 acre waterfront property located in the Norwalk Marine Commercial zone in Norwalk. The property has approximately 70 feet of frontage on Water Street and 150 feet of frontage on Norwalk Harbor. It is a narrow, mostly level, rectangular shaped lot. The land component of the property comprises about 75 percent of the parcel; the remaining 25 percent stretches into Norwalk Harbor. The property is improved with a small two-story building, a bulkhead, a boat lift, a sixty foot dock, and a sixty foot pier that extends into the harbor.

In 2011, the plaintiff, who owns a one-third interest in the property, commenced an action for a partition by sale of the subject property. At that time, Joseph Richichi and Leslie Miklovich, as cotrustees of the Hillard E. Bloom Revocable Trust (Hillard Bloom Trust), and the defendants, were named as defendants in light of their ownership interests in the property.

On June 26, 2013, Richichi and Miklovich filed an answer to the complaint, agreeing with the plaintiff that a partition by sale, with an equitable distribution of the

interest in the property to the defendants for just compensation. Before the hearing was held to determine the amount of just compensation to be paid to the plaintiff and the Hillard Bloom Trust cotrustees, the Hillard Bloom Trust cotrustees entered into a stipulation with the defendants to resolve their claims for just compensation. The Hillard Bloom Trust cotrustees did not participate in this appeal.

proceeds, would better serve the interests of the co-owners than a partition in kind. On July 8, 2013, however, the defendants filed an answer, counterclaim, and cross claim in which they argued that a physical division of the property was not appropriate and that a partition by sale would not be in the interest of the owners. They alleged that the plaintiff's interest in the property was minimal, and, therefore, they were entitled to an order requiring the plaintiff to convey his interest in the property to them in exchange for fair compensation. The defendants also asserted the right to a set off against any fair compensation due to the plaintiff for the amounts that they had spent for the upkeep, maintenance, and improvement of the property. The defendants asserted the same claims as cross claims against Richichi and Miklovich.

On December 22, 2014, Patrick D. McCabe filed a notice of death of Richichi, and McCabe thereafter succeeded Richichi as a cotrustee of the Hillard Bloom Trust.[2] On October 15, 2015, an amended complaint was served and filed to reflect this new interest, in addition to correcting a service issue as to Gardella, as cotrustee of the Norman Bloom Trust. Various counterclaims, answers, special defenses, and replies were filed. Of relevance to this appeal, the plaintiff filed revised special defenses to the defendants' operative counterclaim on August 16, 2016, which included, among other special defenses, that the defendants failed and refused to pay reasonable rents or use and occupancy to him, which amounts equal or exceed the value of any improvements to the property.

The action was tried to the court on August 17 and September 1, 2016, and January 10, 2017, and the court set a briefing schedule at the close of evidence. In a

[2] Hereinafter we refer to McCabe and Miklovich, as cotrustees of the Hillard Bloom Trust, as the "Hillard Bloom Trust cotrustees."

memorandum of decision dated September 5, 2017, the trial court, *Heller*, *J.*, evaluated whether a partition by sale or an equitable distribution, pursuant to General Statutes § 52-500 (a),[3] was appropriate. With respect to the plaintiff, the court found that, despite his ownership of "an undivided one-third—or 33.33 percent—interest in the . . . property," he had "a minimal interest in the . . . property" because, among other things, he failed "to contribute to the cost of the cleaning up [of] the . . . property and constructing and installing the improvements"; he failed "to pay any portion of the real estate taxes or the insurance premiums for the property"; he failed "to contribute to the cost of maintaining the . . . property"; and he "never sought access to the property." The court found that, "[w]hile [the plaintiff] has acted to assert his ownership interest in the . . . property—by prosecuting the 2002 quiet title action and this partition action—he has done nothing to enhance, protect or preserve the property itself. Although he is the plaintiff in this action, he did not testify or offer any evidence to show that he has been anything other than a passive owner of the . . . property."

In regard to the Hillard Bloom Trust cotrustees, the court found that they own "an undivided one-sixth—or 16.67 percent—interest in the . . . property." The court stated that McCabe or Miklovich, "individually or in their capacity as cotrustees of the Hillard Bloom

[3] General Statutes § 52-500 (a) provides: "Any court of equitable jurisdiction may, upon the complaint of any person interested, order the sale of any property, real or personal, owned by two or more persons, when, in the opinion of the court, a sale will better promote the interests of the owners. If the court determines that one or more of the persons owning such real or personal property have only a minimal interest in such property and a sale would not promote the interests of the owners, the court may order such equitable distribution of such property, with payment of just compensation to the owners of such minimal interest, as will better promote the interests of the owners."

Trust, have not had anything to do with the . . . property." The court stated that, like the plaintiff, "they did not testify at trial or offer any evidence to show that they are not merely passive owners." The court found that they, too, had "a minimal interest in the . . . property."

With respect to the defendants, the court found that the Norman Bloom Trust cotrustees owned an undivided one-sixth interest in the property and that New NRB, an oyster and shellfishing company operated by Bloom, owned an undivided one-third interest in the property. Having found that the plaintiff and the Hillard Bloom Trust cotrustees had minimal interests in the property, the court had to determine, in accordance with § 52-500 (a), whether a sale would promote the interests of the defendants. If a sale *did not* promote their interests, the court *could* order an equitable distribution of such property. If a sale *would* promote their interests, an equitable distribution *would not* be appropriate. The court ultimately concluded that, pursuant to § 52-500 (a), the sale of the property would not promote the interests of the defendants, and it accordingly found that "the equitable distribution of the minimal interests of [the plaintiff] and the Hillard Bloom Trust cotrustees to the [the defendants] in return for just compensation [would] better promote the interests of the owners of the . . . property than would a partition by sale."

Instead of determining just compensation at that time, the court's memorandum of decision "direct[ed] the [defendants] to provide a current appraisal of the . . . property, prepared by . . . [Ronald] McInerney, for the consideration of the court and all parties within sixty days of the date of [its] memorandum of decision."[4]

[4] The court previously credited the methodology used by Ronald McInerney, an expert appraiser who testified on behalf of the defendants, as to the fair market value of the property. The court noted, however, that almost two years had passed since McInerney completed his appraisal and that the

The court indicated that the parties would then be heard with respect to the just compensation to be paid to the plaintiff and to the Hillard Bloom Trust cotrustees for their interests in the property.

On October 27, 2017, the defendants filed an updated appraisal completed by McInerney dated October 25, 2017, which the trial court, *Hon. Kevin Tierney*, judge trial referee, accepted on December 20, 2017. The October 25 appraisal valued the property at $1,325,000. On March 16, 2018, before the hearing on just compensation was held, the Hillard Bloom Trust cotrustees entered into a stipulation with the defendants to resolve their claim to just compensation.

On October 8, 2019, the court held a hearing on the just compensation to be paid to the plaintiff, the defendants' claim that they were entitled to contributions for the amounts that they had spent for the upkeep, maintenance, and improvement of the property, and the plaintiff's claim that he should be compensated for the defendants' use and occupancy of the property. The court reserved decision at the conclusion of the hearing and set a posthearing briefing schedule.

In a memorandum of decision dated October 6, 2020, the trial court, *Heller*, *J.*, accepted the updated October, 2017 appraisal completed by McInerney and found that the property had a fair market value of $1,325,000. The court stated: "Absent any credit, setoff or other equitable adjustment in favor of the [defendants], the value of [the plaintiff's] undivided one-third interest would be $441,667." However, the court explained that its "role in this partition action does not end with a simple mathematical calculation." It recognized that "[a] partition action requires that the court balance the equities between the parties." (Internal quotation marks omitted.)

court was not inclined to determine the amount of just compensation to be paid to the plaintiff on "a stale appraisal."

With respect to whether the defendants were entitled to a setoff of the amounts that they spent for the upkeep, maintenance, and improvement of the property, including real estate taxes, the court explained that the defendants introduced evidence that they had spent $893,900 in labor and out-of-pocket expenses between 2000 and 2019, to restore and improve the property so that it could support a marine based business. The court found that Bloom had prepared invoices from Tallmadge Sea and Land, Bloom's marine construction company that completed most of the improvements, to New NRB, to keep track of the improvements that were made to the property and to support a claim for the value of the improvements in a partition action. Bloom testified that the invoices included a profit margin of around 10 percent.

In light of the evidence before it, and balancing the equities of the parties, the court ultimately found that "the [defendants] invested $728,609 in costs and labor to restore the . . . property."[5] (Footnote omitted.) The court found that the defendants were "entitled to a credit of one third of this amount—or $242,870—against the just compensation to be paid to [the plaintiff]." The court next found that the defendants paid "a total of $206,265.28 in real estate taxes . . . ." The court stated: "[The plaintiff] does not dispute that the [defendants] are entitled to set off one third of the total amount of real estate taxes that they paid during the period 2001 through 2019 against the amount due to him. Accordingly, there shall be an additional credit of $68,755 in favor of the [defendants]." (Footnote omitted.) After setting off all the credits to which the court found the

[5] The court noted that it calculated this amount "by subtracting $84,334 (the total of the post-2009 expenses reflected on the [defendants'] exhibit I) from $893,900, and then reducing that amount ($809,566) by 10 percent to eliminate the profit that Mr. Bloom testified was included in the invoiced amounts." The court subtracted the $84,334 from the amount because Bloom's business operations on the property commenced in 2009.

defendants were entitled, the court ordered the defendants to pay just compensation to the plaintiff in the amount of $130,042.

In regard to the plaintiff's claim that the defendants should compensate him for their use and occupancy during the period January 1, 2020, through the present, the court found that he "failed to offer credible evidence to establish the fair market rental value of the . . . property." Accordingly, his claim was denied. This appeal followed. Additional facts will be set forth as necessary.

I

The plaintiff first argues that the trial court abused its discretion in calculating the plaintiff's just compensation by granting the defendants a credit of one third of the costs they claimed for improvements. In particular, the plaintiff argues that, because he was neither consulted about any improvements that were going to be made to the property nor did he consent to them, the defendants are not entitled, as a matter of law, to an allowance for improvements in determining the just compensation awarded to him. The plaintiff further argues that, to the extent a credit for improvements was permissible, the court erred in crediting the defendants on the basis of "the alleged amount of their expenditures, rather than the extent to which any such expenditures enhanced the fair market value of the property." In the plaintiff's view, "[t]he proper measure of any credit should have been calculated, if at all, with reference to the extent to which any 'improvements' increased the property's value, not the amount of costs and labor purportedly needed to make the improvements themselves." We disagree.

We begin by setting forth our standard of review and the legal principles that inform our discussion. A partition action is one of equity. As such, "[t]he determination of what equity requires is a matter for the discretion

of the trial court." (Internal quotation marks omitted.) *DiCerto* v. *Jones*, 108 Conn. App. 184, 188, 947 A.2d 409 (2008). "In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the . . . discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Internal quotation marks omitted.) *Segal* v. *Segal*, 86 Conn. App. 617, 630, 863 A.2d 221 (2004).

In Connecticut, the right to partition has long been recognized as absolute. See *Fernandes* v. *Rodriguez*, 255 Conn. 47, 55, 761 A.2d 1283 (2000) ("[t]he right to partition is well settled and its history has been documented thoroughly"); *Geib* v. *McKinney*, 224 Conn. 219, 224, 617 A.2d 1377 (1992) ("[t]he right to partition has long been regarded as an absolute right, and the difficulty involved in partitioning property and the inconvenience to other tenants are not grounds for denying the remedy"). Prior to 2004, the only two modes of relief available to parties in a partition action were partition by division of real estate and partition by sale. See *Fernandes* v. *Rodriguez*, supra, 57 ("[o]n the basis of the history of the right to partition, and in light of the legislative treatment of that right, we have held repeatedly that in resolving partition actions, the only two modes of relief within the power of the court are partition by division of real estate and partition by sale" (emphasis omitted)).

In 2004, however, a third mode of relief was added by the legislature. "[T]he legislature enacted Public Acts 2004, No. 04-93, § 1, which added the following sentence to General Statutes (Rev. to 2005) § 52-500 (a): 'If the court determines that one or more of the persons owning such real or personal property have only a minimal interest in such property and a sale would not promote

the interests of the owners, the court may order such equitable distribution of such property, with payment of just compensation to the owners of such minimal interest, as will better promote the interests of the owners.' " *Fusco* v. *Austin*, 141 Conn. App. 825, 833, 64 A.3d 794 (2013). Accordingly, as this court explained in *Fusco*, § 52-500 (a), as amended, now "permits the court to order an equitable distribution of the property if it determines that one or more of the persons owning the property have only a minimal interest in the property and a sale would not promote the interest of the owners." (Emphasis omitted.) Id. If an equitable distribution is ordered, "payment of just compensation to the owners of such minimal interest" must be made. See General Statutes § 52-500 (a); see also *Fusco* v. *Austin*, supra, 833.

In a partition action, a court is required to "balance the equities between the parties." *Rissolo* v. *Betts Island Oyster Farms, LLC*, 117 Conn. App. 344, 353, 979 A.2d 534 (2009). As our Supreme Court has stated, "it is not always true that each tenant in common or joint tenant is entitled to equal shares in the real estate." *Fernandes* v. *Rodriguez*, supra, 255 Conn. 60. "Because a partition action is an equitable action, the court has the authority to determine an unequal award on the basis of the evidence presented, including the value of the property and the equitable interests of the parties." *Rissolo* v. *Betts Island Oyster Farms, LLC*, supra, 353–54; see also *Levay* v. *Levay*, 137 Conn. 92, 96, 75 A.2d 400 (1950) ("[a]lthough each party was the owner of an undivided one-half interest in the property, it does not follow that he or she will necessarily be entitled to equal shares of the moneys obtained from the sale"); see also *Hackett* v. *Hackett*, 42 Conn. Supp. 36, 40, 598 A.2d 1112 (1990), aff'd, 26 Conn. App. 149, 598 A.2d 1103 (1991), cert. denied, 221 Conn. 905, 600 A.2d 1359 (1992). Additionally, as our Supreme Court has explained in the context

of our government takings jurisprudence, "[t]he question of what is just compensation is an equitable one rather than a strictly legal or technical one." (Internal quotation marks omitted.) *Alemany* v. *Commissioner of Transportation*, 215 Conn. 437, 444, 576 A.2d 503 (1990).

On appeal, the plaintiff takes exception to the court's award of just compensation.[6] In his view, the court abused its discretion by reducing his undivided one-third interest of the appraised property by $242,870—an amount the court found to be one third of the costs of improvements that the defendants made to the property. In support of his argument, the plaintiff maintains that our Supreme Court's decision in *Neumann* v. *Neumann*, 134 Conn. 176, 55 A.2d 916 (1947), prohibited the trial court from crediting the defendants for costs of improvements to the property because *Neumann* stands for the proposition that, in the absence of an agreement to share the cost of improvements, a co-owner is not responsible for a proportionate share of the cost. We disagree.

In *Neumann*, "[a] wife, while living happily with her husband, transferred to him an undivided one-half interest in certain real estate in consideration of love and affection. She subsequently built a dwelling house on the land. In the course of its construction she was obliged to borrow $3500 to complete the building, and she executed, individually, a mortgage of the premises." Id., 177. There was eventually a breakdown in the relationship, the parties separated, and the wife instituted divorce proceedings. Id. The husband brought an action for a partition or sale of the property. Id. The trial court found that "[t]he [husband] owned an undivided one-half interest in the entire premises, including the house,

[6] We note that the plaintiff does not challenge on appeal the trial court's findings that his interest in the property was minimal and that a sale would not promote the interests of the owners.

and his interest was not subject to the mortgage; the property does not lend itself to a partition; and a sale and division of the proceeds will better promote the interests of the parties." Id., 177–78.

On appeal before our Supreme Court, the defendant wife argued that the court should have ordered a physical division of the land instead of a sale and a division of the proceeds. Id., 180. In determining whether a division of the property would have been more appropriate than a sale of the property, the court indicated that "a determination as to the ownership of the house would be a consideration which would enter into the question whether a division of the property was practicable." Id., 178. Our Supreme Court ultimately concluded that the trial court was correct in ordering a sale of the property. It stated: "No correction in the finding material to the issues before us can be made. The court has found that the defendant of her own volition and without previously consulting her husband began the construction of the house; that there never was any agreement that the building was to belong to the defendant; and that the plaintiff at no time agreed to reimburse the defendant for any moneys expended in the construction of the house. *Where one spouse puts up a building on land owned in common by husband and wife, without any understanding or agreement that the other shall share the expense, the presumption that it was for the joint benefit of both must prevail.*" (Emphasis added.) Id., 178–79. The court also made clear that the "obligation created by the mortgage would be an issue in the supplementary proceedings" when the court would determine the equitable divisions of the proceeds of the sale. Id., 178.

On the basis of our review of *Neumann*, we find the plaintiff's reliance on it misplaced. The central holding in *Neumann* was simply that there is a presumption that improvements made during a marriage by one spouse

to property owned in common by both spouses are made for the benefit of both spouses and that the spouse who incurred expenses for those improvements is generally not entitled to a separate credit for those expenses, in the absence of some agreement or understanding to the contrary. It is manifest from the court's decision that the marital relationship between the parties was essential to the court's holding. The very presumption discussed was predicated on the fact that the parties were married at the time the expenditures were made. Thus, in the present matter, the plaintiff's contention that the trial court was not permitted to credit the defendants for improvements they made to the property, without his consent to those improvements, must be rejected, as no marital relationship was present.[7] It also bears reiterating that "[t]he determination of what equity requires is a matter for the discretion of the trial court" to be determined on a case-by-case basis. (Internal quotation marks omitted.) *DiCerto* v. *Jones*, supra, 108 Conn. App. 188 n.3.

Contrary to the plaintiff's contention, this court repeatedly has held that a trial court may take into consideration contributions, including improvements, that the parties have made to the subject property in its determination of just compensation. See, e.g., *Zealand* v. *Balber*, 205 Conn. App. 376, 393–94, 257 A.3d 411 (2021) ("[i]n light of those contributions, the court awarded the plaintiff $25,000 as just compensation"); *Young* v. *Young*, 137 Conn. App. 635, 651, 49 A.3d 308 (2012) (trial court properly considered plaintiff's expenditures related to upkeep, including mortgage payments, house-

[7] The plaintiff similarly cites to *Levay* v. *Levay*, 17 Conn. Supp. 470, 473 (1952), which relies on *Neumann*, for his contention that he is not required to contribute toward the improvements made to the property. The plaintiff's reliance on *Levay*, however, is misplaced for the same reason his reliance on *Neumann* is misplaced. Furthermore, we note that this court is not bound by decisions of the Superior Court. See *In re Carla C.*, 167 Conn. App. 248, 275, 143 A.3d 677 (2016) ("our appellate courts are not bound to follow the decisions of the trial court").

hold repairs and grounds maintenance and taxes, against countervailing claims for use and occupancy); *Hackett* v. *Hackett*, 26 Conn. App. 149, 150, 598 A.2d 1103 (1991) (following partition sale, party may "be compensated out of the proceeds from the sale of the parties' jointly owned property for his past payments for mortgage, insurance, taxes, improvements and repairs"), cert. denied, 221 Conn. 905, 600 A.2d 1359 (1992).

For example, in *Hackett* v. *Hackett*, supra, 42 Conn. Supp. 39, the plaintiff requested the trial court to order that he be paid out of the proceeds from the sale of the parties' jointly owned property for his past payments for mortgage, insurance, taxes, improvements and repairs. The plaintiff neither alleged nor attempted to prove any agreement with the defendant to make any such contributions. Id., 46.

The court explained that when "a cotenant in possession invokes the jurisdiction of a court of equity to obtain contributions from the cotenant out of possession for funds expended for the betterment of the common interest, the cotenant out of possession may *defensively* charge the cotenant in possession with a part of the reasonable value of the occupancy or use by the cotenant in possession and in some cases may hold the cotenant in possession accountable for profits realized from the premises." (Emphasis in original.) Id., 50; see also General Statutes § 52-404 (b) ("[w]hen two or more persons hold property as joint tenants, tenants in common or coparceners, if one of them occupies, receives, uses or takes benefit of the property in greater proportion than the amount of his interest in the property, any other party and his executors or administrators may bring an action for an accounting or for use and occupation against such person and recover such sum or value as is in excess of his proportion").

