CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

BARCLAYS BANK DELAWARE *v.* DIANA L. BAMFORD (AC 44056)

Moll, Clark and DiPentima, Js.

Syllabus

The plaintiff bank sought to recover damages for the defendant's breach of a credit card agreement, claiming that the defendant had defaulted on a credit card account. The trial court granted the plaintiff's motion for default for failure to disclose a defense, pursuant to the relevant rule of practice (§ 13-19), and rendered judgment thereon following a hearing in damages. During the proceedings, the defendant filed a motion to disqualify the trial judge, F, from further participation in the proceedings on the ground of impropriety, which the trial court denied. On appeal to this court, the defendant claimed, inter alia, that the trial court improperly denied the motion to disqualify. *Held*:

1. The trial court did not abuse its discretion in denying the defendant's motion to disqualify F, the defendant having failed to establish that a reasonable person presented with the facts would doubt F's impartiality; the record demonstrated that the defendant's counsel failed to provide any evidence of bias or impropriety sufficient to meet the required threshold, as counsel's history of past litigation involving F's former law firm and a single conversation with F, both occurring nearly twenty years ago, simply did not put F's impartiality in question.
2. The trial court properly granted the plaintiff's motion for default for failure to disclose a defense; contrary to the defendant's claim that she had no obligation to disclose a defense because the action did not fit into any of the categories specified under Practice Book § 13-19, this court determined that, for the purposes of § 13-19, the complaint, which sounded in default on a credit account, constituted an action "upon [a]

written contract" within the meaning of § 13-19, as each credit card transaction was a unilateral promise to repay the debt being incurred, in accordance with the terms set forth in the credit card agreement, in exchange for the issuing bank's performance.

3. The trial court did not abuse its discretion in admitting the plaintiff's business records of the defendant's monthly account billing statements into evidence; although the defendant claimed that such admission was improper under the business records exception to the hearsay rule pursuant to statute (§ 52-180) and the applicable provision (§ 8-4) of the Connecticut Code of Evidence because the producing witness was not a bookkeeper who kept or maintained the records of the defendant's account, the witness' testimony provided an adequate foundation for admission, as he testified as to his current role as a recovery support lead for the plaintiff, which involved the management of collection agencies and maintaining records for collection efforts to ensure they are accurate and complete, and that he had reviewed the defendant's account history and monthly billing statements and that they were accurate in all respects and had been mailed to the defendant.

Argued December 7, 2021—officially released June 7, 2022

Procedural History

Action to recover damages for, inter alia, breach of a credit card agreement, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the court, *Frechette*, *J.*, granted the plaintiff's motion for default for failure to disclose a defense; thereafter, the court, *Suarez*, *J.*, denied the defendant's motion to disqualify judicial authority; subsequently, following a hearing in damages, the court, *Suarez*, *J.*, rendered judgment for the plaintiff, from which the defendant appealed to this court. *Affirmed.*

Pat Labbadia III, for the appellant (defendant).

Jeanine M. Dumont, for the appellee (plaintiff).

Opinion

DiPENTIMA, J. In this debt collection action, the defendant, Diana L. Bamford, appeals from the judgment of the trial court, *Suarez*, *J.*, following a hearing in damages, awarding the plaintiff, Barclays Bank Delaware, monetary relief in the amount of $5661.81 plus

costs of $436.20. On appeal, the defendant claims that the court: (1) abused its discretion in denying her motion to disqualify the Honorable Matthew E. Frechette, a judge of the Superior Court, and in ruling on her motions to reargue and reconsider that denial; (2) improperly granted the plaintiff's motion for default for failure to disclose a defense; and (3) improperly admitted certain documents containing hearsay statements into evidence at the hearing in damages. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to the resolution of this appeal. On May 7, 2018, the plaintiff filed a two count complaint against the defendant, sounding in breach of contract and account stated. The complaint generally alleges that the defendant was indebted to the plaintiff in the sum of $5661.81 arising out of the use of a credit account issued by the plaintiff.

On June 25, 2018, the defendant filed a request to revise the complaint to allege whether "the alleged debt arose orally or as a result of a written document." On September 11, 2018, the plaintiff filed a motion for extension of time to object thereto, alleging that the defendant never had served her request to revise on the plaintiff. On the same date, the plaintiff also filed an objection to the defendant's request to revise. On September 20, 2018, the defendant moved for a judgment of nonsuit on the ground that the plaintiff failed to comply with the defendant's request to revise; the plaintiff filed an objection to the motion for judgment of nonsuit. On September 24, 2018, the court, *Frechette, J.*, sustained the plaintiff's objection to the defendant's request to revise.

On October 9, 2018, the defendant filed a motion for order seeking to disallow nunc pro tunc the plaintiff's filings relating to the defendant's request to revise and

the motion for judgment of nonsuit, contending that the plaintiff never served those filings on her electronically. On that same date, the defendant's counsel filed a motion to reargue and/or reconsider the court's September 24, 2018 order, outlining for the first time that he had had prior dealings with Judge Frechette and his father. The defendant also requested oral argument on the plaintiff's objection to her motion for a judgment of nonsuit. In the request for argument, the defendant's counsel suggested that, "[d]ue to past dealings, the propriety of Judge Frechette's involvement in the undersigned's cases needs to be addressed."

On October 15 and 22, 2018, Judge Frechette denied the defendant's motion to reargue and the defendant's motion for order, respectively. In denying the motion to reargue, Judge Frechette referred to an earlier unrelated case in which the defendant's counsel filed a motion to "disqualify [Judge Frechette] based on the identical grounds referenced in [multiple paragraphs] of this motion." See *Value Health Care Services, LLC* v. *PARCC Health Care, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV-11-5033728-S (July 9, 2012). Judge Frechette noted "that the Presiding Judge Jonathan Silbert denied said motion, finding it to be 'utterly without merit,' " and that the motion to reargue had also been denied. Judge Frechette attached a copy of both decisions to his ruling and concluded that "[t]he issue concerning the disqualification of the undersigned has already been raised and litigated by defense counsel and found to be without merit." In denying the motion for order, Judge Frechette incorporated his order denying the motion to reargue. On November 5, 2018, the defendant moved for an extension of time to file a motion to reargue the court's order denying her prior motion to reargue regarding her request to revise. The plaintiff objected to the

November 5, 2018 motion, and it was ultimately denied by the court, *Suarez*, *J.*, on February 28, 2019.

Meanwhile, on September 12, 2018, the plaintiff had filed a demand for disclosure of defense, pursuant to Practice Book § 13-19.[1] On October 18, 2018, the plaintiff filed a motion for default for failure to disclose a defense. On October 30, 2018, the defendant objected to the plaintiff's motion for default and moved for an extension of time to plead in response to the plaintiff's demand for disclosure of defense. On November 13, 2018, the defendant filed an objection to the plaintiff's motion for default, contending that the plaintiff's demand for disclosure of defense was improperly filed in the present case on the ground that it is not a case to which § 13-19 applies because it is not an action "upon [a] written contract." On November 14, 2018, the plaintiff replied to the defendant's objection and argued that § 13-19 applied because "[t]his was a revolving credit card account. Each time the defendant used the account, she signed for the charges or otherwise acknowledged the charges to the account. Therefore, each time she charged to this account, there was a

[1] Practice Book § 13-19 provides in relevant part: "In any action to foreclose or to discharge any mortgage or lien or to quiet title, or in any action upon any written contract, in which there is an appearance by an attorney for any defendant, the plaintiff may at any time file and serve in accordance with Sections 10-12 through 10-17 a written demand that such attorney present to the court, to become a part of the file in such case, a writing signed by the attorney stating whether he or she has reason to believe and does believe that there exists a bona fide defense to the plaintiff's action and whether such defense will be made, together with a general statement of the nature or substance of such defense. If the defendant fails to disclose a defense within ten days of the filing of such demand in any action to foreclose a mortgage or lien or to quiet title, or in any action upon any written contract, the plaintiff may file a written motion that a default be entered against the defendant by reason of the failure of the defendant to disclose a defense. If no disclosure of defense has been filed, the judicial authority may order judgment upon default to be entered for the plaintiff at the time the motion is heard or thereafter, provided that in either event a separate motion for such judgment has been filed . . . ."

writing which memorialized her agreement to pay for the charges she made to the account. To claim that this is not an action upon a written contract is unfounded and frivolous." On November 15, 2018, Judge Frechette granted the plaintiff's motion for default.

On November 19, 2018, the defendant filed a "notice that no action can be taken," indicating that she intended to file a motion to recuse Judge Frechette "from further proceedings in this matter, or in any other matters in which the [defendant's counsel] is involved in any capacity in order to avoid the appearance of impropriety." In response to the defendant's filing, the court, *Suarez*, *J.*, held a hearing on December 12, 2018, at which the defendant's counsel reiterated that he intended to file a motion to disqualify Judge Frechette. Judge Suarez stated that, with respect to the requirements to timely file a motion in accordance with Practice Book § 1-23, "if [the defendant's counsel takes] the position that Judge Frechette should be disqualified because he may have some kind of bias . . . we have to address that issue immediately. Certainly [the defendant's counsel is] past ten days with . . . respect to this case." Judge Suarez, then sitting as presiding judge for civil matters and administrative judge for the judicial district of Middlesex, and citing "an obligation to . . . address any potential claim of bias against any judge that sits [in the judicial district of Middlesex]," ordered that, "if [the defendant] wish[ed] to have Judge Frechette recuse himself, [the court would] give [her] one week . . . to file that motion."