In determining the equitable distribution of proceeds, the court in *Hackett* noted that the parties were divorced

in 1978, and that the plaintiff ex-husband had been living at the subject property with their children from 1978 to 1989. *Hackett* v. *Hackett*, supra, 42 Conn. Supp. 46. He had "complete" use of the property and paid the expenses for the premises. Id. The defendant ex-wife lived in Waterbury. Id. The court found that "[t]he plaintiff and the defendant had a right to an undivided one half of [the] real estate." Id., 54. In balancing the equities of how the sale proceeds should be paid out, however, the trial court concluded that, "[a]s to the mortgage payment, which includes the taxes and insurance, to which [the defendant] has never contributed, her share of this obligation [was] . . . 50 percent of $39,875, which is $19,937.50.[8] . . . It is, therefore, concluded that the amount that the defendant must 'contribute' to the plaintiff out of the sales proceeds with reference to the mortgage, taxes and insurance claim of the plaintiff is $19,937.50."[9] (Footnote added.) Id. The court also ordered the defendant to pay 50 percent of the repairs

[8] The plaintiff in *Hackett* claimed entitlement to a greater amount, arguing that he had "paid the mortgage since September, 1978, without any contribution from the defendant [and that] this is twelve (12) years at an average of approximately $475 per month for a total of $68,400." (Internal quotation marks omitted.) *Hackett* v. *Hackett*, supra, 42 Conn. Supp. 52. The court, however, rejected this contention, stating that the plaintiff "does not point out how he gets this figure of approximately $475 per month on the evidence adduced in the present case. There is not in evidence in the present case any cancelled check, any receipt, any book of record, any proof of any payment claimed to have been made by the plaintiff." Id. The court "recognized that there may be cases where proof of such claims, as with damages, are difficult, but it is relevant here to remember that '[t]he court must have evidence by which it can calculate damages, which is not merely subjective or speculative, but which allows for some objective ascertainment of the amount.' " Id., 53. The court concluded that "[t]he only hard evidence before the court of any figure of the mortgage that fairly extends over the entire period from September, 1978, to the time of trial is the monthly payment of $275 on principal and interest. Starting with September, 1978, and through September, 1990, these monthly payments amount to a gross figure of about $39,875." Id., 53–54.

[9] The court observed that at the trial, the defendant indicated that she was not making a formal claim for entitlement to payment for use and occupancy. See *Hackett* v. *Hackett*, supra, 42 Conn. Supp. 50.

and improvements made to the property by the plaintiff. Id., 55. The court stated that "[i]t seems fair to the court that from the defendant's share of the sales proceeds she 'contribute' 50 percent of these expenses, which is $1687.50, whether any or all of them be called an 'improvement' or 'repair.' All appear to be reasonable." Id. There was no discussion of how these repairs and improvements affected the sale price of the property. The defendant appealed.

On appeal to this court, the defendant in *Hackett* argued that the trial court erred in ordering that the plaintiff be compensated out of the proceeds from the sale of the parties' jointly owned property for his past payments for mortgage, insurance, taxes, improvements and repairs. See *Hackett* v. *Hackett*, supra, 26 Conn. App. 150. This court disagreed and stated that the "trial court's memorandum of decision thoughtfully and comprehensively addresse[d] both the factual questions and the legal issue raised by the defendants." Id., 151. We accordingly adopted the trial court's "well reasoned decision as a statement of the facts and the applicable law." Id.

With this as our backdrop, we next address the plaintiff's contention that the court erred in crediting the defendants for their expenditures for improvements because it calculated the credit on the "the alleged amount of their expenditures, rather than the extent to which any such expenditures enhanced the fair market value of the property." In the plaintiff's view, "the proper measure of any credit should have been calculated, if at all, with reference to the extent to which any 'improvements' increased the property's value, not the amount of costs and labor purportedly needed to make the improvements themselves." We disagree.

On the basis of our review of the relevant authorities, we have not found, nor has the plaintiff directed us

to any authority, that would require the trial court to calculate just compensation in such a highly technical or precise manner. In fact, this court rejected a similar claim in *DiCerto* v. *Jones*, supra, 108 Conn. App. 188 n.3, in which the defendant claimed, among other things, that "the court used an improper method for dividing the net partition proceeds" by awarding "each party half of the net partition proceeds after reimbursing him only for his initial expenditures." We stated that "[t]he defendant's argument [was] unpersuasive because the equities in partition actions are balanced by trial courts on a case-by-case basis. The fact that other trial courts may have ruled differently in the ultimate division of sale proceeds in a partition action does not require, in itself, a similar result in the present case." Id.

Here, in determining just compensation for the property, the court reasonably considered, inter alia, the market value of the property ($1,325,000); the interest that the plaintiff had in the property (one third); and the costs and labor associated with the improvements, repairs, and maintenance made by the defendants during their occupancy of the property. To be sure, the trial court found that, "[b]y 2000, it was not possible to operate any marine related business from the . . . property without dredging the seabed and removing all of the garbage, derelict boats, and debris left from [previous] operations that had accumulated over the years.[10] The existing bulkhead had deteriorated. A portion of the marine railway tracks and the old crane were still there. Foundation pilings remained in the

[10] The record discloses that the property historically had been used for marine related business purposes. For example, the trial court found that Wallace Bell, from whom Norman and Hillard Bloom acquired the property in 1962, operated a boatyard on the property under the name "Bell's Boatyard" until the late 1970s. After that time, the property was rented to "to Maurice Marine, a company that hauled and maintained small pleasure boats."

water from a building that had been removed in the 1990s. . . . Bloom testified that everyone in the Bloom family was aware of the work that needed to be done on the . . . property." (Footnote added.)

In or about 2000–2001, "Bloom, through his marine construction company, Tallmadge Sea and Land Construction . . . began to clean up and restore the property with the help of his son and another man that he worked with. He testified that the property was 'a mess' before they started clearing it. He was concerned at that time that the Norwalk Harbor Management Commission might take enforcement action against the . . . property. They filled up many thirty yard dumpsters with garbage and debris. They sent the derelict boats and the old crane to a scrap yard. They cleaned up the pilings on the land side of the property, where the marine railway had been, and extracted the foundation pilings that remained in the water with a crane or a vibratory hammer." (Footnote omitted.)

After obtaining permits in 2002–2003, the defendants began making various improvements to the property. In 2005, "Tallmadge Sea and Land removed the remains of the old bulkhead and the marine railway tracks from the . . . property. Using a crane that worked off land and a vibratory hammer to drive the sheets into the ground, they replaced the old bulkhead with a new sheet steel bulkhead. They also replaced two telephone poles, repaired the water line, and installed underground power lines and frost-free hydrants. After the new bulkhead was anchored, they installed a cap and fender system, a travel lift for hauling boats, and a pier. The pier is made of concrete, on wooden foundation pilings. It is sixty feet long and six feet wide. It extends into the water with an aluminum ramp and a wooden floating dock. The wooden floating dock was installed in October, 2006.

"The seabed portion of the . . . property was dredged in 2009 so that the property could be used for commercial boats. . . . Prior to the dredging . . . commercial fishing boats could not have been tied up to the pier or the dock. Due to the sediment that had built up over the years, even a personal pleasure boat would sit on the seabed at low tide." Following the completion of the dredging in 2009, the defendants' business operations on the property commenced.

The invoices for the repairs and improvements for the period 2000 to 2019 totaled $893,900.[11] In determining the amount, if any, that the plaintiff should contribute toward the cost of the improvements made, the court balanced the equities and reasonably acknowledged that, "[w]hile it would be inequitable to permit the [defendants] to set off costs that were incurred solely for . . . Bloom's benefit against the just compensation due to [the plaintiff], it would also be inequitable to allow [the plaintiff] to contribute nothing *when much of the* [*defendants'*] *investment was necessary for the property to be useable at all.*"[12] (Emphasis added.) Although the court did not make an explicit finding as to the precise effect that the improvements had on the market value of this unique waterfront property, the

[11] The court found that "[t]he invoices include a profit margin of around 10 percent."

[12] As previously noted, the court credited the methodology that McInerney used in reaching the market value of the property in this case. The record discloses that McInerney testified that the sales comparison approach that he used was the most pertinent method and explained, inter alia, that "for a property like this, the main feature is that we take into consideration and account for the differences between the subject and the comparables, [which] would be location, size of the property, *any of the site improvements that are present* in the subject and comparables, *water access*, *how available the water access is*, utility of the lot, views." (Emphasis added.) When asked specifically, McInerney testified that his market value included the land and improvements on the property. It was thus reasonable for the court to infer from the evidence in the record that the restoration and improvements to the property increased its value.

court arrived at an amount that took into account these equitable considerations by excluding from its calculation any expenditures made by the defendants after 2009 (the time when the defendants began business operations on the premises), or the amount of any profits reflected in the defendants' invoices. As such, the court found that between 2000 and 2009, the defendants invested $728,609[13] in costs and labor to restore and improve the property and that they were entitled to a credit of one third of this amount—or $242,870—to be subtracted from the plaintiff's undivided one-third interest in the property ($441,667). It reasonably found that these expenses "benefited all of the co-owners of the . . . property."

On the record before us, we cannot conclude that the court abused its equitable discretion in awarding just compensation in this instance.

II

The plaintiff next argues that the trial court abused its discretion in calculating just compensation by failing to include any compensation for the defendant's twenty year exclusive use and occupancy of the property. We disagree.

Section 52-404 (b) provides: "When two or more persons hold property as joint tenants, tenants in common or coparceners, if one of them occupies, receives, uses or takes benefit of the property in greater proportion than the amount of his interest in the property, any other party and his executors or administrators may bring an action for an accounting or for use and occupation against such person and recover such sum or value as is in excess of his proportion." See also *Lerman* v. *Levine*, 14 Conn. App. 402, 408–409, 541 A.2d 523 (ouster not prerequisite for entitlement to accounting for use

[13] See footnote 5 of this opinion.

and occupancy), cert. denied, 208 Conn. 813, 546 A.2d 281 (1988).

Although § 52-404 (b) does not require a cotenant who does not occupy the property to establish ouster in order to be entitled to collect for use and occupancy, the nonoccupying cotenant must establish more than that he is a cotenant out of occupancy. At a minimum, the party claiming entitlement to equitable relief for use and occupancy must prove the reasonable value owed to him by his cotenant. See *Coughlin* v. *Anderson*, 270 Conn. 487, 512, 853 A.2d 460 (2004) ("[i]t is axiomatic that the burden of proving damages is on the party claiming them" (internal quotation marks omitted)).

At trial, the plaintiff presented the testimony of Michael D. McGuire, a real estate valuation expert, and a written valuation analysis he prepared regarding the fair market rental value of the property from January 1, 2000, to the present. McGuire calculated the fair market rental value of the property as if the defendants were occupying the property under a long-term ground lease. McGuire concluded in the fair market rent valuation analysis that the fair market rental value of the property was $90,094 annually for the years 2000 through 2019.

The court, however, found McGuire's valuation not credible. It stated that "[the plaintiff] has failed to offer credible evidence to establish the fair market rental value of the . . . property." The court agreed with the defendants that the fair market rent valuation analysis provided by McGuire was "based on arbitrary assumptions and so significantly flawed that it cannot be considered credible evidence of the fair market value rent of the . . . property."

Although the plaintiff argues that his expert provided a reasonable basis for determining fair market rent and that the court erred in accepting the defendants' criticisms of his expert's assumptions, it is well settled that

"[t]he weight to be given the evidence and the credibility of the witnesses are within the sole province of the trial court." (Internal quotation marks omitted.) *Antonucci* v. *Antonucci*, 164 Conn. App. 95, 130, 138 A.3d 297 (2016). "The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible." (Internal quotation marks omitted.) *United Technologies Corp.* v. *East Windsor*, 262 Conn. 11, 26, 807 A.2d 955 (2002). "[T]he trial judge . . . is free to accept or reject, in whole or in part, the testimony offered by either party." (Internal quotation marks omitted.) *LaBossiere* v. *Jones*, 117 Conn. App. 211, 224, 979 A.2d 522 (2009). "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.) *Gianetti* v. *Norwalk Hospital*, 304 Conn. 754, 766, 43 A.3d 567 (2012). "Where the trial court rejects the testimony of a plaintiff's expert, there must be some basis in the record to support the conclusion that the evidence of the [expert witness] is unworthy of belief." (Internal quotation marks omitted.) *Builders Service Corp.* v. *Planning & Zoning Commission*, 208 Conn. 267, 294, 545 A.2d 530 (1988).

The court's decision not to credit McGuire's valuation was fully supported by the evidence. In particular, the court found McGuire's valuation severely flawed because, among other things, McGuire used a figure of $1,400,000 for the fair market value of the property, notwithstanding the October, 2017 appraisal; McGuire determined the fair market rental value of the property

as if the plaintiff and the defendants were the landlord and tenant, respectively, under a long-term ground lease, rather than analyzing comparable rentals; McGuire had no basis for assuming that the hypothetical ground lease contained a "not less than" clause; and the fair market rent valuation analysis failed to consider the actual condition of the property, although it assumed a marine commercial use of the property.[14] These shortcomings, which are reflected in the record, clearly bear on the reliability of the valuation, and provide an adequate basis for the court's finding that McGuire's valuation was not credible.[15] See *Wyszomierski* v. *Siracusa*, 290 Conn. 225, 244, 963 A.2d 943 (2009) ("[w]here the factual basis of an opinion is challenged the question before the court is whether the uncertainties in the essential facts on which the opinion is predicated are such as to make an opinion based on them without substantial value" (internal quotation marks omitted)). Accordingly, we cannot conclude that the court erred in not

[14] The court explained that "McGuire testified that he was not aware of this court's findings in the September, 2017 memorandum of decision that it was not possible to operate any marine related business from the property in 2000, or that commercial boats could not use the property until the seabed portion was dredged in 2009."

[15] Citing to *Welsch* v. *Groat*, 95 Conn. App. 658, 666–67, 897 A.2d 710 (2006), the plaintiff also argues that the trial court failed to draw upon its own judgment and experience in determining the reasonable fair rental value. He argues that it "is difficult to understand how the trial court possibly could conclude that a monthly rental of $7500—or at least an amount within that range—would not constitute a fair market rental for the property." This claim is without merit and deserves little discussion. Contrary to the plaintiff's contention, *Welsch* stands for the unremarkable proposition that a court may rely on its common sense in drawing reasonable inferences from the credible evidence before it. It does not, however, suggest that a court may derive a proper value of use and occupancy based on its own experience when there is no credible evidence in the record establishing such value. A court "must have evidence by which it can calculate . . . damages, which is not merely subjective or speculative, but which allows for some objective ascertainment of the amount." *Bronson & Townsend Co.* v. *Battistoni*, 167 Conn. 321, 326–27, 355 A.2d 299 (1974). In the court's determination, the plaintiff presented no such credible evidence.

awarding the plaintiff compensation for the defendants' use and occupancy of the property.

The judgment is affirmed.

In this opinion the other judges concurred.

SARA E. VANDEUSEN *v.* COMMISSIONER OF CORRECTION
(AC 43895)

Prescott, Alexander and DiPentima, Js.

Syllabus

The petitioner, who had been convicted of several crimes in connection with a shooting, sought a writ of habeas corpus, claiming, inter alia, that her trial counsel rendered ineffective assistance when he failed to request that the trial court instruct the jury regarding the elements of the applicable sentence enhancement statute (§ 53-202k) and the statutory (§ 53a-3 (19)) definition of firearm in § 53-202k with respect to the charge of accessory to attempt to commit assault in the first degree. The petitioner and another individual, K, had driven to the residence of a woman, J, where K fired a handgun at the residence before he and the petitioner drove away. The trial court imposed a five year sentence enhancement on the petitioner's conviction of being an accessory to an attempt to commit assault in the first degree. The habeas court denied the habeas petition, concluding that the jury unanimously had determined that the state proved each element of § 53-202k and that any error caused by the trial court's failure to instruct the jury as to the elements of § 53-202k was harmless beyond a reasonable doubt. The habeas court further concluded that the petitioner failed to demonstrate that the outcome of her trial or appeal would have been different even if trial counsel had requested an instruction as to the elements of § 53-202k or objected to the court's instruction concerning § 53-202k. *Held*:

1. The petitioner could not prevail on her claim that her trial counsel provided ineffective assistance by neglecting to request a jury instruction regarding the elements of § 53-202k and the definition of firearm in § 53a-3 (19), or by failing to object to the instruction the court gave, which did not define firearm or instruct as to the elements of § 53-202k: the jury's guilty verdict on the charge of attempted assault as an accessory was predicated on the undisputed evidence the state presented that K discharged a loaded handgun at J's residence, from which the jury necessarily found both that the state proved each element of § 53-202k and that

the handgun K used satisfied the definition of firearm in § 53a-3 (19); moreover, because the jury necessarily accepted the state's theory that K had used a deadly weapon in the commission of the offense, it logically followed that the handgun was a loaded weapon from which he discharged gunshots at the residence, and, thus, the court's failure to instruct the jury as to the elements of § 53-202k was harmless beyond a reasonable doubt; furthermore, because of the harmlessness of the court's failure to instruct the jury on the elements of § 53-202k, the petitioner failed to meet her burden of proving that there was a reasonable probability that, but for trial counsel's failure to object to the court's instruction concerning § 53-202k, the result of the underlying criminal proceeding would have been different.

2. This court declined to review the petitioner's unpreserved claim that she was prejudiced by her trial counsel's failure to request that the jury be instructed as to the definition of firearm in § 53-3 (19) because the sentence enhancement under § 53-202k would not have applied if the weapon K used was an assault weapon; the petitioner's claim of prejudice, which she conceded was raised for the first time before this court, was distinct from her allegation before the habeas court that she was prejudiced by trial counsel's failure to request a jury instruction as to each element of § 53-202k or to otherwise object to the instruction the court gave.

Argued September 9, 2021—officially released May 10, 2022

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Bhatt*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

James E. Mortimer, assigned counsel, for the appellant (petitioner).

Marcia A. Pillsbury, assistant state's attorney, with whom, on the brief, were *Dawn Gallo*, state's attorney, and *Kelly A. Masi*, senior assistant state's attorney, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, Sara E. VanDeusen, appeals from the judgment of the habeas court, denying

her petition for a writ of habeas corpus.[1] On appeal, the petitioner primarily claims that the habeas court improperly concluded that she failed to demonstrate that her trial counsel provided ineffective assistance by neglecting to request a jury instruction setting forth the statutory elements of General Statutes § 53-202k and, more specifically, defining the term "firearm," as used in § 53-202k and defined in General Statutes § 53a-3 (19). She additionally claims on appeal that the habeas court improperly concluded that she failed to demonstrate that her trial counsel provided ineffective assistance by neglecting to request that the court instruct the jury that § 53-202k expressly excludes "assault weapon[s]" from the term "firearm," or otherwise to object to the court's instruction as to § 53-202k. We affirm the judgment of the habeas court denying the petition.

The following facts and procedural history are relevant to the petitioner's claim. The petitioner's underlying conviction stems "from a shooting that occurred on the evening of January 10, 2009, in Torrington at the residence of J.L.,[2] [J.L.'s] then three year old son, A.S., and [J.L.'s] boyfriend, Gregorio Rodriguez.

"Prior to the shooting, the [petitioner] and J.L. were good friends and had several mutual acquaintances, including the [petitioner's] roommate, Carlos Casiano, as well as Alyssa Ayala and her boyfriend, Charles Knowles. At some point, however, the relationship between J.L. and Ayala became antagonistic because J.L. had a sexual encounter with Knowles in October or November, 2008. Once Ayala had learned of the encounter, she became angry with J.L. and threatened to 'fuck that bitch up for messing with [her] man . . . .'