On December 19, 2018, the defendant filed a verified motion to disqualify Judge Frechette on the ground of apparent impropriety. The claim of impropriety centered on a conversation between the defendant's counsel and Judge Frechette at an unspecified time between 1997 and 2007, while Judge Frechette (before he was appointed to the bench) was an attorney working with

his father. Further, the defendant's counsel claimed that a lawsuit filed against him by Judge Frechette's father should bar Judge Frechette from being involved in any future proceedings with him.[2] The defendant's counsel also challenged the propriety of Judge Frechette's orders disposing of the defendant's request to revise in the present case.

Judge Suarez held a hearing on the defendant's motion to disqualify on January 2, 2019, and issued a memorandum of decision denying the motion on February 22, 2019. The memorandum of decision set forth three principal grounds for the denial. First, Judge Suarez reasoned that the motion to disqualify Judge Frechette was barred by collateral estoppel because Judge Silbert previously denied "the same motion, encompassing the same issues," filed by the defendant's counsel in *Value Health Care Services, LLC* v. *PARCC Health Care, Inc.*, supra, Superior Court, Docket No. CV-11-5033728-S. Second, Judge Suarez determined that the defendant's counsel "constructively waived" his right to file his motion to disqualify because "he failed to file his motion to disqualify within ten days of the case being called for trial or hearing," pursuant to Practice Book § 1-23, and, instead, waited "almost three months after Judge Frechette issued his first ruling." Third, Judge Suarez concluded that the motion failed "on the merits" because the defendant's counsel failed to provide any evidence from which one could reasonably question Judge Frechette's impartiality. The defendant then filed two subsequent motions to reargue and/or reconsider; the court denied the first motion and granted the second motion, but denied the relief requested therein.[3]

[2] Although then attorney Frechette worked in the same law firm with his father, he was not the attorney handling the matter involving the defendant's counsel.

[3] The defendant initially appealed from the court's decision to deny the verified motion to disqualify and the first motion to reargue and/or reconsider. The appeal was dismissed for lack of a final judgment.

On February 19, 2020, the plaintiff filed a motion for judgment requesting that the court enter judgment in its favor in the amount of $5661.81 in damages, plus $436.20 in costs, on the basis of the court's prior default of the defendant for her failure to disclose a defense.[4] On that same day, the court, *Suarez*, *J.*, held a hearing in damages at which the plaintiff called one of its employees, Michael Noonan, to testify as to the account statements involved in this matter. During the hearing, after the plaintiff's counsel inquired of Noonan, the account statements were offered as a full exhibit. The defendant objected thereto, on the basis of a lack of proper foundation to qualify as a business record pursuant to General Statutes § 52-180 and § 8-4 of the Connecticut Code of Evidence. This objection was overruled by the court. On March 2, 2020, the court granted the plaintiff's motion for judgment and rendered judgment for the plaintiff in the amounts it had requested. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court abused its discretion in denying her motion to disqualify Judge Frechette. We find no abuse of discretion.[5]

[4] On March 20, 2019, prior to the defendant's filing of the previously mentioned appeal, the plaintiff filed a motion for judgment. See footnote 2 of this opinion. The court did not rule on the motion and instead stated that "[t]he matter may be claimed for a hearing in damages upon the expiration of the Appellate Court stay . . . ."

[5] The defendant also argues that the court erred in concluding that the prior disqualification decision by Judge Silbert was subject to collateral estoppel sufficient to deny his motion to disqualify and/or in concluding that the motion to disqualify was untimely filed. We need not address these claims because we conclude that the court did not abuse its discretion in determining that the defendant's motion to disqualify failed on the merits. See generally *Seder* v. *Errato*, 211 Conn. App. 167, 183, 272 A.3d 252 (2022) (we need not reach appellant's additional claims when court's decision is supported by other proper grounds).

In addition, our conclusion that the court did not abuse its discretion in denying the defendant's motion to disqualify Judge Frechette is dispositive

We begin with the applicable standard of review. "Our review of the trial court's denial of a motion for disqualification is governed by an abuse of discretion standard." *State* v. *Milner*, 325 Conn. 1, 12, 155 A.3d 730 (2017). Practice Book § 1-23 provides: "A motion to disqualify a judicial authority shall be in writing and shall be accompanied by an affidavit setting forth the facts relied upon to show the grounds for disqualification and a certificate of the counsel of record that the motion is made in good faith. The motion shall be filed no less than ten days before the time the case is called for trial or hearing, unless good cause is shown for failure to file within such time."

"Of all the charges that might be leveled against one sworn to administer justice and to faithfully and impartially discharge and perform all the duties incumbent upon [them] . . . a charge of bias must be deemed at or near the very top in seriousness, for bias kills the very soul of judging—fairness." (Internal quotation marks omitted.) *Wendt* v. *Wendt*, 59 Conn. App. 656, 693, 757 A.2d 1225, cert. denied, 255 Conn. 918, 763 A.2d 1044 (2000). Pursuant to rule 2.11 (a) of the Code of Judicial Conduct, "[a] judge shall disqualify himself . . . in any proceeding in which the judge's impartiality might reasonably be questioned . . . . In applying this rule, [t]he reasonableness standard is an objective one. Thus, the question is not only whether the particular judge is, in fact, impartial but whether a reasonable person would question the judge's impartiality on the basis of all the circumstances. . . . Moreover, it is well established

of the claims raised in the defendant's motions to reargue and/or reconsider, and, accordingly, we need not address the defendant's argument as to the court's denials of those motions. See, e.g., *Kling* v. *Hartford Casualty Ins. Co.*, 211 Conn. App. 708, 723 n.7, A.3d (2022) ("The plaintiff also claims on appeal that the court erred when it denied his motion to reargue/reconsider. Because our conclusion that the defendant did not have a duty to defend is dispositive of the claims raised in the motion to reargue/reconsider, we need not address this argument.").

that [e]ven in the absence of actual bias, a judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned, because the appearance and the existence of impartiality are both essential elements of a fair exercise of judicial authority. . . . Nevertheless, because the law presumes that duly elected or appointed judges, consistent with their oaths of office, will perform their duties impartially . . . the burden rests with the party urging disqualification to show that it is warranted." (Internal quotation marks omitted.) *State* v. *Milner*, supra, 325 Conn. 12.

The defendant argues that Judge Frechette "is the son of the longtime enemy" of the defendant's counsel. Specifically, the defendant contends that Judge Frechette and his father belonged to a law firm that sued the defendant's counsel in his individual capacity, and, according to the defendant's counsel, "there was substantial animosity and discord between the law firm of Frechette & Frechette and its members (including now [Judge] Frechette), and the [defendant's] counsel as an individual defendant in that matter, and also in its related matters. The [defendant's] counsel believes this animosity is still present." Because of this tumultuous history, the defendant argues that the situation clearly involves the appearance of impropriety.

In addressing the defendant's motion to disqualify, the court held that "[t]here is nothing in the record indicating that Judge Frechette has provided even a minute appearance of impropriety, nor would a reasonable person question his impartiality. This motion is completely lacking factual support and is instead riddled with unsubstantiated, opinionated accusations aimed at achieving some personally motivated goal." The court went on to state that "[t]here is nothing to show that Judge Frechette has demonstrated animosity toward [the defendant's counsel] but, rather, it is apparent that [the defendant's counsel] still holds resentment

toward Judge Frechette. . . . The allegedly inflammatory conversation between Judge Frechette and [the defendant's counsel] occurred sometime in 1997, over twenty years ago. . . . An adverse or hostile conversation between attorneys, without more, does not provide an adequate basis for a motion to disqualify judicial authority and fails to fall within rule 2.11 of the Code of Judicial Conduct."

We iterate that "[v]ague and unverified assertions of opinion, speculation and conjecture cannot support a motion to recuse nor are they sufficient to warrant an evidentiary hearing on the same." *DeMatteo* v. *DeMatteo*, 21 Conn. App. 582, 591, 575 A.2d 243, cert. denied, 216 Conn. 802, 577 A.2d 715 (1990). Moreover, adverse rulings, even if later determined to be erroneous, do not demonstrate judicial bias or partiality. See *Bieluch* v. *Bieluch*, 199 Conn. 550, 553, 509 A.2d 8 (1986) ("[t]he fact that a trial court rules adversely to a litigant, even if some of these rulings were to be determined on appeal to have been erroneous, does not demonstrate personal bias"); *Emerick* v. *Glastonbury*, 177 Conn. App. 701, 739, 173 A.3d 28 (2017) ("[A]dverse rulings do not themselves constitute evidence of bias. . . . The fact that [a party] strongly disagrees with the substance of the court's rulings does not make those rulings evidence of bias." (Internal quotation marks omitted.)), cert. denied, 327 Conn. 994, 175 A.3d 1245 (2018); *Traystman* v. *Traystman*, 141 Conn. App. 789, 803, 62 A.3d 1149 (2013) ("an adverse or unfavorable ruling is not, in itself, evidence of judicial bias against a litigant").