[1] The habeas court granted the petitioner certification to appeal.

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

"At the same time, the relationship between Rodriguez and Knowles also became antagonistic. Both were drug dealers, but belonged to two rival gangs. On January 9, 2009, Knowles and Rodriguez engaged in a fistfight at a local pub. As a result of the fight, Knowles suffered a broken facial bone, for which he sought treatment at a hospital the following day.

"At the hospital, Knowles was accompanied by Ayala and Casiano. While waiting at the hospital, the trio discussed going to J.L.'s and Rodriguez' residence to 'get back at them.' Ayala, however, was concerned that neither Knowles nor she herself could participate in a physical altercation.[3] Ayala then called the [petitioner] and explained to her the nature and extent of Knowles' injury.

"The [petitioner] later arrived at the hospital to pick up Ayala and Knowles. Once she had seen the extent of the injury, the [petitioner] offered to fight J.L. instead of having Ayala fight J.L. because, according to the [petitioner], J.L.'s sexual relationships with both Rodriguez and Knowles had instigated the fight at the pub the previous night. Ayala thereafter placed several telephone calls from a private number to J.L.'s residence, trying to ascertain whether she and Rodriguez were there by pretending to be someone else looking for Rodriguez. Having nevertheless recognized Ayala as the caller, J.L. told her that Rodriguez was home and further remarked that [A.S.] was also at home.

"Alarmed by Ayala's calls, J.L. called the [petitioner] and told her that Ayala was 'trying to start problems . . . .' During that conversation, J.L. threatened to 'kick [Ayala's] ass' and stated that she had sexual intercourse with Knowles throughout the entire time that Ayala had

[3] "Ayala was unable to fight because, at that time, she was pregnant with Knowles' child." *State* v. *VanDeusen*, 160 Conn. App. 815, 818 n.2, 126 A.3d 604, cert. denied, 320 Conn. 903, 127 A.3d 187 (2015).

been dating him. In addition, J.L. gave the [petitioner] her new address, adding that Ayala could come over if she wanted to have an altercation.

"The [petitioner] then called Ayala and relayed to her the essence of her conversation with J.L. and, once again, volunteered to fight in Ayala's stead. Knowles overheard J.L.'s challenge and became 'mad' because J.L. had threatened to beat up his pregnant girlfriend. Knowles then called Casiano and asked Casiano to fight Rodriguez. Knowles also told Casiano to come get him at Ayala's residence and to bring the [petitioner] because 'she was the only one [who] knew where [J.L.] lived . . . .' Knowles then mentioned to Casiano that he had a gun. After the call to Casiano, Knowles also called his mother in New York and told her that he would be coming back there.

"Thereafter, Casiano and the [petitioner] picked up Knowles in a green van. Before leaving Ayala's residence, Knowles retrieved a handgun[4] from a shoe box in a bedroom closet. The trio then headed to J.L.'s residence. On the way to J.L.'s residence, the [petitioner] saw that Knowles was armed. Despite her knowledge of the handgun, after pulling up in front of J.L.'s residence, the [petitioner] called J.L. from her cellular phone and asked her and Rodriguez to come out of the house. Sensing trouble, J.L. refused to come out, hung up the telephone, and turned off the lights in the living room, which was facing the street.

"Once the [petitioner], Casiano, and Knowles realized that J.L. and Rodriguez were not going to come out, Knowles opened the van's door and fired his handgun at the residence. Inside of the residence, Rodriguez and J.L.'s friend, Casey Delmonte, who were watching television in a back bedroom, heard 'a very loud noise

[4] At trial, Alaya testified that the weapon that Knowles had retrieved from the shoe box was a "black" handgun.

. . . .' When Delmonte went to the living room window to investigate, she saw the taillights of a 'bigger vehicle' as it drove away. At that time, none of them realized that they had heard the sound of gunshots.

"Later that evening, however, J.L., Rodriguez, and Delmonte discovered that a bullet had pierced the front door window and lodged in a wall separating the entryway and the bedroom where Rodriguez, Delmonte, and A.S. had been watching television at the time of the shooting. The bullet had struck the wall at four feet, two inches above the floor. In addition, it was later discovered that a second bullet had struck a supporting pillar on the front porch of the residence.

"Following the shooting, Knowles directed Casiano and the [petitioner] to dispose of the gun by delivering it to someone in Waterbury. Thereafter, Knowles and Casiano went into hiding, ultimately ending up in New York. Ayala later also joined Knowles in New York. The [petitioner] did not leave Torrington following the shooting. When the [petitioner] was later interviewed by the police in connection with the shooting investigation, she denied any knowledge of the shooting and stated that she could not recall her whereabouts on the night in question. The [petitioner] further stated that she did not know Knowles and that she had not called J.L. on the day of the shooting.

"As a result of the investigation, the [petitioner] was arrested on August 5, 2009, and charged with one count of conspiracy to commit assault in the first degree in violation of [General Statutes] §§ 53a-48 and 53a-59 (a) (1); one count of being an accessory to an attempt to commit assault in the first degree in violation of [General Statutes] §§ 53a-59 (a) (1), 53a-49 (a) (2) and 53a-8; and one count of risk of injury to a child in violation of [General Statutes] § 53-21 (a) (1). In addition, the

state sought to enhance the [petitioner's] sentence on all counts pursuant to § 53-202k.[5]

"Following a trial, the jury found the [petitioner] guilty as charged on all counts. Thereafter, the court sentenced the [petitioner] to ten years incarceration, execution suspended after five years, followed by five years enhancement, pursuant to § 53-202k, on each count, to run concurrently, for a total effective sentence of fifteen years incarceration, suspended after ten years, followed by five years probation." (Footnotes added; footnote in original; footnotes omitted.) *State* v. *VanDeusen*, 160 Conn. App. 815, 818–21, 126 A.3d 604, cert. denied, 320 Conn. 903, 127 A.3d 187 (2015).

On direct appeal, the petitioner claimed "that (1) the evidence was insufficient to support her conviction of conspiracy and attempt to commit assault in the first degree, and of risk of injury to a child, (2) the trial court improperly instructed the jury on the elements of conspiracy and attempt to commit assault in the first degree, and (3) the court improperly enhanced her sentence on the counts of conspiracy to commit assault in the first degree and risk of injury to a child pursuant to § 53-202k." Id., 817. This court affirmed the judgment of the trial court with respect to the first and the second claims but agreed with the petitioner that the trial court improperly enhanced her sentence on the counts of conspiracy to commit assault in the first degree and risk of injury to a child. Id. Accordingly, this court affirmed the trial court's judgment in part, reversed it

[5] General Statutes § 53-202k, titled "Commission of a class A, B or C felony with a firearm: Five-year nonsuspendable sentence," provides: "Any person who commits any class A, B or C felony and in the commission of such felony uses, or is armed with and threatens the use of, or displays, or represents by his words or conduct that he possesses any firearm, as defined in [§] 53a-3, except an assault weapon, as defined in [§] 53-202a, shall be imprisoned for a term of five years, which shall not be suspended or reduced and shall be in addition and consecutive to any term of imprisonment imposed for conviction of such felony."

in part, and remanded the case to the trial court with direction to vacate the sentence enhancements imposed on counts one and three. See id., 850. Because, however, this court's decision did not alter the petitioner's total effective sentence[6] and there was no evidence that the decision would alter the trial court's original sentencing intent, this court concluded that the petitioner need not be resentenced. See id., 850–51 n.22.

On March 10, 2016, the petitioner filed a petition for a writ of habeas corpus. In the operative, amended petition dated September 25, 2018, the petitioner raised four claims. First, she alleged a freestanding sixth amendment claim[7] that her sentence on her conviction of attempt to commit assault in the first degree improperly was enhanced pursuant to § 53-202k because the jury was not instructed on one or more of the elements of § 53-202k, including the legal definition of "firearm,"[8] as defined in § 53a-3.[9] See *Apprendi* v. *New Jersey*, 530

[6] The sentence enhancement on the petitioner's conviction of attempted assault in the first degree as an accessory was not challenged on direct appeal. See *State* v. *VanDeusen*, supra, 160 Conn. App. 842.

[7] "In habeas corpus proceedings, courts often describe constitutional claims that are not tethered to a petitioner's sixth amendment right to counsel as 'freestanding.' " *McCarthy* v. *Commissioner of Correction*, 192 Conn. App. 797, 810 n.8, 218 A.3d 638 (2019).

[8] Although the petitioner's operative petition for a writ of habeas corpus and her corresponding brief to the habeas court in support of her petition set forth this claim in somewhat vague terms, her habeas counsel clarified during the habeas trial that she specifically contended that the court should have instructed the jury as to the statutory definition of "firearm," as set forth in § 53a-3 (19). During closing argument, the petitioner's counsel specifically argued to the habeas court, "if you look at the [jury] instructions as a whole, the [trial court] never actually instruct[ed] [the jury as to] *what a firearm is*, per se. . . . [The jury instructions did not] list . . . all [of] the different types of firearms that could be used [that would constitute a "firearm" under § 53a-3], as is typically done in jury instructions." (Emphasis added.)

[9] Section 53-202k provides for a five year sentence enhancement to "[a]ny person who commits any class A, B or C felony and in the commission of such felony uses, or is armed with and threatens the use of, or displays, or represents by his words or conduct that he possesses *any firearm*, *as defined in* [*§*] *53a-3*, except an assault weapon . . . ." (Emphasis added.) The term "firearm," as defined in § 53a-3, includes "any sawed-off shotgun,

U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (defendant's sixth amendment right to jury trial requires that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"); *State* v. *Velasco*, 253 Conn. 210, 225–26, 228, 751 A.2d 800 (2000) (holding pre-*Apprendi* that legislature had not intended to eliminate jury's role as fact finder during application of § 53-202k). Second, she alleged that her trial counsel provided ineffective assistance by failing to request a jury instruction regarding the statutory elements of § 53-202k, including the definition of "firearm" as set forth in § 53a-3 (19). See General Statutes § 53-202k. Third, she asserted that her appellate counsel provided ineffective assistance by failing to raise a claim in her direct appeal that the trial court had failed to instruct the jury on the elements of § 53-202k. Finally, she alleged that the errors referenced in the prior counts of her petition violated her right to due process of law.

The habeas court conducted a trial on the petition for a writ of habeas corpus on November 19, 2019. In a memorandum of decision dated December 17, 2019, the court denied the petition. The court stated that the jury had found the petitioner guilty of attempted assault in the first degree as an accessory on the premise that a coparticipant had used a firearm in the commission of the offense. The court also noted that the trial court had submitted to the jury an interrogatory concerning § 53-202k, which inquired whether the state had proven beyond a reasonable doubt that "the defendant or another participant used, or was armed with and threatened the use of, or displayed a firearm," and had instructed the jury to answer the interrogatory *only* if

machine gun, rifle, shotgun, pistol, revolver or other weapon, whether loaded or unloaded from which a shot may be discharged . . . ." General Statutes § 53a-3 (19).

it found the defendant guilty of attempted assault in the first degree.[10] The jury answered the interrogatory affirmatively.[11] Thus, because the jury had found the petitioner guilty of attempted assault in the first degree as an accessory, predicated on the theory that a coparticipant had used a deadly weapon in the commission of the offense, and had answered the corresponding interrogatory affirmatively, the habeas court concluded that the jury unanimously had determined that the state had proven, beyond a reasonable doubt, each element of § 53-202k—including that a coparticipant had used a "firearm" in the commission of the attempted assault. Therefore, the habeas court, citing *State* v. *Beall*, 61 Conn. App. 430, 435, 769 A.2d 708, cert. denied, 255 Conn. 954, 772 A.2d 152 (2001),[12] determined that any

[10] The trial court submitted to the jury three interrogatories, each corresponding to a separate charged offense. In its jury charge, the court instructed the jury to answer each interrogatory *only* "in the event that [the jury] . . . [found] the [petitioner] guilty" of the respective offense.

The interrogatory that corresponded to the second charge—attempted assault in the first degree as an accessory in violation of §§ 53a-59 (a) (1), 53a-49 (a) (2), and 53a-8—specifically provided in relevant part:

"You will answer the following interrogatory if, but only if, you have found the [petitioner] guilty as an accessory to attempt to commit assault in the first degree as charged in count two. If you have found [her] not guilty of that charge, do not answer it.

"This submission in no way suggests what your verdict should be.

"If you reach the following interrogatory, your conclusion must be unanimous. . . .

"Has the state proven to all of you unanimously beyond a reasonable doubt, that the [petitioner] or another participant used, or was armed with and threatened the use of, or displayed a firearm?"

[11] An "X" was marked next to the word, "yes," on the interrogatory form, and the jury foreperson signed the bottom of the form. After the jury returned a guilty verdict on each count, the court polled each juror to ask whether the state had proven, unanimously and beyond a reasonable doubt, that the petitioner or another participant in the commission of the offense had used, was armed with or threatened the use of, or displayed a firearm. Each juror answered affirmatively.

[12] As we discussed in more detail in part I of this opinion, in *State* v. *Beall*, supra, 61 Conn. App. 435, this court stated, in reliance on our Supreme Court's decision in *State* v. *Montgomery*, 254 Conn. 694, 737–38, 759 A.2d 995 (2000), that, "[if] there is no question that the jury's finding necessarily

error caused by the trial court's failure to instruct the jury as to the elements of § 53-202k was harmless beyond a reasonable doubt and, accordingly, the petitioner had failed to meet her burden as to her first claim.

Moreover, the court concluded that the petitioner had failed to meet her burden as to her second and third claims. In light of the court's determination that any alleged error caused by the trial court's failure to instruct the jury as to the elements of § 53-202k was harmless beyond a reasonable doubt, the court concluded that the petitioner had failed to demonstrate that, even if her trial counsel had requested an instruction as to the elements of § 53-202k or objected to the court's instruction concerning § 53-202k or if her appellate counsel had raised the issue on appeal, the outcome of the trial or appeal would have been different. See *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 30, 188 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019). The court also concluded that, because the petitioner's due process claim was "predicated on" the success of her other claims, she likewise had failed to meet her burden as to that claim. This appeal followed.[13] Additional procedural history will be set forth as needed.

We begin by setting forth the principles of law that govern claims of ineffective assistance of counsel, as well as our standard of review for a challenge to the denial of a petition for a writ of habeas corpus, both of which are well settled. "A criminal defendant's right to the effective assistance of counsel extends through

satisfied the two requirements of § 53-202k, the court's failure to instruct the jury regarding the elements of § 53-202k is harmless beyond a reasonable doubt."

[13] On appeal, the petitioner does not challenge the habeas court's conclusion that she failed to demonstrate that her appellate counsel provided ineffective assistance.

the first appeal of right and is guaranteed by the sixth and fourteenth amendments to the United States constitution and by article first, § 8, of the Connecticut constitution. . . . To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra, 466 U.S. 687]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Citations omitted; internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 712–13, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008).

"In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . Instead, *Strickland* asks whether it is reasonably likely the result would have been different. . . . This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. . . . The likelihood of a different result must be substantial, not just conceivable." (Internal quotation marks omitted.) *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 40. "In a habeas proceeding, the petitioner's burden of proving that a fundamental unfairness had been done is not met by speculation . . . but

by demonstrable realities." (Internal quotation marks omitted.) *Davis* v. *Commissioner of Correction*, 198 Conn. App. 345, 354, 233 A.3d 1106, cert. denied, 335 Conn. 948, 238 A.3d 18 (2020). "Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong." (Internal quotation marks omitted.) *Antwon W.* v. *Commissioner of Correction*, 172 Conn. App. 843, 849–50, 163 A.3d 1223, cert. denied, 326 Conn. 909, 164 A.3d 680 (2017).

On appeal, "[a]lthough the underlying historical facts found by the habeas court may not be disturbed unless they were clearly erroneous, whether those facts constituted a violation of the petitioner's [right to the effective assistance of counsel] under the sixth amendment is a mixed determination of law and fact that requires the application of legal principles to the historical facts of th[e] case. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard." (Internal quotation marks omitted.) *Gonzalez* v. *Commissioner of Correction*, 308 Conn. 463, 469–70, 68 A.3d 624, cert. denied sub nom. *Dzurenda* v. *Gonzalez*, 571 U.S. 1045, 134 S. Ct. 639, 187 L. Ed. 2d 445 (2013).

I

We first address the petitioner's principal claim on appeal that the habeas court improperly concluded that she failed to demonstrate that her trial counsel provided ineffective assistance by neglecting to request a jury instruction setting forth the statutory elements of § 53-202k and, specifically, defining the term "firearm," as set forth in § 53a-3 (19); see General Statutes § 53-202k; or otherwise object to the instruction that the court provided regarding § 53-202k because it failed to set forth the elements of § 53-202k by failing to define the

term "firearm," as set forth in § 53a-3 (19).[14] Because we conclude that, even if the trial court had instructed the jury as to the definition of the term "firearm," as set forth in § 53a-3 (19), and the other statutory elements of § 53-202k, a reasonable probability does not exist that the result of the underlying criminal proceeding would have been different, we reject this claim.

The following additional procedural history is relevant to our resolution of the petitioner's claim. At the conclusion of the trial, the court held a charge conference on the record. During the conference, the petitioner's trial counsel did not object that the proposed jury instruction concerning § 53-202k improperly failed to delineate each statutory element and state that the prosecution was required to prove each element of § 53-202k beyond a reasonable doubt or request that a jury instruction be provided as to the statutory elements of § 53-202k. The petitioner's trial counsel did not request specifically that the jury be instructed as to the legal definition of "firearm" under § 53-202k, as set forth in § 53a-3 (19), or object to the proposed jury instruction because it failed to provide the definition of "firearm."

[14] We note that it is difficult to ascertain the petitioner's precise claim from reviewing the record below and the petitioner's principal appellate brief. Nonetheless, we conclude that the petitioner articulated this claim of ineffective assistance of trial counsel to the habeas court and, once again, raises this claim on appeal to this court.

To the extent that the petitioner contends that the trial court improperly provided the elements of § 53-202k to the jury by way of *written* interrogatory, instead of *orally* instructing the jury as to the elements of § 53-202k, her reliance on this argument is misplaced. First, her reasoning presumes that the interrogatory that the court provided to the jury; see footnote 10 of this opinion; set forth each statutory element of § 53-202k. The interrogatory, however, failed to define fully the statutory elements of § 53-202k. See General Statutes § 53-202k. As we explain herein in more detail, despite the fact that the interrogatory was deficient because it failed to define fully the statutory elements of § 53-202k, any error was nonetheless harmless because the jury necessarily found that the state had proven each statutory element of § 53-202k beyond a reasonable doubt.

See General Statutes §§ 53-202k and 53a-3 (19). Subsequently, the court delivered its instructions to the jury. The court instructed the jury, "[i]n count two, in the event that you do find the [petitioner] guilty [of attempted assault in the first degree], you have to answer the interrogatory that's going to be provided to you; it is written, it is self-explanatory, your answer or response to the interrogatory has to be unanimous." The court provided no further instruction as to the sentence enhancement contained in § 53-202k and did not instruct the jury as to the definition of the term "firearm."

In connection with the attempted assault charge, which required the jury to find that the state had proven beyond a reasonable doubt that the petitioner or a coparticipant attempted to cause serious physical injury to another person "by means of a deadly weapon or a dangerous instrument"; General Statutes § 53a-59 (a) (1); see also General Statutes §§ 53a-49 (a) (2) and 53a-8; the court instructed the jury as to the definition of "deadly weapon," as set forth in § 53a-3 (6). Section § 53a-3 defines "deadly weapon" to mean "*any weapon, whether loaded or unloaded, from which a shot may be discharged*, or a switchblade knife, gravity knife, billy, blackjack, bludgeon, or metal knuckles." (Emphasis added.) General Statutes § 53a-3 (6). Thus, in accordance with §§ 53a-3 and 53a-59, the court instructed the jury in relevant part: "The statute defining [assault in the first degree, § 53a-59] reads in pertinent part as follows: A person is guilty of assault in the first degree when, with intent to cause serious physical injury to another person, he causes such injury to such a person or to a third person by means of a *deadly weapon* or a dangerous instrument. . . . The third [statutory] element [of § 53a-59 (a) (1)] is that the defendant attempted to cause [serious physical] injury by means of a deadly weapon." (Emphasis added.) The court also stated: "Deadly weapon is defined by [§ 53a-3 (6)] as *any weapon*,

whether loaded or unloaded, from which a shot may be discharged. If the weapon is a firearm, it may be unloaded, but it must be in such condition that a shot may be discharged from it. . . . If the weapon is unloaded, but in working order, it is a deadly weapon." (Emphasis added.)

After it delivered the jury charge, the court asked the parties whether they had any objection with respect to the jury instructions. The petitioner's trial counsel raised no objection with respect to the court's instruction regarding the interrogatory, the court's failure to delineate or define fully the statutory elements of § 53-202k in its instruction, or the court's failure to instruct the jury as to the term "firearm," as defined in § 53a-3 (19). The petitioner's trial counsel, likewise, raised no objection as to the court's instruction concerning the definition of "deadly weapon."

"[W]hen an accused is convicted by a jury of an underlying felony, the question of whether the accused used a proscribed firearm in the commission of that felony must also be decided by the jury . . . ." *State* v. *Velasco*, supra, 253 Conn. 214. Thus, "[a] jury, and not the trial court, is required to determine whether a defendant has used a firearm in the commission of a class A, B or C felony for purposes of § 53-202k." *State* v. *Montgomery*, 254 Conn. 694, 736–37, 759 A.2d 995 (2000); see also *State* v. *Beall*, supra, 61 Conn. App. 435 (same). If, however, "there is no question that the jury's finding necessarily satisfied the two requirements of § 53-202k, the court's failure to instruct the jury regarding the elements of § 53-202k is harmless beyond a reasonable doubt."[15] *State* v. *Beall*, supra, 435; see also *State* v.

[15] In her principal appellate brief, the petitioner appears to contend that the court's failure to provide a jury instruction concerning the statutory elements of § 53-202k is not subject to harmless error analysis. In support of her contention, the petitioner points us to the decision of the United States Court of Appeals for the Ninth Circuit in *United States* v. *Becerra*, 939 F.3d 995 (9th Cir. 2019), in which the court stated that a trial court's "failure to provide any oral instructions to the jurors is an error that as a

Montgomery, supra, 737–38 (analyzing whether court's failure to instruct jury regarding statutory elements of § 53-202k was harmless). Accordingly, if we conclude that the jury's ultimate determination necessarily satisfied the statutory elements of § 53-202k; see *State* v. *Beall*, supra, 435; it is axiomatic that the petitioner has failed to meet her burden of proving that there is a reasonable probability that, but for her trial counsel's failure to object to the court's instruction concerning § 53-202k, the result of the underlying criminal proceeding would have been different. See *Small* v. *Commissioner of Correction*, supra, 286 Conn. 712–13.

In *Montgomery*, our Supreme Court concluded that a trial court's failure to instruct the jury as to the statutory elements of § 53-202k was harmless because the jury's determination that the defendant was guilty of murder necessarily satisfied the statutory requirements of § 53-202k. See *State* v. *Montgomery*, supra, 254 Conn. 738. The defendant in *Montgomery* was convicted, following a jury trial, of murder and felony murder, arising out of an incident during which the defendant shot and killed a coworker, and was charged with using a firearm

practical matter *precludes a harmless error analysis . . . .*" (Emphasis added; internal quotation marks omitted.) Id., 1004; see also *Guam* v. *Marquez*, 963 F.2d 1311, 1316 (9th Cir. 1992) (same).

To adopt such a rule, however, would run afoul of the binding precedent of our Supreme Court; see *State* v. *Montgomery*, supra, 254 Conn. 737 (determining that trial court's failure to provide jury instruction concerning elements of § 53-202k was *harmless* in light of fact that jury's ultimate finding that defendant was guilty of underlying felony offense necessarily satisfied all statutory elements of § 53-202k); and would require us to overturn a decision of another panel of this court. See *State* v. *Beall*, supra, 61 Conn. App. 435 n.6 ("The defendant argues that the court's failure to instruct the jury on the requirements of § 53-202k is not amenable to harmless error analysis . . . . *We see no merit in his argument that this error requires automatic reversal and can never be found harmless.*" (Emphasis added.)). "[I]t is not the province of this panel to disregard binding authority of our Supreme Court or to overturn a decision of another panel of this court." *State* v. *Bouvier*, 209 Conn. App. 9, 43 n.21, 267 A.3d 211 (2021), cert. denied, 341 Conn. 903, 269 A.3d 789 (2022). Accordingly, we decline to do so.

during the commission of the murder in violation of § 53-202k. Id., 696–98. The state sought a five year sentence enhancement pursuant to § 53-202k during the defendant's sentencing hearing. Id., 735–36. The court sentenced the defendant to a total term of sixty-five years of incarceration, a sixty year sentence that was enhanced by a five year term of incarceration pursuant to § 53-202k. See id., 697.

On direct appeal, the defendant claimed, inter alia, that the trial court improperly had failed to instruct the jury as to the statutory elements of § 53-202k and, as a result, had violated his constitutional right to due process. Id., 735. Our Supreme Court determined that, "[a]lthough [it] agree[d] with the defendant that the jury and not the trial court must make the factual determinations required under § 53-202k . . . under the circumstances of th[e] case, the trial court's failure to instruct the jury regarding the elements of § 53-202k was harmless." Id. Specifically, our Supreme Court stated, "[t]here [wa]s no dispute that the jury was not expressly asked to" determine whether the defendant had used a firearm in the commission of a class A, B or C felony for the purposes of § 53-202k. Id., 737. Nonetheless, "the jury necessarily found that the defendant had committed a class A felony by virtue of finding [the defendant] guilty of . . . a felony, namely, murder. . . . With respect to the second element of § 53-202k, the defendant *did not contest* the fact, established by incontrovertible evidence, that the victim had been shot repeatedly in the head with a firearm and had died as a result of wounds caused by that firearm. Indeed, in closing argument, the defendant acknowledged that the victim had been brutally murdered. The defendant sought to convince the jury, rather, that the evidence was insufficient to establish beyond a reasonable doubt that *he* was the shooter." (Citation omitted; emphasis altered; internal quotation marks omitted.) Id., 738.

Thus, "[b]ecause the defendant did not dispute the fact that the victim's fatal wounds were inflicted by a firearm, and because the jury found beyond a reasonable doubt that the defendant was guilty of the victim's murder, a class A felony, the trial court's failure to instruct the jury regarding the elements of § 53-202k was harmless beyond a reasonable doubt." Id.

In *Beall*, the defendant was convicted, following a jury trial, of assault in the first degree arising out of an incident during which the defendant had shot and caused serious injury to a victim. See *State* v. *Beall*, supra, 61 Conn. App. 432–34. The defendant was charged separately in a part B information with using a firearm in the commission of a felony in violation of § 53-202k. See id., 433. The court ultimately sentenced the defendant to a term of eighteen years of incarceration, suspended after thirteen years, with three years of probation. See id. His sentence was enhanced by a five year nonsuspendable term of incarceration pursuant to § 53-202k. Id.

On direct appeal, the defendant claimed, inter alia, that the trial court improperly had failed to submit to the jury the question of whether he had used a firearm in the commission of a class A, B or C felony in accordance with § 53-202k. Id., 435. This court rejected the defendant's claim and determined that the court's failure to instruct the jury as to the elements of § 53-202k was harmless beyond a reasonable doubt. See id., 436. This court specifically determined that "[t]he jury's finding that the defendant was guilty of having committed assault in the first degree, a class B felony, necessarily satisfied the first requirement [of § 53-202k—namely, that he had committed a class A, B or C felony]. The use of a firearm [however] is not always an element of the crime of assault in the first degree, and the information . . . did not expressly state that the 'deadly weapon' used to cause the serious physical injury was

a firearm. The evidence presented at trial was that the victim was shot in the chest and paralyzed below the site of the wound. *The defendant did not dispute that evidence* [*at trial*]. His defense was that he was not the shooter. The sole evidence, therefore, of the assault in the first degree, was that it was committed with a firearm. The element found by the court rather than by the jury, i.e., that the class B felony was committed *with a firearm*, was uncontested [at trial] and supported by overwhelming evidence; the court's failure to instruct on that element of § 53-202k therefore constituted harmless error. . . . [B]ecause the defendant . . . did not dispute that the victim suffered serious physical injury by means of being shot by a firearm, and because the jury found beyond a reasonable doubt that the defendant was guilty of assault in the first degree, a class B felony, the court's failure to instruct the jury regarding the elements of § 53-202k was harmless beyond a reasonable doubt." (Citation omitted; emphasis added.) Id., 435–36.

Guided by *State* v. *Montgomery*, supra, 254 Conn. 738, and *State* v. *Beall*, supra, 61 Conn. App. 435–36, we conclude in the present case that the jury's determination that the petitioner was guilty of attempt to commit assault in the first degree as an accessory, in light of the state's theory of the case and the evidence presented at trial, necessarily satisfied each statutory requirement of § 53-202k, including that a coparticipant used a "firearm," as defined in § 53a-3, in that attempted assault. There is no question that the jury found the petitioner guilty of a class B felony—attempted assault in the first degree as an accessory in violation of §§ 53a-59 (a) (1), 53a-49 (a) (2) and 53a-8—beyond a reasonable doubt. See *State* v. *VanDeusen*, supra, 160 Conn. App. 817; see also General Statutes § 53a-59. Accordingly, the jury's finding satisfied the first requirement of

§ 53-202k—namely, that the petitioner had committed a class A, B or C felony. See *State* v. *Beall*, supra, 435.

With respect to the second element of § 53-202k—that the petitioner or a coparticipant, during the commission of the felony, used, was armed with and threatened to use, or displayed a "firearm," as defined in § 53a-3; see General Statutes § 53-202k; we note that "the use of a firearm is not an element of the crime of [attempt to commit assault in the first degree] . . . [so] the jury lawfully could have returned a finding of guilty on the [attempt to commit assault] charge without also having found that the [petitioner or a coparticipant] had used a firearm in the commission of that crime." (Citation omitted.) *State* v. *Montgomery*, supra, 254 Conn. 737. Accordingly, we look to the circumstances of the case to determine whether the court's failure to instruct the jury as to the definition of the term "firearm" was harmless. See id., 738.

To start, we note, as we have stated previously in this opinion, that § 53-202k employs the statutory definition of "firearm," set forth in § 53a-3 (19). See General Statutes § 53-202k. Section 53a-3 (19) defines "firearm" to mean "any sawed-off shotgun, machine gun, rifle, shotgun, pistol, revolver or other weapon, whether loaded or unloaded from which a shot may be discharged . . . ." General Statutes § 53a-3 (19). We also note that, by finding the petitioner guilty of attempted assault in the first degree as an accessory, the jury necessarily determined that the state had proven each element of §§ 53a-59 (a) (1), 53a-49 (a) (2) and 53a-8 beyond a reasonable doubt, including that a coparticipant used a "deadly weapon" in the commission of the attempted assault. Section 53a-3 defines "deadly weapon" to include "any weapon, whether unloaded or loaded, from which a shot may be discharged . . . ." General Statutes § 53a-3 (6).

At trial, the state presented evidence that Knowles, using a handgun, fired gunshots from the van at the

residence of J.L. See *State* v. *VanDeusen*, supra, 160 Conn. App. 820. Specifically, the state elicited testimony from Ayala that she had observed Knowles retrieve a black gun from a shoe box, enter the van with it, and that, later that night, Knowles told her they had gone to J.L.'s house and he had fired gunshots from the van toward J.L.'s residence. The state elicited testimony from Delmonte that, from inside of J.L.'s residence, she had heard a "very loud noise" and subsequently observed the taillights of a vehicle as it drove away. Further, the state elicited testimony from J.L. and Rodriguez that, later that evening, J.L., Rodriguez, and Delmonte discovered bullets that had pierced a window and a supporting pillar of J.L.'s residence. The state additionally elicited testimony from a responding police officer that he observed what appeared to be a bullet hole that had pierced the front of J.L.'s residence and recovered bullets from the scene. The state did not present evidence that any other type of deadly weapon was used during the commission of the offense. The sole evidence, therefore, that the state presented to support the charge of attempted assault in the first degree, of which the jury found the petitioner to be an accessory, was that it was committed with a handgun—specifically, that Knowles discharged a loaded handgun at J.L.'s residence. See *State* v. *Beall*, supra, 61 Conn. App. 436.

The petitioner did not contest the state's theory at trial that Knowles used a handgun in the commission of the offense. By contrast, a thorough review of the trial transcripts reveals that the petitioner's theory of her defense was that she either was uninvolved entirely with, or, at most, merely was an uninvolved witness to, the commission of the offense. Specifically, the petitioner sought to convince the jury that the state had failed to present reliable witnesses that could attest to her alleged involvement in the shooting and that the witnesses that the state *did* call were unreliable "low-

li[ves]" whose testimony was not credible. On several occasions during closing argument, in fact, the petitioner's trial counsel acknowledged that an individual *had* fired shots from a "gun" at J.L.'s home; the petitioner's trial counsel argued, however, that the *petitioner* neither had possessed nor had used the gun on the night of January 10, 2009.

Thus, we conclude that the jury's guilty verdict as to the charge of attempted assault—and, consequently, its determination that a coparticipant used a deadly weapon in the commission of the attempted assault—was predicated on the evidence that the state presented as to the only weapon used during the commission of the offense: the handgun. The jury necessarily accepted the state's theory, undisputed by the petitioner at trial, that Knowles used a "deadly weapon," the handgun, in the commission of the attempted assault. It logically follows, in light of the undisputed evidence that the state presented at trial, that the jury found that the handgun was a "loaded" weapon from which Knowles "discharged" a "shot" at the residence of J.L. Thus, the jury necessarily determined that the handgun satisfied the statutory definition of a "firearm" in § 53a-3 (19)—a "sawed-off shotgun, machine gun, rifle, shotgun, pistol, revolver or other *weapon*, whether *loaded* or unloaded *from which a shot may be discharged* . . . ." (Emphasis added.) General Statutes § 53a-3 (19). We, therefore, conclude that the jury necessarily found that the state had proven each statutory element of § 53-202k beyond a reasonable doubt and, accordingly, that the court's failure to instruct the jury as to the elements of § 53-202k was harmless beyond a reasonable doubt. See *State* v. *Beall*, supra, 61 Conn. App. 435–36.

Because we conclude that the court's failure to provide the jury instruction concerning the statutory elements of § 53-202k was harmless beyond a reasonable doubt, it is axiomatic that the petitioner has failed to meet her burden of proving that there is a reasonable

probability that, but for her trial counsel's failure to object to the court's instruction concerning § 53-202k, the result of the underlying criminal proceeding would have been different. See *Small* v. *Commissioner of Correction*, supra, 286 Conn. 712–13. Accordingly, the petitioner's claim fails.[16]

II

The petitioner additionally claims on appeal that the habeas court improperly concluded that she failed to demonstrate that her trial counsel provided ineffective assistance by neglecting to request that the court instruct the jury, or otherwise object to the court's instruction concerning § 53-202k, that (1) § 53-202k expressly excludes "assault weapon[s]" from the term "firearm"; see General Statutes § 53-202k; see also footnote 10 of this opinion; and (2) the state was obligated to prove beyond a reasonable doubt that the weapon used on January 10, 2009, was not an "assault weapon."[17] She claims that her trial counsel's failure to request such an instruction caused her prejudice because, if the weapon at issue was an "assault weapon," the sentence enhancement contained in § 53-202k would not have applied. As appellate counsel for the respondent, the Commissioner of Correction, conceded at oral argument before this court, the sentence enhancement contained in § 53-202k would not have applied if the weapon used during the shooting was an "assault weapon." Appellate counsel for the respondent also

[16] Because we determine on the basis of our plenary review that the petitioner failed to satisfy her burden under the prejudice prong of *Strickland*, it is unnecessary for us to determine whether the petitioner satisfied the performance prong. See *Jordan* v. *Commissioner of Correction*, 197 Conn. App. 822, 831 n.9, 234 A.3d 78 (2020), aff'd, 341 Conn. 279, 267 A.3d 120 (2021).

[17] General Statutes § 53-202j imposes a harsher penalty—an eight year, nonsuspendable sentence—on "[a]ny person who commits any class A, B or C felony and in the commission of such felony uses, or is armed with and threatens the use of, or displays, or represents by his words or conduct that he possesses an *assault weapon*, as defined in [General Statutes §] 53-202a . . . ." (Emphasis added.)

conceded at oral argument before this court that the state presented no evidence during the petitioner's underlying criminal trial to distinguish whether the weapon used during the shooting was a "firearm" or an "assault weapon."[18] Because we conclude that this claim was not adequately preserved for appellate review, we decline to review the petitioner's claim.

The following additional procedural history is relevant to our resolution of the petitioner's claim. In her petition for a writ of habeas corpus and in her brief to the habeas court in support of her petition, the petitioner claimed, inter alia, that her trial counsel had provided ineffective assistance by failing to request a jury instruction regarding each statutory element of § 53-202k, including the definition of "firearm" as set forth in § 53a-3 (19), or otherwise objecting to the instruction that the court gave. In connection with her claim, the petitioner alleged that her trial counsel's deficient performance prejudiced her because, as a result of her trial counsel's deficient performance, a reasonable "possibility" existed that the jury misunderstood what it was required to consider to determine whether the sentence enhancement contained in § 53-202k applied.

During the habeas trial, the petitioner reiterated the claim that she had raised in her petition and corresponding brief—that her trial counsel provided ineffective assistance and that counsel's allegedly deficient performance prejudiced her because, as a result of her trial counsel's failure to request a jury instruction regarding the elements of § 53-202k or otherwise object to the instruction that the court gave, a reasonable probability existed that the jury may have misunderstood what it

[18] At oral argument before this court, appellate counsel for the respondent also conceded that the projectiles that were discovered in or around J.L.'s home could have been discharged from an assault weapon, that some assault weapons are handguns, and that a weapon described simply as a "black handgun" could have been an assault weapon.

was required to find for the defendant's sentence to be enhanced pursuant to § 53-202k. Specifically, the petitioner's habeas counsel argued, "[t]he only plausible explanation [as to how the jury concluded that the state had proven each element of § 53-202k] is that the jury *must have guessed*" what it must find for the sentence enhancement contained in § 53-202k to apply. (Emphasis added.) At no point in her petition for a writ of habeas corpus, in her brief in support of her petition, or during the habeas trial did the petitioner assert that she was prejudiced by her trial counsel's failure to request the jury instruction because, if the weapon that was used during the shooting was an assault weapon, the sentence enhancement contained in § 53-202k would not have applied.

On appeal to this court, the petitioner maintains—as she did before the habeas court—that her trial counsel provided ineffective assistance. She appears to claim on appeal, however, that her trial counsel's failure to request that the jury be instructed as to the definition of "firearm" under § 53-202k prejudiced her because, if what was used on January 10, 2009, was an "assault weapon," the sentence enhancement contained in § 53-202k would not have applied. The petitioner's appellate counsel conceded at oral argument before this court that the petitioner advances this specific legal theory of prejudice for the first time on appeal.