Having reviewed the record, we conclude that the defendant has not met her burden to show that the court abused its discretion in determining that the defendant failed to establish that a reasonable person presented with the facts would doubt Judge Frechette's impartiality. See *State* v. *Milner*, supra, 325 Conn. 12. As the court aptly concluded, the defendant's counsel failed

to provide any evidence of bias or impropriety sufficient to meet the required threshold. A history of past litigation involving Judge Frechette's former law firm and a single conversation, both occurring nearly twenty years ago, simply do not put Judge Frechette's impartiality in question. Thus, we conclude that the court did not abuse its discretion in denying the defendant's motion to disqualify Judge Frechette.

II

The defendant next claims that the court erred in granting the plaintiff's motion for default for failure to disclose a defense. Specifically, the defendant argues that the plaintiff did not base its allegations in the complaint "upon [a] written agreement," as required by Practice Book § 13-19. We disagree with the defendant.

The defendant's claim concerns the interpretation of a rule of practice, as well as our interpretation of the plaintiff's complaint; thus, our review is plenary. See *Compass Bank* v. *Dunn*, 196 Conn. App. 43, 46, 228 A.3d 663 (2020). "The interpretive construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation. . . . The interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary." (Internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 594, 181 A.3d 550 (2018); see also *Caron* v. *Connecticut Pathology Group, P.C.*, 187 Conn. App. 555, 564, 202 A.3d 1024 (interpretation of pleadings is subject to plenary review and this court is not bound by labels attached to complaint), cert. denied, 331 Conn. 922, 206 A.3d 187 (2019).

"In seeking to determine [the] meaning [of a statute or a rule of practice, we] . . . first . . . consider the text of the statute [or rule] itself and its relationship to other statutes [or rules]. . . . If, after examining such

text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence . . . shall not be considered. . . . We recognize that terms [used] are to be assigned their ordinary meaning, unless context dictates otherwise." (Citations omitted; internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, supra, 328 Conn. 594. "[W]e follow the clear meaning of unambiguous rules, because [a]lthough we are directed to interpret liberally the rules of practice, that liberal construction applies only to situations in which a strict adherence to them [will] work surprise or injustice." (Internal quotation marks omitted.) Id., 595.

We turn to the relevant rule of practice at issue in this case, Practice Book § 13-19, which provides in relevant part: "In any action to foreclose or to discharge any mortgage or lien or to quiet title, or in any action upon any written contract, in which there is an appearance by an attorney for any defendant, the plaintiff may at any time file and serve . . . a written demand that such attorney present to the court, to become part of the file in such case, a writing signed by the attorney stating whether or not he or she has reason to believe and does believe that there exists a bona fide defense to the plaintiff's action and whether such defense will be made, together with a general statement of the nature or substance of such defense. If the defendant fails to disclose a defense within ten days of the filing of such demand in any action to foreclose a mortgage or lien or to quiet title, or in any action upon any written contract, the plaintiff may file a written motion that a default be entered against the defendant by reason of the failure of the defendant to disclose a defense."

As recently restated in *Compass Bank* v. *Dunn*, supra, 196 Conn. App. 49, "[o]ne of the purposes of the rule

is to enable the plaintiff, at an early stage of the proceedings, to ascertain whether a defense is claimed in good faith to exist, and is honestly intended to be made, or whether it is a mere sham defense to be interposed merely for delay." (Internal quotation marks omitted.) To this end, Practice Book § 13-19 clearly states: "If no disclosure of defense has been filed, the judicial authority may order judgment upon default to be entered for the plaintiff at the time the motion is heard or thereafter, provided that in either event a separate motion for such judgment has been filed."

In the present case, the defendant never disclosed a defense and instead argues that she was under no obligation to do so because the demand to disclose a defense was improper in this case. Specifically, the defendant argues that Practice Book § 13-19 allows a demand to be filed in only three types of cases: (1) an "action to foreclose or to discharge any mortgage or lien"; (2) an action "to quiet title"; and (3) an "action upon any written contract." See Practice Book § 13-19. The defendant argues that the plaintiff's complaint fails to fit within any of the three categories of cases. The plaintiff's two count complaint alleges that the defendant became indebted to the plaintiff in the sum of $5661.81 for use of a credit account issued by the plaintiff. The complaint further alleges that the defendant had a credit account with the plaintiff, and in connection with that account, the plaintiff sent periodic account statements to the defendant setting forth all of the charges and credits applicable to the account, as well as the balance due.

Because the plain language of Practice Book § 13-19 is unequivocal with respect to the permissible type of actions in which a plaintiff may file a demand for disclosure of defense, the relevant inquiry in the instant appeal is whether the plaintiff stated a cause of action predicated upon a "written contract." In resolving this

question, we construe count one of the complaint, titled "Default on Credit Account," to allege a credit card account relationship between the plaintiff and the defendant, noting that the first paragraph includes a sixteen digit credit account number.[6] Thus, in applying § 13-19 to the present case, we note that a majority of courts have adopted a theory of contract that "draws upon common law principles of contract law and interprets each credit card transaction as a unilateral contract[7] in which the cardholder unilaterally promises to repay the debt being incurred, in accordance with the terms set forth in the credit card agreement, in exchange for the issuing bank's performance (i.e. reimbursing the merchant for the goods)." (Footnote added.) *Bank of America* v. *Jarczyk*, 268 B.R. 17, 21–22 (Bankr. W.D.N.Y. 2001); see also 1 T. Murray, Corbin on Contracts (Rev. Ed. 1998) § 2.33, p. 376 (describing "typical credit card" transaction as "offer by the issuer to a series of unilateral contracts"). More particularly, when applying this theory, courts have determined that "each time a cardholder uses his credit card, he impliedly represents to the issuing bank that he intends to repay the debt incurred." *In re Thanh* v. *Truong*, 271 B.R. 738, 745 (Bankr. D. Conn. 2002); see also *American Express Bank, FSB* v. *Bennett*, Superior Court, judicial district of Middlesex, Docket No. CV-14-6012244-S (September 11, 2015) (61 Conn. L. Rptr. 15, 17) ("[i]n addition to signatures on applications and/or credit card charge

[6] The first paragraph of count one of the complaint alleges that "[o]n or before September 28, 2017, the defendant became indebted to the plaintiff in the sum of $5,661.81 for use of credit account number XXXXXXXXXXXX9832 issued by the plaintiff."

[7] "[T]he mere issuance of a credit card does not create a binding contract between the card issuer and the cardholder. Instead, the issuance of a credit card is simply an offer to a series of unilateral contracts. Until that offer is accepted by the cardholder, by using his credit card, no contract has been formed." (Emphasis omitted.) *Bank of America* v. *Jarczyk*, 268 B.R. 17, 22 (Bankr. W.D.N.Y. 2001).

slips, each use of a credit card constitutes a representation by the cardholder of his or her intention to pay for the charges to the account").

In the present case, we apply this theory to determine that, for the purposes of Practice Book § 13-19, the complaint, which sounds in default on a credit account, constitutes an action "upon [a] written contract." See Practice Book § 13-19. The defendant neither has disclosed any defense nor cited any authority in her appellate brief that stands for the proposition that this was not an action subject to § 13-19. Accordingly, we conclude that the court properly granted the plaintiff's motion for default for failure to disclose a defense.

III

The defendant finally claims that the trial court improperly admitted certain documents into evidence at the hearing on damages. Specifically, the defendant argues that the court improperly allowed her monthly account billing statements from February, 2016, through September, 2017, into evidence, over her objection. The defendant argues that the statements were admitted without a proper foundation as required by the business records exception to the hearsay rule under § 52-180 and § 8-4 of the Connecticut Code of Evidence.

The following additional procedural history is relevant to our analysis. Following the entry of default against the defendant and the filing of the plaintiff's motion for judgment, on February 19, 2020, the court, *Suarez*, *J.*, held a hearing in damages. The plaintiff's counsel called Noonan and inquired as to his seventeen years of employment with the plaintiff, including: his current title as a recovery support lead, which involves the management of collection agencies; all of his prior roles with the plaintiff; and his review of the account statements prior to testifying. The plaintiff's counsel then asked Noonan to identify plaintiff's exhibit one,

which included the account billing statements relative to the defendant's account. The defendant's counsel objected and stated: "I don't believe the witness has—they've laid a foundation for the witness to testify to that. He's indicated that after they were prepared, he reviewed them. So, how would he know what was sent out or not sent out? So, I object to the question; there's no proper foundation for it." The court overruled the objection.