"It is well settled that this court [and our Supreme Court] shall not be bound to consider a claim unless it was *distinctly* raised at the trial . . . ." (Emphasis added; internal quotation marks omitted.) *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 177, 982 A.2d 620 (2009). "A reviewing court will not consider claims not raised in the habeas petition or decided by the habeas court." (Internal quotation marks omitted.) *Giattino* v. *Commissioner of Correction*, 169 Conn. App. 566, 580, 152 A.3d 558 (2016). Indeed, "[w]e do

not entertain claims not raised before the habeas court but raised for the first time on appeal. . . . The purpose of the [petition] is to put the [respondent] on notice of the claims made, to limit the issues to be decided, and to prevent surprise." (Internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 820–21 n.3, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017). "[P]rinciples of fairness dictate that both the opposing party and the [habeas] court are entitled to have proper notice of a claim. . . . Our review of a claim not distinctly raised [before] the [habeas] court violates that right to notice. . . . [A]ppellate review of newly articulated claim[s] not raised before the habeas court would amount to an ambuscade of the [habeas] judge . . . ." (Citation omitted; internal quotation marks omitted.) *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 597–98, 188 A.3d 702 (2018); see also *Crawford* v. *Commissioner of Correction*, supra, 177 ("[f]or this court to . . . consider a claim on the basis of a specific legal ground not raised [before the habeas court] would amount to trial by ambuscade, unfair both to the [habeas court] and to the opposing party" (internal quotation marks omitted)). Accordingly, "our review is limited to matters in the record, [and] we will not address issues not decided by the [habeas] court." (Internal quotation marks omitted.) *Alexander* v. *Commissioner of Correction*, 103 Conn. App. 629, 640, 930 A.2d 58, cert. denied, 284 Conn. 939, 937 A.2d 695 (2007).

In the present case, a thorough review of the record—including the petitioner's petition for a writ of habeas corpus, her brief to the habeas court in support of her petition, and the transcript from the habeas trial—reveals, as the petitioner conceded, that she did not raise before the habeas court her distinct claim that her trial counsel's failure to request a jury instruction that § 53-202k excludes "assault weapon[s]" from the

term "firearm" prejudiced her because, if the weapon at issue was an "assault weapon," the sentence enhancement contained in § 53-202k would not have applied. She alleged before the habeas court that she was prejudiced by her trial counsel's allegedly deficient performance because, as a result of her trial counsel's failure to request a jury instruction as to each element of § 53-202k or otherwise object to the instruction that the court gave, a reasonable probability existed that the jury misunderstood the law to be applied. The petitioner's claim on appeal, thus, is predicated on a distinct allegation of "prejudice" that she never presented before the habeas court—one on which the habeas court did not rule. Accordingly, we conclude that this distinct claim was not adequately preserved for appellate review, and, because our consideration of "a claim on the basis of a specific legal ground not raised [before the habeas court] would amount to trial by ambuscade"; (internal quotation marks omitted) *Crawford* v. *Commissioner of Correction*, supra, 294 Conn. 177; we decline to review the claim.[19]

The judgment is affirmed.

In this opinion the other judges concurred.

[19] We note that review of the petitioner's claim 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), is not available in these circumstances. "*Golding* review is not available for [a] petitioner's unpreserved ineffective assistance of counsel claim [if] that claim does not arise out of the actions or omissions of the habeas court itself. . . . *Golding* review is available in a habeas appeal *only* for claims that challenge the actions of the habeas court." (Emphasis added.) *Moye* v. *Commissioner of Correction*, 316 Conn. 779, 787, 114 A.3d 925 (2015). In the present case, "[t]he petitioner's unpreserved ineffective assistance claim challenges [her] trial attorney's allegedly [ineffective assistance] at [her] criminal trial. Thus, the basis for the petitioner's ineffective assistance claim arose during [her] criminal trial and should have been presented to the habeas court as an additional basis for granting the writ of habeas corpus." Id. Accordingly, "*Golding* review is not available for the petitioner's unpreserved ineffective assistance of counsel claim because that claim does not arise out of the actions or omissions of the habeas court itself." Id.

TOWN OF MIDDLEBURY *v.* FRATERNAL ORDER OF POLICE, MIDDLEBURY LODGE NO. 34 ET AL.
(AC 44061)

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

Syllabus

The plaintiff town appealed to the Superior Court from the decision of the defendant State Board of Labor Relations determining that the town had unilaterally changed an established past practice of including extra duty pay in the calculation of pensions for members of the defendant union, M Co., in violation of the Municipal Employees Relations Act (§ 7-467 et seq.). The town established a retirement committee to administer its retirement plan, consisting of three members appointed by the town. In the midst of ongoing negotiations with M Co. for a successor collective bargaining agreement, the retirement committee notified M Co. that it had decided to exclude extra duty pay from pension calculations. M Co. filed a complaint with the labor board, alleging that the town violated the act when the retirement committee unilaterally eliminated extra duty pay from pension calculations. The town claimed, inter alia, that the labor board lacked jurisdiction over the complaint because the retirement committee was not a municipal employer under the act as defined by statute (§ 7-467). The labor board issued a finding that the town violated the statute (§ 7-470 (a) (4)) requiring municipal employers to bargain in good faith when the retirement committee excluded extra duty pay from the calculation of pensions. The labor board found, inter alia, that there was a consistent past practice of including extra duty pay in pension calculations that had endured for almost thirty years. It rejected the town's contract defense, concluding that M Co. had not waived its right to bargain over changes to the calculation of future retirement benefits. The labor board applied its well established standard that a waiver must be clear and unmistakable. During the pendency of the town's administrative appeal, the National Labor Relations Board issued a decision in *MV Transportation, Inc.* (368 N.L.R.B. No. 66), in which it abandoned the clear and unmistakable waiver standard for determining whether a union has waived its right to bargain over an otherwise mandatory subject of bargaining in favor of the contract coverage standard in cases over which it had jurisdiction. Because the National Labor Relations Board held that its newly adopted rule applied retroactively to all pending cases, the trial court remanded the town's case to the labor board to determine whether it would adopt the new standard. The labor board subsequently issued an order declining to adopt the contract coverage standard, and the court dismissed the town's administrative appeal, finding that the town had failed to

demonstrate any illegality, abuse of discretion, or prejudice to its rights in the labor board's decision. On the town's appeal to this court, *held*:

1. The town could not prevail on its claim that the labor board improperly determined that it had jurisdiction over M Co.'s prohibited practice complaint: there was substantial evidence in the record to support the labor board's conclusion that the retirement committee was acting as the town's agent, as the town board of selectmen controlled the composition of the retirement committee under its authority to appoint and remove committee members, the town charter and retirement plan vested in the town the authority to amend or cancel the retirement plan and, in deciding to exclude extra duty pay from pension calculations, the retirement committee relied on the legal opinion of the town attorney; moreover, contrary to the town's claim, the labor board did not fail to adhere to its own administrative precedent, as those prior labor board decisions addressed actions by a retirement committee in administering a plan with regard to specific employee applications, not actions effecting unilateral change to the terms of a plan, and those decisions did not address an agency relationship between pension boards and cities; furthermore, the labor board's decision did not violate the town's rights under the Home Rule Act (§ 7-188) as the labor board's finding that the retirement committee was acting as the town's agent when it unilaterally effected the change at issue did not deprive the town of the right to legislate on purely local affairs or invalidate the town's charter or retirement plan; additionally, the labor board did not exceed its jurisdiction, as it properly considered the terms of the town's charter and retirement plan to the extent necessary to resolve M Co.'s prohibited practice complaint.

2. The town could not prevail on its claim that the labor board, in considering the town's defense to M Co.'s unilateral change complaint, failed to apply the contract coverage standard: the labor board was not compelled to follow the policy adopted by the National Labor Relations Board in *MV Transportation, Inc.*, and it did not act illegally, arbitrarily, or in abuse of its discretion in declining to adopt the contract coverage standard; moreover, this court declined to consider the town's unpreserved argument that the labor board misapplied the clear and unmistakable waiver standard to the facts it found.

Argued November 8, 2021—officially released May 10, 2022

Procedural History

Appeal from the decision of the defendant State Board of Labor Relations determining that the plaintiff's change in its practice of including extra duty pay in the calculation of pensions for members of the named defendant violated the Municipal Employees Relations

Act, brought to the Superior Court in the judicial district of New Britain, where the court, *Hon. Stephen F. Frazzini*, judge trial referee, remanded the case to the defendant State Board of Labor Relations to determine whether a decision of the National Labor Relations Board applied retroactively; thereafter, the case was tried to the court, *Hon. Stephen F. Frazzini*, judge trial referee; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Thomas G. Parisot, with whom was *Connor McNamara*, for the appellant (plaintiff).

Frank Cassetta, general counsel, with whom were *J. Brian Meskill*, and, on the brief, *Harry B. Elliot, Jr.*, former general counsel, for the appellee (defendant State Board of Labor Relations).

David S. Taylor, for the appellee (named defendant).

Opinion

BRIGHT, C. J. The plaintiff, the town of Middlebury (town), appeals from the judgment of the trial court dismissing the town's administrative appeal from the decision of the defendant State Board of Labor Relations (labor board). The labor board found that the town violated the Municipal Employee Relations Act (act), General Statutes § 7-467 et seq., by unilaterally changing an established past practice of including extra duty pay in the calculation of pensions for members of the defendant Fraternal Order of Police, Middlebury Lodge No. 34 (union), the union representing the town's police officers. On appeal, the town claims that the labor board improperly (1) concluded that it had jurisdiction over the union's prohibited practice complaint and (2) applied the incorrect standard for evaluating the town's contract defense to the unilateral change complaint. We disagree and, accordingly, affirm the judgment of the trial court.

The labor board found the following relevant facts. The town is a municipal employer under the act, and the union is an employee organization representing all full-time employees of the town's police department with authority to exercise police powers, except for the chief of police. By town meeting on March 22, 1967, the town established the Town of Middlebury Retirement Plan (retirement plan) and created the Retirement Plan Committee (retirement committee) to administer the plan. The three members of the retirement committee are appointed by the town's board of selectmen and must include one employee of the town, one member of the town's board of finance, and one citizen of the town. Under the retirement plan, the retirement committee "shall have complete authority in all matters pertaining to the administration of the [retirement] [p]lan." In addition, the retirement plan "may be amended, modified or discontinued in a [t]own [m]eeting held for that purpose."

In 1987, the town adopted a municipal charter, which provided that the provisions of the retirement plan "shall remain in full force and effect until such time as said plan is amended."

By town meeting on June 5, 1995, the town amended the retirement plan, changing, among other things, the definition of "salary" from "the actual compensation received from the [t]own in any plan year" to "the actual compensation paid to the employee by the [t]own in any calendar year . . . ." Section 7.2 of the retirement plan provides that "[t]he primary responsibility of the [retirement] [c]ommittee is to administer the [retirement] [p]lan for the exclusive benefit of the [m]embers and their [b]eneficiaries, subject to the specific terms of the [retirement] [p]lan. The [c]ommittee shall administer the [retirement] [p]lan in accordance with its terms . . . and shall have the power to determine all questions arising in connection with the administration,

interpretation, and application of the [retirement] [p]lan. Any such determination by the [c]ommittee shall be conclusive and binding upon all affected parties.

"The [c]ommittee may correct any defect, supply any information, or reconcile any inconsistency in such manner and to such extent as shall be deemed necessary or advisable to carry out the purpose of the [retirement] [p]lan, provided, however, that any interpretation or construction shall be done in a nondiscriminatory manner. The [c]ommittee shall have all powers necessary or appropriate to accomplish its duties under the [retirement] [p]lan." Under § 7.6 of the retirement plan, "[t]he [t]own reserves the right at any time and from time to time by action of [t]own meeting to modify, amend or terminate the [retirement] [p]lan."

By town meeting on August 25, 2011, the town established the Town of Middlebury Defined Contribution Retirement Plan (defined contribution plan) to provide pension benefits for town employees hired on or after July 1, 2011. Under the defined contribution plan, " '[c]ompensation' " is defined as a "participant's wages as defined in [Internal Revenue] Code [§] 3401 (a) and all other payments of compensation by the [e]mployer (in the course of the [e]mployer's trade or business) for a [p]lan [y]ear . . . ."

The town and the union are parties to a series of successive collective bargaining agreements. The relevant collective bargaining agreement at issue before the labor board was effective from July 1, 2013, through June 30, 2017 (agreement). Under article XVI of the agreement, "[t]he [t]own agrees to maintain in effect for the duration of this [a]greement the [retirement] [p]lan dated July 1, 1967, as amended on July 1, 1995, and to further amend the [r]etirement [p]lan to provide that employees retiring after twenty (20) years shall receive credit for [2.5 percent] of the average pay per

year of service for the first twenty years of service and [2] percent for years 21 through 30 with a maximum benefit accrual of [70 percent]. . . . The employee contribution to the Middlebury Retirement Fund shall be [4.6 percent] for the duration of this agreement. . . . Those employees hired on or after July 1, 2013, shall become members of the . . . [d]efined [c]ontribution [p]lan as developed by the [retirement committee], as approved at a [t]own [m]eeting on August 25, 2011."

Article VI, § 1, of the agreement provides for " 'special police duty' " or " 'extra police work' " (extra duty), defined as "assignment for work during off-duty hours for some other party or entity other than the police department or other than the [t]own." Article XVII, § 2, provides that "[a]ll benefits, rights and privileges enjoyed by the employees prior to entering into this [a]greement which are not specifically provided for or which are not relinquished or abridged by or in conflict with the other provisions of this [a]greement are hereby made a part of and protected by this [a]greement."

The labor board found that "[union] members have regularly worked extra duty. 'Extra duty' is work performed in the capacity of a police officer that is voluntary, occurs outside the member's normal work hours, is not performed as part of the member's normal duties, and is paid for by an entity other than the police department (e.g., a private contractor or another municipal department). Such entities pay the town the applicable rate for extra duty hours worked as well as an administrative surcharge assessed by the town. The town includes pay for extra duty hours worked in [union] members' regular paychecks and when it receives funds from third party entities, the town reimburses itself for such payments and retains the administrative surcharges. . . .

"[S]ince on or before 1988, the town included extra duty pay as 'salary' when calculating and paying pension

benefits to [union] members and when calculating and collecting employee pension contributions, to the extent that such contributions were assessed, pursuant to the [retirement plan]. . . . [F]rom the inception of the defined contribution plan, the town included extra duty pay as 'compensation' when calculating and collecting employee or matching pension contributions to said plan." (Footnotes omitted.)

In March, 2017, the town and the union began negotiations for a successor agreement to the agreement expiring on June 30, 2017. On August 10, 2017, amidst ongoing negotiations, the retirement committee "met and discussed the impact of [union] extra duty [pay] on the [retirement plan]. [The] town chief financial officer, Lawrence Hutvagner, informed the [retirement committee] that, while third party entities reimbursed the town for extra duty pay, extra duty was a liability of the [retirement plan]. The [retirement committee] members then unanimously voted to have the town attorney clarify whether extra duty pay was properly included in [retirement plan] benefit calculations."

In an October 23, 2017 memorandum addressed to the retirement committee, the town attorney, Robert W. Smith, who was representing the town in the negotiations with the union, claimed that "[t]he definition of salary, as amended in 1995, in conjunction with the addition of [§] 7.2 (which vests conclusive plan interpretation in the [retirement committee]), certainly allows the [retirement committee] to vote, consistent with its interpretation, on the issue of whether the [retirement plan] includes/excludes extra duty pay in/from pension calculations, going forward." Smith averred that the 1995 change to the definition of salary "is significant, inasmuch as extra duty pay, although always 'received from' the town, was always 'paid' by private parties. The fact that the money is passed through the town does not change who actually pays it (private parties)."

On October 24, 2017, the retirement committee voted unanimously to clarify that extra duty pay is not included in a member's "salary" or "compensation" as defined in the retirement plan and the defined contribution plan. In a January 30, 2018 letter, the retirement committee informed the union that the committee had decided to exclude all extra duty pay from pension calculations and that the town would refund the pension contributions withheld against such pay during the period of January 1, 2010, through October 24, 2017. The board noted that the town's records regarding union members' wages "cannot differentiate members' extra duty earnings from members' other earnings prior to [January 1, 2010]."

On January 24, 2018, the union filed a complaint[1] with the labor board alleging that the town violated the act when the retirement committee unilaterally eliminated extra duty pay from the calculation of members' pensions. In response, the town claimed that the board lacked jurisdiction over the complaint because the retirement committee, which had engaged in the conduct at issue, is a separate legal entity from the town and is not a municipal employer under the act. In the alternative, the town claimed that the union had waived its right to bargain as to the change at issue because the agreement incorporated by reference the retirement plan, which authorizes the retirement committee "to determine all questions arising in connection with the administration, interpretation, and application of the [retirement plan]" and provides that "[a]ny such determination . . . shall be conclusive and binding upon all affected parties."

After a three day hearing, the labor board issued its decision on December 21, 2018,[2] finding that the town

[1] The complaint was filed by NIPSEU-Middlebury Police Union (NIPSEU), but the union replaced NIPSEU as the recognized representative for the bargaining unit in February, 2018.

[2] The board initially issued its decision on December 14, 2018, but it issued a corrected decision on December 21, 2018, to correct minor clerical errors.

violated General Statutes § 7-470 (a) (4) when the retirement committee excluded extra duty pay from the calculation of members' pension benefits.[3] The labor board first determined that it had jurisdiction to adjudicate the union's prohibited practice complaint because, although the retirement committee is not a municipal employer under the act,[4] the retirement committee's change to the calculation of retirement benefits was attributable to the town under principles of agency law. The labor board then determined that the union had established a prima facie case of unlawful unilateral change to a term or condition of employment. Specifically, the labor board found that there was a consistent past practice of including extra duty pay in the calculation of pension benefits that had endured for almost thirty years before the retirement committee's October, 2017 meeting. The labor board rejected the town's contract defense, concluding that the union had not waived its right to bargain over changes to the calculation of future retirement benefits by referencing the retirement plan in the parties' agreement. In so concluding, the labor board applied its well established standard for determining whether a union has waived its right to bargain over an otherwise mandatory subject of bargaining, which requires that the waiver be clear and unmistakable. See, e.g., *In re State of Connecticut*, Conn. Board of Labor Relations Decision No. 2859 (October 30, 1990) p. 5

[3] General Statutes § 7-470 provides in relevant part: "(a) Municipal employers or their representatives or agents are prohibited from . . . (4) refusing to bargain collectively in good faith with an employee organization which has been designated in accordance with the provisions of said sections as the exclusive representative of employees in an appropriate unit . . . ."

[4] Under the act, a municipal employer is defined as "any political subdivision of the state, including any town, city, borough, district, district department of health, school board, housing authority or other authority established by law, a private nonprofit corporation which has a valid contract with any town, city, borough or district to extinguish fires and to protect its inhabitants from loss by fire, and any person or persons designated by the municipal employer to act in its interest in dealing with municipal employees . . . ." General Statutes § 7-467 (1).

("[t]o constitute a waiver of rights . . . the waiver must be clear and unmistakable").

The town appealed from the labor board's decision to the Superior Court pursuant to General Statutes § 4-183.[5] After the parties appeared for oral argument and submitted briefs in the trial court, the National Labor Relations Board (NLRB) issued a decision in which it abandoned the clear and unmistakable waiver standard in favor of the contract coverage standard in cases over which it has jurisdiction. See *MV Transportation, Inc.*, 368 N.L.R.B. No. 66 (September 10, 2019). Because the NLRB held that the newly adopted rule applies retroactively to all pending cases, the trial court remanded the present case to the labor board to consider whether to adopt the new federal standard in Connecticut and, if so, whether to apply it retroactively in the present case.

On December 12, 2019, the labor board issued an order declining to adopt the contract coverage standard, and the court issued its decision dismissing the town's appeal on March 12, 2020. The court determined that the labor board's decision was supported by substantial evidence and that the town had failed to demonstrate any illegality, abuse of discretion, or prejudice to its rights in the labor board's decision. This appeal followed. Additional facts will be set forth as necessary.

We begin with the applicable standard of review for both of the plaintiff's claims. "[J]udicial review of an administrative agency's action is governed by the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq., and the scope of that review is limited. . . . [R]eview of an administrative agency decision requires a court to determine whether there

[5] General Statutes § 4-183 provides in relevant part: "(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section. . . ."

is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Conclusions of law reached by the administrative agency must stand if . . . they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . The court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of [its] discretion." (Internal quotation marks omitted.) *AFSCME, AFL-CIO, Council 4, Local 2405* v. *Norwalk*, 156 Conn. App. 79, 85–86, 113 A.3d 430 (2015).