The plaintiff's counsel later offered the account billing statements as a full exhibit, to which the defendant's counsel again objected and stated: "Your Honor, there's not a proper foundation for the admission of these . . . documents. . . . [T]hey have to prove certain things under the business records exception to the hearsay rule . . . . There's not a proper foundation for—for the—the admission of these documents . . . ." The plaintiff's counsel responded by stating that: "Mr. Noonan has worked for this bank for seventeen years handling account records. . . . [H]e testified that these are the account records relating to [the defendant's] account . . . and that they were sent to her on this account. And I am not sure what further foundation I can give [the defendant's counsel] that would satisfy it." The court then overruled the objection.

Ultimately, the court stated that, on the basis of the testimony from Noonan, it was satisfied that the defendant owed the plaintiff $5661.81.

On appeal, the defendant claims that the court erred when it allowed the account statements into evidence over the defendant's objections that the statements failed to meet the requirements of § 52-180 and § 8-4 of the Connecticut Code of Evidence. Specifically, the defendant argues that, although Noonan may maintain possession of the books and records after they have been charged off, he is not a bookkeeper who kept or

maintained the records of the defendant's account. The defendant also argues that the plaintiff failed to elicit testimony that the account statements were kept in the ordinary course of business.

We begin by setting forth our standard of review. "To the extent [that] a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law . . . for an abuse of discretion." (Internal quotation marks omitted.) *LM Ins. Corp.* v. *Connecticut Dismanteling, LLC*, 172 Conn. App. 622, 627–28, 161 A.3d 562 (2017).

Next, we identify the relevant legal principles regarding the defendant's evidentiary claim. "Hearsay is an out-of-court statement offered to establish the truth of the matter asserted. Conn. Code Evid. § 8-1 (3). Hearsay evidence is inadmissible, subject to certain exceptions. Conn. Code Evid. § 8-2. . . . One such exception is the business records exception. See General Statutes § 52-180; Conn. Code Evid. § 8-4. In order to establish that a document falls within the business records exception to the rule against hearsay, codified at § 52-180, three requirements must be met. . . . The proponent need not produce as a witness the person who made the record or show that such person is unavailable but must establish that [1] the record was made in the regular course of any business, and [2] that it was the regular course of such business to make such writing or record [3] at the time of such act, transaction, occurrence or event or within a reasonable time thereafter." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 628–29.

"The rationale for the exception derives from the inherent trustworthiness of records on which businesses rely to conduct their daily affairs." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 116, 956 A.2d 1145 (2008). Furthermore, "[i]n applying the business records exception . . . [§ 52-180] should be liberally interpreted." (Internal quotation marks omitted.) Id.

In *Connecticut Light & Power Co.*, our Supreme Court concluded "that the trial court properly determined that [the witness] was competent to testify that the computer printout and the letter, which included information transferred electronically from the technician in the field to the plaintiff's in-house database, had been made in the ordinary course of the plaintiff's business, that similar documents were generated in the course of the plaintiff's business and that the documents had been created within a reasonable time following the inspection of the defendant's residence. [The witness'] testimony provided an adequate foundation for admission of the documents because, as an eighteen year employee of the plaintiff and a supervisor of credit and collection, he had demonstrated extensive personal knowledge of the plaintiff's billing procedures, the procedures established to collect on past due accounts and the electronic and computerized systems used to maintain and update information regarding such matters." Id., 117. Additionally, although the witness was not present when the technician performed any work, the witness had gone to the defendant's home previously to gather information and investigate the meters and "thus was acquainted with the actual meters that had produced the information recorded by the technician." Id., 118. Accordingly, the court concluded that "the trial court did not abuse its discretion in admitting the letter and the computer printout into evidence under the business records exception to the hearsay rule." Id.

Similarly, in *State* v. *Bermudez*, 95 Conn. App. 577, 589, 897 A.2d 661 (2006), this court concluded that a defendant's argument that portions of medical records that were admitted into evidence "should have been excluded because [the witness] was not the treating physician is wholly without merit." In so concluding, the court iterated that "[t]he statute expressly provides that the person making the record is not required to testify. . . . [T]he fact that the . . . sole witness as to the creation of the records . . . personally did not create each entry in the . . . narrative and [did] not have personal knowledge of the particular events recorded in the entry does not impact the admissibility of the records under § 52-180." (Internal quotation marks omitted.) Id.