I

The town first claims that the labor board improperly determined that it had jurisdiction over the union's prohibited practice complaint. The town argues that, in finding that the retirement committee's decision to exclude extra duty pay from pension calculations was attributable to the town under principles of agency law, the labor board (1) misapplied the law of agency, (2) failed to adhere to its own administrative precedent, (3) failed to consider the import of Connecticut's Home Rule Act, General Statutes § 7-188, and (4) exceeded its authority under the act by considering whether the retirement plan had been modified. We address each argument in turn.

A

We first address the town's argument that the labor board misapplied the law of agency. "The existence of an agency relationship is a question of fact . . . which may be established by circumstantial evidence based

upon an examination of the situation of the parties, their acts and other relevant information. . . .

"Three elements are required to show the existence of an agency relationship: (1) a manifestation by the principal that the agent will act for him; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal will be in control of the undertaking. . . . [A]n essential ingredient of agency is that the agent is doing something at the behest and for the benefit of the principal." (Citations omitted; internal quotation marks omitted.) *Bank of America, N.A.* v. *Gonzalez*, 187 Conn. App. 511, 516–17, 202 A.3d 1092 (2019). "[T]he labels used by the parties in referring to their relationship are not determinative; rather, a court must look to the operative terms of their agreement or understanding." (Internal quotation marks omitted.) *National Publishing Co.* v. *Hartford Fire Ins. Co.*, 287 Conn. 664, 678, 949 A.2d 1203 (2008).

In its decision, the labor board explained that "[c]ourts have found the absence of a specific enabling statute to be dispositive in determining that a municipal body is not a distinct body politic. . . . The sole applicable enabling statute, [General Statutes] § 7-450,[6] does

[6] General Statutes § 7-450 provides in relevant part: "(a) Any municipality or subdivision thereof may, by ordinance, or with respect to a municipality not having the authority to make ordinances, by resolution adopted by a two-thirds vote of the members of its legislative body, establish pension, retirement, or other postemployment health and life benefit systems for its officers and employees and their beneficiaries, or amend any special act concerning its pension, retirement, or other postemployment health and life benefit systems, toward the maintenance in sound condition of a pension, retirement, or other postemployment health and life benefit fund or funds, provided the rights or benefits granted to any individual under any municipal pension or retirement system shall not be diminished or eliminated. The legislative body of any such municipality, by resolution adopted by a two-thirds vote of its members, may provide for pensions to persons, including survivors' benefits for widows of such persons, not included in such pension or retirement system.

"(b) Notwithstanding the provisions of the general statutes or of any special act, charter, special act charter, home-rule ordinance, local ordinance or other local law, any municipality or subdivision thereof may, by ordinance

not afford the [retirement committee] legal status independent of the town. . . . Furthermore, the record before us reflects the three elements necessary to establish an agency relationship . . . . We find the first two elements in the town's establishment of the [retirement committee] and the pension plans at issue. As to the third element, we note that it is only the general *right* to control, and not the actual exercise of specific control that must be established, that [a]gents may be vested with considerable discretion and independence in *how* they perform their work for the principal's benefit, yet still be deemed subject to the principal's general right to control, and that the control needed to establish the relation of master and servant may be very attenuated. . . .

"The town created the [retirement committee], which exists for the sole purpose of administering a town retirement plan according to its terms. This function does not include the power to modify or to amend the terms of the plans as that authority is expressly reserved to the town's legislative body, not the [retirement committee]. . . .

and amendment thereto, or with respect to a municipality not having the authority to make ordinances, by resolution adopted by a two-thirds vote of the members of its legislative body, (1) establish one or more trusts, or determine to participate in a multiemployer trust, to hold and invest the assets of such pension, retirement or other postemployment health and life benefit system; (2) provide for the management and investment of such system and any such trust, including the establishment of a board or commission or the designation of an existing board or commission for such purposes; or (3) provide for the organization of and the manner of election or appointment of the members of such board or commission. . . .

"(c) The provisions of subsections (a) and (b) of this section shall not operate to invalidate the establishment by any municipality or subdivision thereof, pursuant to the provisions of any public or special act, charter, special act charter, home-rule ordinance, local ordinance or local law, of any postemployment health and life benefit system duly established prior to October 1, 2005, or of any trust duly established or board or commission duly established or designated prior to July 1, 2006, with respect to a pension, retirement or other postemployment health and life benefit system."

"Purporting to administer the pension plans in the absence of a specific application for benefits, the [retirement committee] substantially changed the terms of the plans, diminishing [union] members' future benefits to the town's advantage. We need not assess whether this conduct was unauthorized or ultra vires because . . . the town has ratified the [retirement committee's] conduct. . . . Absent a statute affording the [retirement committee] independent legal status, we cannot but find that it is [the town's] agent acting with actual authority and we reject the specious argument that these circumstances afford the town a valid means to circumvent its duty under the act to negotiate substantial changes to [union] members' future pension benefits with the union." (Citations omitted; emphasis in original; footnote added; footnotes omitted; internal quotation marks omitted.)

On appeal, the town argues that, as to the first two agency elements, "[u]ncontested evidence established that the [retirement committee] constitutes an independent committee, comprised of members from labor, management, and the electorate, with the independent purpose of providing administrative and fiduciary oversight of the retirement plan(s)." As to the third element, the town argues that it "has no oversight capability with respect to the [retirement committee]; it cannot direct the [retirement committee] and it cannot review the [retirement committee's] authorized actions pursuant to its duties."

The labor board responds that, "[v]iewed as a whole, the [retirement plan's] language limiting the [retirement committee's] role to 'administer[ing] the [retirement plan]' and reserving to the town the exclusive right to 'amend, modif[y] or discontinue' the plan terms, evidences an understanding that the town, not the [retirement committee], is in overall control of the undertaking." For its part, the union argues that, "[b]y handpicking

all three members of the [retirement committee], the town controls not just the one member [whom] the town characterizes as 'management,' but the entire panel. . . . [T]he [retirement committee] actively coordinated with the town attorney . . . who would later represent the town before the labor board, to justify reduction of the pension benefit[s] of union members. . . . This is not the behavior of an independent body." We agree with the labor board and the union.

In support of its argument, the town principally relies on § 7.2 of the retirement plan, which provides that the retirement committee's primary responsibility is to administer the retirement plan for the exclusive benefit of the members and grants the retirement committee "conclusive and binding" authority "to determine all questions arising in connection with the administration, interpretation, and application of the [retirement plan]." Although these provisions arguably support the town's position, as the retirement committee's decisions are binding on the town as well as the union, the significance of these provisions is diminished by other provisions in the charter and retirement plan that support the labor board's finding of agency.

For example, the town charter provides that, "[i]n order to provide for the proper administration of the business of the [t]own, the boards, commissions and committees specified [herein] shall, except as otherwise provided herein, be appointed by the [b]oard of [s]electmen by a majority vote of the entire [b]oard to perform the duties and functions herein provided or provided in the General Statutes . . . ." The charter further provides that the retirement committee members are "appointed to *serve* the [b]oard of [s]electmen in accordance with and subject to the provisions of the [t]own [o]rdinances and the General Statutes." (Emphasis added.) Under the retirement plan, "[t]he term of office of each member

of the [retirement] [c]ommittee shall be subject to determination by the [b]oard [of selectmen]. A [c]ommittee member . . . may be removed by the [b]oard [of selectmen] by delivery to such member of written notice of removal, to take effect at a date specified therein, or upon delivery of such written notice to the [c]ommittee if no date is specified."

These provisions establish that the town created the retirement committee to serve the town's board of selectmen by administering the town's retirement plan. The board of selectmen controls the composition of the retirement committee under its authority to appoint and remove committee members. In addition, because the town reserves the right to amend or terminate the retirement plan, the town has the authority to eliminate the retirement committee or limit the retirement committee's authority to administer the retirement plan. Indeed, as noted by the court, the town, by town meeting, "may just as easily remove the [retirement committee's] power to administer or interpret the [retirement plan] as it did in assigning those responsibilities to [the retirement committee]." Accordingly, because the charter and the retirement plan vest in the town the authority to appoint and remove individual members of the retirement committee and to amend or cancel the retirement plan itself, it reasonably follows that the town maintains the right to control the retirement committee.

Furthermore, in deciding to exclude extra duty pay from the calculation of members' retirement benefits, the retirement committee relied on the legal opinion of the town attorney, who was representing the town in ongoing negotiations with the union. Consequently, it reasonably follows that the retirement committee understood that the town wanted the retirement committee to "interpret" the retirement plan in accordance with the town attorney's opinion. See, e.g., *LeBlanc* v. *New England Raceway, LLC*, 116 Conn. App. 267, 275,

976 A.2d 750 (2009) ("[a]n agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act" (internal quotation marks omitted)). Thus, although there may be evidence in the record that supports the town's position, we conclude that there is substantial evidence in the record to support the labor board's findings and that its conclusion that the retirement committee was acting as the town's agent logically follows from the facts found.

B

The town next argues that the labor board failed to follow its own precedent holding that the labor board "[does] not have jurisdiction over [prohibited practice] complaints alleging unilateral change[s] attributed to municipal pension boards analogous to the [retirement committee]." We disagree.

In its decision, the labor board addressed its prior decisions in *In re City of Norwalk*, Conn. Board of Labor Relations Decision No. 3885 (October 22, 2002), and *In re City of Milford*, Conn. Board of Labor Relations Decision No. 3701 (June 10, 1999). The labor board distinguished these cases, noting that "[t]he [retirement committee] . . . must necessarily act independent of the town in specific cases if it is to administer [retirement] plan terms notwithstanding the town's vested interest in conserving finite resources and its obligations to 'make contributions . . . sufficient to make all benefit payments . . . .' Citing [*In re City of Milford* and *In re City of Norwalk*], the town argues [that] our past recognition of this autonomy supports its claim that the [retirement committee's] actions in this case are not attributable to the town through basic principles of agency. We are not persuaded.

"In [*In re*] *City of Milford*, a union did not contest an arbitration award denying a grievance challenging a rejection of a disability pension application on the basis that the pension board making [that] decision was autonomous and acted independent of the municipal employer. We subsequently dismissed the . . . prohibited practice complaint for the same reason as res judicata. Similarly, in [*In re*] *City of Norwalk*, a union accepted the municipal employer's resolution of grievances challenging a pension board's refusal to afford applicants survivorship options and we dismissed the union's unilateral change complaint because the applicants failed to avail themselves of the appeals provision in the pension plan. Both cases involved pension board decisions in cases involving specific employee applications and reason that, while the municipal employer 'is the entity responsible for negotiating pension benefits, that responsibility clearly does not extend to having control over the decisions of the pension board itself . . . . [B]y agreeing to the pension plan, the parties have agreed to this status and function of the pension board.' . . .

"Purporting to administer the pension plans in the absence of a specific application for benefits, the [retirement committee] substantially changed the terms of the plans, diminishing [union] members' future benefits to the town's advantage." (Citation omitted; footnote omitted.)

The town claims that the labor board draws "an artificial distinction" between *In re City of Milford* and *In re City of Norwalk* in concluding "that, because this case arose in the context of general plan administration—and not in the context of an application for benefits—that the [retirement committee] is not an independent entity and was acting as an agent of the town. This conclusion disregarded the substantial evidence presented to the [labor] board." We are not persuaded.

Although the town minimizes the distinction drawn by the labor board, the labor board found it to be significant, noting that the retirement committee had not administered the plan when it effected the unilateral change but rather "substantially changed the terms of the plans, diminishing [union] members' future benefits to the town's advantage." Moreover, in *In re City of Milford* and *In re City of Norwalk*, the labor board did not address the elements of an agency relationship and, instead, summarily found that there was insufficient evidence for it to conclude that either pension board was an agent of the respective city. In the present case, by contrast, the labor board found substantial evidence to support a finding of an agency relationship, and, as we concluded in part I A of this opinion, the record supports the labor board's findings. Accordingly, we conclude that the labor board reasonably determined that the decisions in *In re City of Milford* and *In re City of Norwalk* were distinguishable from the present case.

C

The town next argues that the labor board, by focusing on the absence of an enabling statute granting the retirement committee independent legal status, disregarded "the fact that the town's charter, including its [retirement plan] and the designation of the [retirement committee] therein, constitutes the organic law of the town pursuant to [the] Home Rule Act."[7] We are not persuaded.

[7] General Statutes § 7-188 (a) provides: "Any municipality, in addition to such powers as it has under the provisions of the general statutes or any special act, shall have the power to (1) adopt and amend a charter which shall be its organic law and shall supersede any existing charter, including amendments thereto, and all special acts inconsistent with such charter or amendments, which charter or amended charter may include the provisions of any special act concerning the municipality but which shall not otherwise be inconsistent with the Constitution or general statutes, provided nothing in this section shall be construed to provide that any special act relative to any municipality is repealed solely because such special act is not included in the charter or amended charter; (2) amend a home rule ordinance which has been adopted prior to October 1, 1982, which revised home rule ordi-

"It is settled law that as a creation of the state, a municipality has no inherent powers of its own. . . . A municipality has only those powers that have been expressly granted to it by the state or that are necessary for it to discharge its duties and to carry out its objects and purposes. . . . The Home Rule Act . . . is the relevant statutory authority. Under the [Home Rule] [A]ct, municipalities have the power to adopt a charter to serve as the organic law of that municipality. . . . It is well established that a [town's] charter is the fountainhead of municipal powers. . . . The charter serves as an enabling act, both creating power and prescribing the form in which it must be exercised. . . .

"The purpose [of the act] is clearly twofold: to relieve the General Assembly of the burdensome task of handling and enacting special legislation of local municipal concern and to enable a municipality to draft and adopt a home rule charter or ordinance which shall constitute the organic law of the [municipality], superseding its existing charter and any inconsistent special acts. . . . The rationale of the act, simply stated, is that issues of local concern are most logically answered locally, pursuant to a home rule charter, exclusive of the provisions of the General Statutes. . . . Moreover, home rule legislation was enacted to enable municipalities to conduct their own business and [to] control their own affairs to the fullest possible extent in their own way . . . upon the principle that the municipality itself [knows] better what it want[s] and need[s] than . . . the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs. . . . Consistent with this purpose, a state statute cannot deprive [municipalities] of the right to legislate on

nance shall not be inconsistent with the Constitution or the general statutes; and (3) repeal any such home rule ordinance by adopting a charter, provided the rights or benefits granted to any individual under any municipal retirement or pension system shall not be diminished or eliminated."

purely local affairs germane to [municipal] purposes. . . . Consequently, a general law, in order to prevail over a conflicting charter provision of a [municipality] having a home rule charter, must pertain to those things of general concern to the people of the state . . . ." (Citations omitted; internal quotation marks omitted.) *Cook-Littman* v. *Board of Selectmen*, 328 Conn. 758, 768–69, 184 A.3d 253 (2018).

The town argues that, "pursuant to the Home Rule Act, the charter and the [retirement] plan define that all issues related to pension administration must be determined exclusively by the [retirement committee]. . . . The provisions of the [retirement] plan vest in the [retirement committee] the exclusive authority to interpret the plan provisions. As such, the determination of whether the salary contributions and benefit calculations include police extra duty pay falls squarely within the [retirement committee's] enumerated powers and duties. Further, the [retirement committee's] conclusion with respect to whether police extra duty pay constitutes salary does not conflict with any statutory mandate or any definition or requirement set forth in the charter or the plan itself." In its reply brief, the town further argues that "the state does not have an interest in whether the town's police officers' extra duty pay is included in or excluded from their pension benefit calculations. This is a matter of local concern and the Home Rule Act should apply."

Because the labor board's decision neither deprives the town of the right to legislate on purely local affairs nor invalidates the town's charter or retirement plan, it is unclear how the Home Rule Act undermines the labor board's finding that the retirement committee was acting as the town's agent when it unilaterally effected the change at issue. To the extent that the town suggests that the Home Rule Act allows the town to avoid its statutory obligation to bargain with the union regarding

changes to a mandatory subject of bargaining, we are not persuaded. Aside from the additional description of the charter and the retirement plan as the "organic law" of the town, the town simply restates its argument that the provisions of the retirement plan establish the independence of the retirement committee. The labor board rejected this argument and concluded that the retirement committee was acting as the town's agent, and we have determined that this conclusion is supported by substantial evidence in the record. Accordingly, we conclude that the labor board's decision did not violate the town's rights under the Home Rule Act.

D

Finally, the town argues that, "assuming arguendo, that the [labor] board had jurisdiction over the [retirement committee], its order remains outside the scope of the subject matters that it has jurisdiction to adjudicate." Specifically, the town argues that "[d]etermining whether a public retirement system plan has been modified (properly or defectively) is not within the [labor] board's powers and it cannot decide a prohibited practice complaint premised on a legal determination that it is not empowered to make." We are not persuaded.

The labor board has jurisdiction to adjudicate a prohibited practice complaint under General Statutes § 7-471 (5), which provides in relevant part: "Whenever a question arises as to whether a practice prohibited by sections 7-467 to 7-477, inclusive, has been committed by a municipal employer or employee organization, the [labor] board shall consider that question . . . ." In *Piteau* v. *Board of Education*, 300 Conn. 667, 689, 15 A.3d 1067 (2011), our Supreme Court noted that, although the labor board "is not the proper body to resolve contract disputes that do not involve an allegation of a prohibited labor practice, [there is] no authority . . . to support [a] claim that the [labor board] may

not exercise jurisdiction over a breach of contract claim when it is interdependent with a claim over which the [labor board] does have jurisdiction."

In the present case, the union filed a prohibited practice complaint alleging that the town unilaterally changed a term or condition of employment as to which it was required to bargain with the union. Under § 7-471 (5), the labor board had jurisdiction to consider whether such a unilateral change occurred and, in considering that issue, the labor board found that the town had changed a condition of employment by reducing the future retirement benefits of union members without bargaining. Thus, the labor board had jurisdiction to consider the terms of the retirement plan insofar as it was necessary to resolve the prohibited practice complaint, over which the labor board had jurisdiction. See id., 688–89; see also *National Labor Relations Board* v. *Strong*, 393 U.S. 357, 361, 89 S. Ct. 541, 21 L. Ed. 2d 546 (1969) ("[T]he [NLRB] may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts. . . . It may also, if necessary to adjudicate an unfair labor practice, interpret and give effect to the terms of a collective bargaining contract." (Citation omitted.)). Stated differently, the labor board properly considered the terms of the charter and retirement plan to the extent necessary to resolve the union's prohibited practice complaint. Accordingly, we conclude that the labor board did not exceed its jurisdiction in the present case.

In sum, for all of the foregoing reasons, we conclude that the labor board's findings are supported by substantial evidence in the record and that its conclusion that it had jurisdiction to consider the union's prohibited practice complaint reasonably follows from the facts found.

II

Finally, the town claims that the labor board, in considering the town's defense to the union's unilateral change complaint, improperly failed to apply the contract coverage standard, as adopted by the NLRB in *MV Transportation, Inc.*, supra, 368 N.L.R.B. No. 66.

The following legal principles regarding the unilateral change doctrine are relevant to the town's claim. In *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 743, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962), the United States Supreme Court held that an employer violates § 8 (a) (5) of the National Labor Relations Act (NLRA), when, without first bargaining to impasse, the employer unilaterally changes a term or condition of employment that is a mandatory subject of bargaining. Although *Katz* involved a unilateral change during negotiations for an initial collective bargaining agreement, "[t]he *Katz* doctrine has been extended as well to cases where . . . an existing agreement has expired and negotiations on a new one have yet to be completed." *Litton Financial Printing Division* v. *National Labor Relations Board*, 501 U.S. 190, 198, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991).

Likewise, a municipal employer and an employee organization "have the duty to bargain collectively . . . ." General Statutes § 7-469. "[A] unilateral change to an employment condition constitutes an unlawful refusal to negotiate under the [act]. . . . To establish a unilateral change of a condition of employment, the union must establish that the employment practice was clearly enunciated and consistent, [that it] endure[d] over a reasonable length of time, and [that it was] an accepted practice by both parties. . . .

"However, not all unilateral changes made by an employer constitute a refusal to bargain, such as when the change does not amount to a substantial change in

a major term or condition . . . or where the collective bargaining agreement gives express or implied consent to the type of unilateral action involved." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Board of Education* v. *State Board of Labor Relations*, 299 Conn. 63, 73–74, 7 A.3d 371 (2010).

Although both this court and our Supreme Court have "had little occasion to address the standards that apply in determining whether a union has established a violation of labor law under the unilateral change doctrine, the [labor] board has applied the doctrine in many cases over many years." Id., 73 n.8.

In the present case, the town does not dispute that employees' pension benefits are a condition of employment that are a mandatory subject of collective bargaining under the act or that the inclusion of extra duty pay in the calculation of pension benefits was a clearly enunciated and consistent past practice. See *West Hartford Education Assn., Inc.* v. *DeCourcy*, 162 Conn. 566, 576, 295 A.2d 526 (1972) ("[t]he significance of calling something a 'condition of employment' is that it then becomes a mandatory subject of collective bargaining"); see also *Allied Chemical & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 180, 92 S. Ct. 383, 30 L. Ed. 2d 341 (1971) ("future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining"). Instead, the town claimed that the union had waived its statutory right to bargain regarding the change to the calculation of members' pensions because the references to the retirement plan and the defined contribution plan in article XVI of the parties' agreement authorized the retirement committee's unilateral action.

"Because waiver of statutory rights by unions is disfavored, the purported waiver must be clear and unmis-

takable. . . . Waiver may be established by either an express provision in the collective bargaining agreement, or by the conduct of the parties, including past practices and bargaining history. . . . An employer relying on a claim of waiver of a duty to bargain bears the burden of demonstrating it clearly and unmistakably." (Citations omitted; internal quotation marks omitted.) *Greater Bridgeport Transit District* v. *State Board of Labor Relations*, 43 Conn. Supp. 340, 358, 653 A.2d 229 (1993), aff'd, 232 Conn. 57, 653 A.2d 151 (1995).

In the present case, the labor board, applying the clear and unmistakable waiver standard, rejected the town's defense, explaining that "[n]either the collective bargaining agreement nor the [retirement] plan documents contain the unequivocal and specific language necessary to waive the union's right to bargaining over removal of extra duty compensation from pension calculations and contributions. There is no mention of the role of extra duty pay in either plan, the specific past practice at issue. As to past practices in general, consideration of extra duty pay for pension purposes is, in our view, protected under [article] XVII, § 2, of the collective bargaining agreement as a '[benefit], [right] and [privilege] enjoyed by the employees' that was not 'relinquished or abridged by or in conflict with the other provisions' of the agreement. Nor do we find that the 1995 amendments to the [retirement] plan . . . made any significant change to the [retirement committee's] authority. The [retirement committee] already had 'complete authority in all matters pertaining the administration' of the [retirement plan] under the 1967 plan document and the town does not contend that the [retirement committee] is empowered to perform functions in addition to that role."

Until recently, the NLRB also applied the clear and unmistakable waiver standard when considering an employer's defense to a unilateral change complaint.

See *MV Transportation, Inc.*, supra, 368 N.L.R.B. No. 66, slip op., p. 4. "This standard is predicated on the union's *waiver* of its right to insist on bargaining, and it requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." (Emphasis in original; internal quotation marks omitted.) Id.

Now, however, under the contract coverage standard recently enunciated in *MV Transportation, Inc.*, the NLRB "will assess the merits of [an employer's] defense by undertaking the more limited review necessary to determine whether the parties' collective-bargaining agreement covers the disputed unilateral change (or covered it, if the disputed change was made during the term of an agreement that has since expired). In doing so, the [NLRB] will give effect to the plain meaning of the relevant contractual language, applying ordinary principles of contract interpretation; and the [NLRB] will find that the agreement covers the challenged unilateral act if the act falls within the compass or scope of contract language that grants the employer the right to act unilaterally. . . . Accordingly, [the NLRB] will not require that the agreement specifically mention, refer to or address the employer decision at issue. . . . Where contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally, and the employer will not have violated [§] 8 (a) (5) [of the National Labor Relations Act (NLRA)]." (Citation omitted; internal quotation marks omitted.) Id., 11.

The NLRB noted that the contract coverage standard encourages employers and unions "to foresee potential labor-management relations issues, and resolve those issues through collective bargaining in as comprehensive a manner as practicable. Moreover, by ensuring

that *all* provisions of the parties' agreement are given effect, the contract coverage test will end the [NLRB's] practice of selectively applying exacting scrutiny only to those provisions of a labor contract that vest in the employer a right to act unilaterally. The contract coverage test will also end the [NLRB's] practice of sitting in judgment on certain provisions of the parties' agreement—contrary to the authoritative teaching of the Supreme Court—by refusing to give effect to those provisions unless a standard of specificity is met that is, in practice, all but impossible to meet. By adopting contract coverage, [the NLRB] will also ensure that [its] contract interpretations remain within the [NLRB's] limited authority to interpret collective-bargaining agreements in the exercise of [its] primary jurisdiction to administer the [NLRA], but because [the NLRB] will apply the same standard the courts apply, [its] interpretations will predictably align with theirs as well. Finally, adopting contract coverage will discourage forum shopping. Since the [NLRB] will resolve unilateral-change disputes under the same standard that arbitrators apply, there will no longer be any incentive to bypass grievance arbitration, and such disputes will be channeled into the method agreed upon by the parties . . . ." (Emphasis in original; footnote omitted; internal quotation marks omitted.) Id., 9.

One member of the NLRB, Lauren McFerran, issued a separate opinion in *MV Transportation, Inc.*, concurring in part and dissenting in part. McFerran noted her disapproval with the NLRB's decision to overrule seventy years of NLRB precedent by abandoning the clear and unmistakable waiver standard. Id., 25 (Member McFerran, concurring in part and dissenting in part). She explained that the United States Supreme Court endorsed the clear and unmistakable waiver standard in *National Labor Relations Board* v. *C & C Plywood Corp.*, 385 U.S. 421, 430–31, 87 S. Ct. 559, 17 L. Ed. 2d

486 (1967), holding that the NLRB properly concluded that a contested provision in a collective bargaining agreement did not authorize the employer's unilateral action. *MV Transportation, Inc.*, supra, 368 N.L.R.B. No. 66, slip op., p. 29 (Member McFerran, concurring in part and dissenting in part); see also *C & C Plywood Corp.*, 148 N.L.R.B. 414, 416 (1964) ("Waiver of a statutory right will not lightly be inferred. The relinquishment to be effective must be 'clear and unmistakable.' "). In *National Labor Relations Board* v. *C & C Plywood Corp.*, supra, 430, the United States Supreme Court reasoned that, "[i]n reaching [its] conclusion, the [NLRB] relied upon its experience with labor relations and the [NLRA's] clear emphasis upon the protection of free collective bargaining. We cannot disapprove of the [NLRB's] approach. For the law of labor agreements cannot be based upon abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying the context."

In her opinion concurring in part and dissenting in part, McFerran also explained that "the theory of contract coverage originated with the District of Columbia Circuit, decades after *C & C Plywood* [*Corp.*] was decided. The [c]ircuit's seminal 1993 decision in [*National Labor Relations Board* v. *United States Postal Service*, 8 F.3d 832 (D.C. Cir. 1993)] is notable both for its failure to address the [United States] Supreme Court's decision in *C & C Plywood* [*Corp.*] and for its inconsistency with [c]ircuit precedent endorsing the [NLRB's] waiver standard. . . .

"There is no acknowledgment in [*United States*] *Postal Service* that the waiver doctrine was (even then) long and firmly established in [NLRB] law, no acknowledgment that the District of Columbia Circuit had previously rejected the [NLRB's] deviation from the waiver standard, and no acknowledgment that the Supreme

Court had approved the [NLRB's] application of the waiver standard in *C & C Plywood* [*Corp.*]. . .

"From this flawed analytical foundation, the [District of Columbia] Circuit reached a flawed result imposing a new test that leading labor law scholars have criticized. Those scholars observe that the [NLRB's] waiver standard is more consistent with the policy of the [NLRA] and that statutory policy is better realized when bargaining over real and pressing matters is not held hostage to linguistic contests over hypothetical future contingencies." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *MV Transportation, Inc.*, supra, 368 N.L.R.B. No. 66, slip op., 30–31 (Member McFerran, concurring in part and dissenting in part).

We note that the contract coverage standard has been considered and adopted by a minority of federal circuit courts of appeal. At the time *MV Transportation, Inc.*, was decided, only the First, Seventh, and District of Columbia Circuits had adopted the contract coverage standard. See id., 29 n.41 (Member McFerran, concurring in part and dissenting in part). Recently, the Second Circuit also adopted the contract coverage standard, noting that it would "defer to the [NLRB's] interpretations of the NLRA—including with respect to the legal standard governing an unfair labor practice charge—as long as its interpretations are 'rational and consistent with the [NLRA].' " *International Brotherhood of Electrical Workers, Local Union 43* v. *National Labor Relations Board*, 9 F.4th 63, 70–71 (2d Cir. 2021). After considering the NLRB's analysis in *MV Transportation, Inc.*, the Second Circuit concluded that it would "defer to the [NLRB] and adopt the contract coverage standard as rational and consistent with the [NLRA]." Id., 73. The United States Supreme Court and the remaining federal circuits have not addressed whether they should similarly defer to the NLRB and abandon the clear and

unmistakable waiver test in favor of the contract coverage standard.

In the present case, the town claims that the contract coverage standard should apply, arguing that the labor board's continued application of the clear and unmistakable waiver standard raises the same issues as those identified by the NLRB and "runs counter to the framework set out by the Connecticut Supreme Court with respect to interpreting collective bargaining agreements." The labor board responds that the NLRB's decisions are not binding precedent and that its decision to adhere to the waiver standard is entitled to deference. We agree with the labor board.

We begin by noting that "[t]he Connecticut labor board, like the NLRB, has broad discretion in administering the state labor laws." *Connecticut State Labor Relations Board* v. *Connecticut Yankee Greyhound Racing, Inc.*, 175 Conn. 625, 638, 402 A.2d 777 (1978). "While the interpretation of provisions of the federal act may be extremely helpful, however, neither the state board nor our courts are compelled to slavishly follow policies which have been adopted by the NLRB for the purpose of ensuring administrative efficiency at the federal level." Id., 633–34.

As previously noted in this opinion, the labor board declined to adopt the contract coverage standard. The labor board has applied the clear and unmistakable waiver standard for decades, and that standard has been affirmed by our Supreme Court. See *Greater Bridgeport Transit District* v. *State Board of Labor Relations*, 232 Conn. 57, 64, 653 A.2d 151 (1995) (adopting trial court's decision as "a statement of the facts and the applicable law"). Moreover, although the United States Supreme Court has endorsed the clear and unmistakable waiver standard, it has not considered the NLRB's application of the contract coverage standard. In addition, as the

agency tasked with enforcing the labor laws of this state, the labor board's policy decision is entitled to deference. See *Connecticut State Labor Relations Board* v. *Connecticut Yankee Greyhound Racing, Inc.*, supra, 175 Conn. 640 ("[b]ecause the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the [labor] [b]oard's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy" (internal quotation marks omitted)). Consequently, just as the Second Circuit, in *International Brotherhood of Electrical Workers, Local Union 43*, deferred to the NLRB, we similarly defer to the labor board in this case. For these reasons, we conclude that the labor board did not act illegally, arbitrarily or in abuse of its discretion in declining to adopt the contract coverage standard.[8]

[8] Following its decision in *MV Transportation, Inc.*, the NLRB held "that provisions in an expired collective-bargaining agreement do not cover post-expiration unilateral changes unless the agreement contained language explicitly providing that the relevant provision would survive contract expiration." *Nexstar Broadcasting, Inc.*, 369 N.L.R.B. No. 61, slip op., p. 2 (April 21, 2020), enforcement granted, *National Labor Relations Board* v. *Nexstar Broadcasting, Inc.*, 4 F.4th 801 (9th Cir. 2021); see *National Labor Relations Board* v. *Nexstar Broadcasting, Inc.*, supra, 809 ("[A]n employer may not excuse itself from its obligation to maintain status quo working conditions after the [collective bargaining agreement's] expiration by simple reference to the broad compass or scope of *expired* contractual terms. Rather, contract rights only survive expiration if the [collective bargaining agreement] explicitly so provides." (Emphasis in original.)).

In the present case, the town made the unilateral change to the retirement plan and the defined contribution plan in October, 2017, *after* the parties' agreement had expired on June 30, 2017. The provision in the parties agreement on which the town relies provides that "[t]he [t]own agrees to maintain in effect *for the duration of this* [*a*]*greement* the [retirement plan] dated July 1, 1967, as amended on July 1, 1995 . . . ." (Emphasis added.) Accordingly, because this provision does not contain express language providing that it will survive the contract expiration, it appears that, even if we agree with the town and adopt the contract coverage standard in Connecticut, that standard would not apply in the present case because the unilateral change at issue was made after the expiration of the collective bargaining agreement.

Finally, we note that the town did not claim in either its principal or reply brief to this court that the labor board misapplied the clear and unmistakable waiver standard to the facts it found. Nevertheless, at oral argument before this court, counsel for the town, for the first time, argued that the town should prevail under the clear and unmistakable waiver standard, as well as the contract coverage standard. Because the town did not properly brief whether the labor board correctly applied the clear and unmistakable waiver standard, we decline to consider it. See *In re Adelina G.*, 56 Conn. App. 40, 42, 740 A.2d 920 (1999) ("[b]ecause the issue was raised for the first time during oral argument and, therefore, has not been properly briefed, we decline to consider it").

The judgment is affirmed.

In this opinion the other judges concurred.

ROBBINS EYE CENTER, P.C. *v.* COMMERCE PARK ASSOCIATES, LLC, ET AL.
(AC 44657)

Moll, Clark and DiPentima, Js.

Syllabus

The plaintiff sought to recover damages from the defendant property owner, C Co., and its property manager, R Co., for, inter alia, damages incurred as a result of the defendants' alleged negligent failure to maintain certain real property in a reasonably safe condition. R, the sole shareholder of the plaintiff, and C Co. entered into a lease for a portion of one of C Co.'s commercial buildings. Although not a party to the lease, the plaintiff occupied the leased premises. The plaintiff initiated the present action, and the trial court rendered judgment in its favor solely with respect to its negligence claim against C Co., determining that C Co. had committed gross negligence and awarding the plaintiff damages, from which C Co. appealed to this court. Thereafter, the trial court granted the plaintiff's application for a prejudgment remedy to secure its judgment, authorizing the plaintiff to attach C Co.'s real and personal property and to garnish any and all debts due and obligations owed to C Co. After determining

that the real property subject to the prejudgment remedy order was encumbered by a mortgage that exceeded the property's fair market value, the plaintiff filed a motion to modify, seeking authorization to garnish an account receivable owed to C Co. by R Co. The trial court sustained the defendants' objection to the motion, determining that permitting the plaintiff to garnish the account receivable would be contrary to the source of recovery limitation provision of the lease. Thereafter, in response to the plaintiff's motion to reargue and reconsider the court's order sustaining the defendants' objection, the trial court vacated its prior ruling and granted the plaintiff's motion to modify. The court ordered that the plaintiff was authorized to garnish the account receivable, that payments made thereafter on the account receivable would be held in escrow, and that the escrowed funds could be released only following written authorization of the parties or a court order. Subsequently, this court reversed a portion of the initial judgment rendered in favor of the plaintiff, only with respect to the amount of damages awarded and remanded the case to the trial court with direction to render judgment in the plaintiff's favor in a reduced amount. On remand, the trial court rendered judgment in the plaintiff's favor on its negligence claim against C Co. in accordance with a stipulation executed by the parties, which provided that judgment should enter in the plaintiff's favor in a reduced amount. Thereafter, the plaintiff filed a motion seeking to compel C Co. to deliver to the plaintiff all funds held in escrow and any future payments received on the account receivable. The trial court granted the plaintiff's motion to compel, and the defendants appealed to this court. *Held* that the trial court did not err in granting the plaintiff's motion to compel because the source of recovery limitation provision of the lease did not preclude the plaintiff from collecting the escrowed funds and payments at issue: the lease's source of recovery limitation provision provided, in clear and unambiguous terms, that such provision applied only to R as the tenant and, in contrast to certain other provisions of the lease, did not include language extending its applicability to all entities related to R; moreover, the plaintiff's negligence claim against C Co. was not subject to the lease's source of recovery limitation provision because, by its clear language, that provision applied only to a breach or default by C Co. with respect to its obligations under the lease, and the plaintiff was not a party to the lease and did not assert a claim thereunder but, rather, asserted a tort claim sounding in negligence based on C Co.'s breach of its common-law duty to maintain its property in a reasonably safe condition; furthermore, the defendants' reliance on the lease's negligence waiver and jury trial waiver provisions and the trial court's construction thereof to support its argument that the plaintiff and its negligence claim were subject to the source of recovery limitation was misplaced, as those provisions contained language extending their applicability to the plaintiff and its claim, which language was absent from the lease's source of recovery limitation provision.

Argued February 14—officially released May 10, 2022

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Krumeich*, *J.*; thereafter, the court, *Krumeich*, *J.*, granted the plaintiff's application for a prejudgment remedy; subsequently, the court, *Hon. George N. Thim*, judge trial referee, granted the plaintiff's motion to modify the prejudgment remedy order; thereafter, the court, *Krumeich*, *J.*, rendered judgment in part for the plaintiff, from which the defendants appealed to this court, *Lavine*, *Prescott* and *Eveleigh*, *Js.*, which reversed the trial court's judgment only with respect to the amount of damages awarded and remanded the case to the trial court with direction to render judgment in the plaintiff's favor; subsequently, on remand, the court, *Krumeich*, *J.*, rendered judgment in the plaintiff's favor on its negligence claim against the named defendant in accordance with a stipulation executed by the parties; thereafter, the court, *Stevens*, *J.*, granted the plaintiff's motion to compel, and the defendants appealed to this court. *Affirmed.*

Joseph DaSilva, *Jr.*, with whom, on the brief, was *Colin B. Connor*, for the appellants (defendants).

Aaron A. Romney, with whom, on the brief, was *James M. Moriarty*, for the appellee (plaintiff).

Opinion

MOLL, J. The defendants, Commerce Park Associates, LLC (Commerce Park), and RDR Management, LLC (RDR), appeal from the judgment of the trial court granting a postjudgment motion of the plaintiff, Robbins Eye Center, P.C., seeking an order compelling Commerce Park to deliver to the plaintiff's counsel certain escrowed funds and future payments received by Commerce Park vis-à-vis an account receivable. The dispositive issue raised by the defendants on appeal is whether

a provision in a commercial lease executed by Commerce Park and Kim Robbins, who owns the plaintiff and is a nonparty to this matter, precludes the plaintiff from collecting the escrowed funds and payments at issue. We conclude that the lease provision does not bar the plaintiff's collection efforts, and, therefore, we affirm the judgment of the trial court.

The following facts, as drawn from this court's opinion in *Commerce Park Associates, LLC* v. *Robbins*, 193 Conn. App. 697, 220 A.3d 86 (2019), cert. denied sub nom. *Robbins Eye Center, P.C.* v. *Commerce Park Associates, LLC*, 334 Conn. 912, 221 A.3d 447 (2020), and cert. denied sub nom. *Robbins Eye Center, P.C.* v. *Commerce Park Associates, LLC*, 334 Conn. 912, 221 A.3d 448 (2020), and procedural history are relevant to our resolution of this appeal. Robbins is an ophthalmologist and the sole shareholder of the plaintiff, which operates an ophthalmological and surgical practice. Id., 702, 704. In 1995, Robbins began leasing space in the lower level of a commercial building in Bridgeport owned by Commerce Park. Id., 704. Pursuant to a lease executed on August 1, 2007 (lease), Robbins rented the entire lower level of the building, consisting of 20,750 square feet (leased premises). Id., 704–705. Robbins then spent $1,186,267 to remodel the leased premises, turning them into a "state-of-the-art eye care center, complete with a surgical center with two operating rooms certified by the state for optical surgery . . . a LASIK facility, and an optical shop." (Internal quotation marks omitted.) Id., 706. Although Robbins was a party to the original and all subsequent leases, the leased premises were occupied by the plaintiff. Id., 704.

In 2016, the plaintiff commenced the underlying action against the defendants.[1] The plaintiff's operative complaint asserted claims sounding in negligence against

[1] In 2014, Commerce Park commenced a separate action against Robbins to recover back rent. See *Commerce Park Associates, LLC* v. *Robbins*, Superior Court, judicial district of Fairfield, Docket No. CV-14-4052827-S

the defendants; common-law recklessness against Commerce Park only; and violations of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., against the defendants. The plaintiff's claims were predicated on events that transpired prior to June 30, 2015, when the plaintiff and Robbins vacated the leased premises, including a major flooding incident in 2013 that caused substantial damage to the plaintiff's equipment, materials, and work spaces, and sewage issues in 2015 that resulted in sewer water and waste flooding the leased premises. See *Commerce Park Associates, LLC* v. *Robbins*, supra, 193 Conn. App. 706–708.

On February 6, 2018, following a seven day trial in July, 2017, the trial court, *Krumeich, J.*, rendered judgment in favor of the plaintiff on its negligence claim against Commerce Park and against the plaintiff as to its remaining claims. With respect to the plaintiff's negligence claim against Commerce Park, the court determined that, pursuant to a negligence waiver provision set forth in the lease, the plaintiff had waived Commerce Park's liability for any ordinary negligence; however, the provision excluded any waiver of liability for conduct constituting " 'gross negligence' . . . ." The court determined that Commerce Park had committed conduct that was grossly negligent and awarded the plaintiff $899,190 in damages, which the court later increased to $958,041.92, plus postjudgment interest. Commerce Park appealed from the portion of the judgment ren-

(rent action). The rent action was consolidated with the underlying action for trial. In 2018, judgment was rendered in part in favor of Commerce Park in the rent action. See *Commerce Park Associates, LLC* v. *Robbins*, supra, 193 Conn. App. 712–13. Subsequently, this court reversed the judgment rendered in the rent action only as to the calculation of damages and remanded the matter for a new hearing limited to a determination of the amount of rent owed by Robbins to Commerce Park. Id., 745. On remand, the trial court, *Krumeich, J.*, rendered judgment in the rent action in accordance with a stipulation executed by Commerce Park and Robbins. That judgment is not at issue in this appeal.

dered in the plaintiff's favor.[2] *Commerce Park Associates, LLC* v. *Robbins*, supra, 193 Conn. App. 703–704.

On February 14, 2018, the plaintiff filed an application for a prejudgment remedy, seeking to secure the judgment rendered in its favor against Commerce Park by requesting authorization (1) to "attach sufficient property of [Commerce Park] to secure [the judgment], including, but not limited to, any and all of [Commerce Park's] real property and personal property wherever located" and (2) to "garnish any and all debts due and obligations owed to [Commerce Park] . . . wherever held and in whatever form . . . ." On March 2, 2018, Commerce Park filed an objection only as to the scope of the relief requested by the plaintiff. Relying on paragraph 28 (b) of the lease,[3] Commerce Park argued that the plaintiff was limited to seeking attachment of the leased premises and/or rents or property related to the leased premises only. On March 22, 2018, following a hearing held on March 5, 2018, the court granted the plaintiff's application, determining that there was probable cause to believe that the plaintiff would recover a judgment against Commerce Park in the amount of $1,111,328.63, which included postjudgment interest, and authorizing the plaintiff to attach certain real property in Bridgeport owned by Commerce Park beyond the leased premises. In its decision, the court did not expressly address Commerce Park's argument predicated on paragraph 28 (b) of the lease. No appeal was taken from that decision.

On August 2, 2018, the plaintiff filed a motion to modify the prejudgment remedy order to authorize it

[2] Although Commerce Park and RDR jointly filed their appeal, the claims were raised solely by Commerce Park. *Commerce Park Associates, LLC* v. *Robbins*, supra, 193 Conn. App. 703 n.2.

[3] Paragraph 28 (b) of the lease provides in relevant part: "In the event of any breach or default by Landlord with respect to any of Landlord's obligations hereunder, it is agreed and understood that Tenant shall look solely to the estate and property of Landlord in the Demised Premises for the satisfaction of Landlord's remedies . . . ."

to garnish an account receivable owed to Commerce Park by RDR, which was Commerce Park's property manager, as the plaintiff had come to believe that the real property subject to the prejudgment remedy order was encumbered by a mortgage that exceeded the property's fair market value.[4] On September 26, 2018, the defendants filed an objection. On September 27, 2018, following a hearing held on the same day, the court, *Hon. George N. Thim*, judge trial referee, sustained the defendants' objection, determining that permitting the plaintiff to garnish the account receivable "would be contrary to the provisions of [paragraph] 28 (b) of the [lease] . . . ."

On October 18, 2018, the plaintiff filed a motion to reargue and to reconsider the court's September 27, 2018 order sustaining the defendants' objection to the plaintiff's motion to modify the prejudgment remedy order. The plaintiff argued that (1) it did not have a fair opportunity to address the defendants' argument regarding paragraph 28 (b) of the lease because the defendants had raised that argument for the first time at the hearing on the motion to modify, and (2) as reflected in the transcript of the March 5, 2018 hearing held on the plaintiff's application for a prejudgment remedy, Judge Krumeich previously had rejected the defendants' reliance on paragraph 28 (b) in issuing the prejudgment remedy order. In addition, the plaintiff contended that enforcing paragraph 28 (b) would contravene public policy by exempting Commerce Park from

[4] The plaintiff also sought to modify the prejudgment remedy order to allow it to attach a certain account containing funds to secure a judgment rendered in a separate action filed by Commerce Park against Robbins to recover back rent. See footnote 1 of this opinion. The parties subsequently executed a stipulation, which was approved by the court, *Hon. George N. Thim*, judge trial referee, authorizing the plaintiff to attach and/or garnish that account but prohibiting the release of the funds without a written agreement of the parties or a court order.

liability for its grossly negligent conduct. The defendants did not file a written objection. On December 6, 2018, the court, *Hon. George N. Thim*, judge trial referee, issued an order stating that Judge Krumeich previously had determined that paragraph 28 (b) of the lease (1) does not apply to the plaintiff, which is not a party to the lease, (2) does not apply to a claim of gross negligence, and (3) contravenes public policy. Agreeing with Judge Krumeich's interpretation of paragraph 28 (b), the court vacated its prior ruling and granted the plaintiff's motion to modify. On December 11, 2018, the court ordered that (1) the plaintiff was authorized to garnish and/or attach the account receivable, (2) payments made on the account receivable on or after December 6, 2018, would be held in escrow by Commerce Park's counsel, and (3) the funds held in escrow could not be released without a written agreement of the parties or a court order. That same day, Commerce Park appealed from the court's judgment granting the plaintiff's motion to modify. See *Robbins Eye Center, P.C.* v. *Commerce Park Associates, LLC*, Connecticut Appellate Court, Docket No. 42375 (appeal withdrawn October 31, 2019).

On October 22, 2019, this court released its decision reversing the portion of the February 6, 2018 judgment rendered in favor of the plaintiff only with respect to the amount of damages awarded and remanded the case to the trial court with direction to render judgment in the plaintiff's favor in the amount of $741,847.34. *Commerce Park Associates, LLC* v. *Robbins*, supra, 193 Conn. App. 745–46. On October 31, 2019, Commerce Park withdrew its appeal from the judgment granting the plaintiff's motion to modify the prejudgment remedy order. On February 7, 2020, the court, *Krumeich, J.*, rendered judgment in the plaintiff's favor on its negligence claim against Commerce Park in accordance with a stipulation executed by the parties, which provided

that judgment shall enter in the plaintiff's favor in the amount of $744,093.16, including taxable costs, and which included a calculation of postjudgment interest.

On April 24, 2020, the plaintiff filed a motion seeking an order compelling Commerce Park to deliver to the plaintiff (1) all funds held in escrow pursuant to the court's December 11, 2018 order of garnishment and (2) all future payments received by Commerce Park vis-à-vis the account receivable (motion to compel). The plaintiff stated that, per the December 11, 2018 order, either a written agreement by the parties or a court order was necessary to release the escrowed funds. The plaintiff further asserted that Commerce Park did not agree to the release of the funds on the basis of its position that paragraph 28 (b) of the lease restricted the source of the plaintiff's recovery to the leased premises. The plaintiff maintained that Commerce Park's argument predicated on paragraph 28 (b) previously had been rejected by Judge Krumeich and Judge Thim in deciding, respectively, its application for a prejudgment remedy and its motion to modify the prejudgment remedy order. On July 8, 2020, the defendants filed an objection, arguing that paragraph 28 (b) prohibited the plaintiff from recovering the funds and that the court's prior rulings rejecting their reliance on that provision, issued in the context of a prejudgment remedy, did not constitute the law of the case as to the plaintiff's collection efforts. Thereafter, the plaintiff filed a reply brief claiming, inter alia, that the defendants' argument grounded in paragraph 28 (b) was precluded by collateral estoppel or was subject to the law of the case doctrine.

On December 29, 2020, after hearing argument from the parties on September 22, 2020, the court, *Stevens*, *J.*, issued an order rejecting the plaintiff's contention that collateral estoppel or the law of the case doctrine barred the defendants from invoking paragraph 28 (b)

of the lease as a defense to the motion to compel. In addition, the court ordered the parties to file supplemental briefs to delineate further their positions regarding paragraph 28 (b). The parties subsequently filed supplemental briefs in accordance with the court's order. The court heard additional argument on February 22 and March 29, 2021.

On April 8, 2021, the court granted the motion to compel. First, the court concluded that no provision of the lease made the terms of the entire lease applicable to the plaintiff, which was not a party to the lease, and that paragraph 28 (b) did not contain language extending its application to the plaintiff. The court also determined that paragraph 28 (b), as written, applied only to " 'any breach or default by [Commerce Park] with respect to [Commerce Park's] obligations [under the lease]' . . . ." Alternatively, assuming arguendo that paragraph 28 (b) applied to the plaintiff and its negligence claim against Commerce Park in this matter, the court determined that carrying out that provision would violate public policy because "the evidence fails to establish that the limitations of [paragraph] 28 (b) allow any meaningful or reasonable recovery to compensate the plaintiff for the damages caused by [Commerce Park's] gross negligence." This appeal followed. Additional facts will be set forth as necessary.[5]

[5] On February 10, 2022, we issued an order, sua sponte, instructing the parties to be prepared to address at oral argument the issue of "whether this appeal is subject to the jurisdictional time period set forth in General Statutes § 52-278*l* (b). See *Ambroise* v. *William Raveis Real Estate, Inc.*, 226 Conn. 757, 764–67, 628 A.2d 1303 (1993)." Section 52-278*l* (b) sets forth a seven day limitation period with respect to an appeal from an order (1) granting or denying a prejudgment remedy following a hearing under General Statutes § 52-278d, (2) granting or denying a motion to dissolve or modify a prejudgment remedy under General Statutes § 52-278e, or (3) granting or denying a motion to preserve an existing prejudgment remedy under General Statutes § 52-278g. At oral argument, the parties' respective counsel both argued that the jurisdictional time period of § 52-278*l* (b) did not apply to this appeal taken from the court's granting of the plaintiff's postjudgment motion to compel. Upon additional reflection, and particularly in light of

The dispositive claim raised by the defendants on appeal is that the court improperly concluded that paragraph 28 (b) of the lease does not apply either to (1) the plaintiff or (2) the plaintiff's negligence claim against Commerce Park. We disagree.[6]

"In construing a written lease, which constitutes a written contract, three elementary principles must be kept constantly in mind: (1) The intention of the parties is controlling and must be gathered from the language of the lease in the light of the circumstances surrounding the parties at the execution of the instrument; (2) the language must be given its ordinary meaning unless a technical or special meaning is clearly intended; (3) the lease must be construed as a whole and in such a manner as to give effect to every provision, if reasonably possible. . . . A determination of contractual intent ordinarily presents a question of fact for the ultimate fact finder, although where the language is clear and unambiguous, it becomes a question of law for the court. . . . Furthermore, when the language of the [lease] is clear and unambiguous, [it] is to be given effect according to its terms. A court will not torture words to import ambiguity [when] the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a [lease] must emanate from the language used in the [lease] rather than from one party's subjec-

the December 11, 2018 order that the funds held in escrow could not be released without a written agreement of the parties or a court order, we agree and conclude that this appeal is not subject to the jurisdictional time period of § 52-278*l* (b).

[6] The defendants also claim on appeal that the court improperly (1) determined that Commerce Park's real property subject to the prejudgment remedy order, including the leased premises, had a de minimis value, (2) made a determination as to the value of Commerce Park's real property without having any proper evidence before it or conducting an evidentiary hearing, and (3) concluded that paragraph 28 (b) of the lease, if applicable, violated public policy under the circumstances of this case. Our conclusion that paragraph 28 (b) does not apply either to the plaintiff or to its negligence claim against Commerce Park is dispositive of this appeal, and, accordingly, we need not address the merits of the defendants' remaining claims.

tive perception of [its] terms." (Citation omitted; internal quotation marks omitted.) *Cohen* v. *Postal Holdings, LLC*, 199 Conn. App. 312, 323–24, 235 A.3d 674, cert. denied, 335 Conn. 969, 240 A.3d 285 (2020).

Paragraph 28 (b) of the lease provides: "In the event of any breach or default by Landlord with respect to any of Landlord's obligations hereunder, it is agreed and understood that Tenant shall look solely to the estate and property of Landlord in the Demised Premises[7] for the satisfaction of Landlord's remedies,[8] including the collection or a judgment (or other judicial process) requiring the payment of money by Landlord, and no other property or assets of Landlord shall be subject to levy, execution or other enforcement procedure for the satisfaction thereof. The provisions of this [p]aragraph 28 (b) are not for the benefit of any insurance company or any other third party." (Footnotes added.) The introductory clause of the lease defines Robbins as the "Tenant," and, moreover, Robbins signed the lease as the "Tenant."[9]

We conclude that the lease, in clear and unambiguous terms, provides that the source of recovery limitation contained in paragraph 28 (b) applies only to the "Landlord," that is, Commerce Park, and to the "Tenant," who is expressly defined in the lease as Robbins. By comparison, other provisions of the lease contain language referring to entities related to Robbins, such as the plaintiff. For instance, paragraph 16 (b), which we

[7] Pursuant to paragraph 1 of the lease, " 'Demised Premises' " refers to the 20,750 square foot space leased by Robbins from Commerce Park, including the right to use certain rights of way and parking areas in common with Commerce Park's other tenants.

[8] In their principal appellate brief, the defendants represent that the use of the phrase " 'Landlord's remedies' " in this instance, rather than " 'Tenant's remedies,' " is a typographical error. The plaintiff, in its appellate brief, does not address this apparent discrepancy.

[9] The introductory clause of the lease defines Commerce Park as the "Landlord." The parties do not appear to dispute that "Landlord" as used in paragraph 28 (b) means Commerce Park.

discuss in more detail subsequently in this opinion, addresses Commerce Park's liability to the "Tenant, or any person, firm or corporation claiming by, through, or under Tenant . . . ." Another example is paragraph 25 (b) (ii), which, for purposes of a specific provision of the lease unrelated to paragraph 28 (b), expands the definition of "Tenant" to mean "any person, firm or entity controlled by, under common control with, or controlling . . . the Tenant under [the lease] . . . ." Put simply, in light of the lease as a whole, the plaintiff is not subject to the terms of paragraph 28 (b).

In addition, the clear and unambiguous terms of the lease provide that paragraph 28 (b) applies "[i]n the event of any breach or default by Landlord with respect to any of Landlord's obligations *hereunder*"; (emphasis added); that is, under the lease. In the present matter, the plaintiff, a nonparty to the lease, did not assert a claim against Commerce Park predicated on a breach of the lease; rather, it asserted a tort claim sounding in negligence on the basis of Commerce Park's breach of its common-law duty to maintain its property in a reasonably safe condition.[10] Accordingly, we conclude that the plaintiff's negligence claim against Commerce Park is not subject to the source of recovery limitation set forth in paragraph 28 (b).

The defendants rely on paragraphs 16 (b) and 30.3 of the lease, as well as prior rulings by the trial court

[10] Quoting *Atelier Constantin Popescu, LLC* v. *JC Corp.*, 134 Conn. App. 731, 757, 49 A.3d 1003 (2012), in rendering judgment in the plaintiff's favor on its negligence claim against Commerce Park, Judge Krumeich stated that "[t]here is no question that a duty of care may arise out of a contract, but when the claim is brought against a defendant who is not a party to the contract, the duty must arise from something other than mere failure to perform properly under the contract." (Internal quotation marks omitted.) Judge Krumeich determined that Commerce Park violated its obligations to make certain repairs pursuant to the lease *and* its common-law duty. Moreover, in a footnote, Judge Krumeich observed that the plaintiff, as a nonparty to the lease, could not bring an action for breach of the lease or breach of the covenant of good faith and fair dealing.

interpreting those provisions, to support their contention that the plaintiff and its negligence claim against Commerce Park are subject to paragraph 28 (b). The defendants' reliance on these other lease provisions and related court rulings is misplaced.

Paragraph 16 (b) of the lease provides in relevant part: "Tenant . . . covenants and agrees that unless caused by the gross negligence or willfulness of Landlord, or of Landlord's agents, Landlord shall not be responsible or liable to Tenant, or any person, firm or corporation claiming by, through, or under Tenant for, or by reason of, any defect in the Demised Premises . . . ." The defendants highlight that Judge Krumeich, in rendering judgment in the plaintiff's favor on its negligence claim against Commerce Park, determined that the plaintiff had waived Commerce Park's liability for ordinary negligence pursuant to paragraph 16 (b). By its express terms, however, the negligence waiver set forth in paragraph 16 (b) applies not only to Robbins as the "Tenant," but also to "any person, firm or corporation claiming by, through, or under Tenant . . . ." That language, which is absent from paragraph 28 (b), plainly includes the plaintiff, of which Robbins is the sole shareholder. Thus, paragraph 16 (b) and Judge Krumeich's construction of that provision do not support the defendants' position.

Paragraph 30.3 of the lease provides: "To the extent permitted by applicable law, Landlord and Tenant hereby waive trial by jury in any action proceeding or counterclaim brought by either against the other on any matter whatsoever arising out of or in any way connected with [the lease], the relationship of Landlord and Tenant, or Tenant's use or occupancy of the Demised Premises, or any emergency or other statutory remedy with respect thereto." The defendants note that in 2017, the court, *Radcliffe, J.*, struck a claim for a jury trial filed by the plaintiff on the ground that paragraph 30.3 applied to

bar the jury trial claim. Even assuming that paragraph 30.3 applies to both Robbins and the plaintiff, the language of paragraph 30.3 providing that the provision applies to "any matter whatsoever arising out of or in any way connected with [the lease]" is significantly broader than the language of paragraph 28 (b), which applies "[i]n the event of any breach or default by Landlord with respect to any of Landlord's obligations [under the lease] . . . ." The plaintiff's negligence claim, predicated on Commerce Park's common-law duty to maintain its premises in a reasonably safe condition, falls outside of the parameters of paragraph 28 (b). Accordingly, the defendants' argument predicated on paragraph 30.3 and Judge Radcliffe's ruling fails.

In sum, we reject the defendants' contention that paragraph 28 (b) of the lease prohibits the plaintiff from recovering the escrowed funds and payments sought as relief in the motion to compel. Accordingly, we conclude that the court did not err in granting the motion to compel.

The judgment is affirmed.

In this opinion the other judges concurred.