In the present case, Noonan testified as to his current role as recovery support lead for the plaintiff, as well as his previous experience with the company. Similar to the witness in *Connecticut Light & Power Co.* v. *Gilmore*, supra, 289 Conn. 117–18, he also testified that his current position involved the management of collection agencies, managing the back office processing of fraud and dispute claims, and maintaining the records for collection efforts to ensure that they are accurate and complete. Additionally, similar to *State* v. *Bermudez*, supra, 95 Conn. App. 589, although Noonan was not the individual who created the record, he testified that in preparation for his testimony, he reviewed the defendant's account history and monthly billing statements, and then testified that those statements, which he reviewed, dated February 25, 2016, through September 24, 2017, were accurate in all respects and were mailed to the defendant.[8]

[8] Additionally, the following colloquy took place between the plaintiff's counsel and Noonan:

"Q. Okay. Now, could you tell us, sir, does [the plaintiff] have records relating to each one of the charges that appear on this account?

"A. Yes.

"Q. Okay. What kind of records does the bank have?

The defendant's argument that, although Noonan "may maintain possession of the books and records after they have been charged off," he is not a "bookkeeper" is the same as that rejected by the courts in both *Connecticut Light & Power Co.* v. *Gilmore*, supra, 289 Conn. 117–18, and *State* v. *Bermudez*, supra, 95 Conn. App. 589. Upon a review of the record and the applicable law, we determine that the defendant has failed to meet her burden to show that the court abused its discretion in admitting the plaintiff's business records into evidence.

The judgment is affirmed.

In this opinion the other judges concurred.

"A. We have electronic records, which are encapsulated in this—in the billing statements, so that it mirrors.

"Q. Okay. Do you have signed or authorized receipts for each one of these charges by [the defendant]?

"A. No.

"Q. And can you explain to the court why that is?

"A. We do—we do not—those would be in [the defendant's] possession.

"Q. Okay.

"A. We do not have access to any of the signed receipts that she—when she made these purchases.

"Q. Are signed receipts ever provided to [the plaintiff] on an account with activity like this?

"A. No, not unless—not unless there is a fraud investigation or—of that nature, yeah.

"Q. Or a dispute on the charges?

"A. Or a dispute, correct.

"Q. Okay. So, they would not be recorded or maintained by the bank in the ordinary course of its business?

"A. Correct, they would not."

JOHN DOE 1 ET AL. *v.* BOARD OF EDUCATION OF THE TOWN OF WESTPORT ET AL. (AC 44153)

JOHN DOE 2 ET AL. *v.* BOARD OF EDUCATION OF THE TOWN OF WESTPORT ET AL. (AC 44122)

Moll, Alexander and Bear, Js.

Syllabus

In each case, the plaintiff minor child, A and B, respectively, and his parents, sought to recover damages from the defendants, the town of Westport, its board of education, the town's superintendent of schools, L, and certain employees of one of the town's middle schools, namely, the principal, S, the vice principal, M, and a physical education teacher, Q, for injuries allegedly sustained as a result of, inter alia, the defendants' negligence in responding to reports of bullying of A and B by their classmates while they attended the middle school. Both cases arose out of the same incident, during which A and B were attacked by other students while in gym class. The plaintiffs filed reports detailing the gym incident and prior incidents of bullying with the school's administration. Thereafter, A and B both had bullying complaints filed against them by other students involved in the gym incident and they received suspensions as a result thereof. A few weeks later, A was again bullied by a fellow student. He reported the incident to S, who insisted that he write down his account of what had occurred. When A instead asked to speak with his father, S grabbed his arm in a hostile manner and shook it. The plaintiffs alleged, inter alia, that, in their handling of the bullying incidents, the defendants failed to comply with the safe school climate plan that had previously been implemented at the direction of the board in accordance with the applicable statute ((Rev. to 2015) § 10-222d). The plaintiffs further alleged that the defendants retaliated against them for filing their bullying complaints by, among other things, issuing suspensions to A and B. Additionally, in the first action, the plaintiffs alleged that S assaulted A when she grabbed and shook his arm. The trial court consolidated the cases and granted the defendants' motions for summary judgment with respect to all claims except those against S in connection with the first action, as it found that there was a genuine issue of material fact concerning her alleged assault of A. Thereafter, the plaintiffs in each case separately appealed to this court. *Held*:

1. The plaintiffs' inadequately briefed their claims that, in granting the motions for summary judgment, the trial court failed to construe the evidence in the light most favorable to them; accordingly, the plaintiffs abandoned such claims and this court declined to review them.

2. The trial court did not err in granting the motions for summary judgment as to the claims of negligence and negligent infliction of emotional distress against M, Q, L and the board in the first case and against S, M, Q, L and the board in the second case: the trial court properly determined that the individual defendants and the board were protected by statutory immunity (§ 10-222*l*) with respect to the claims of negligence alleged against them for violations of the plan because the plaintiffs failed to set forth any argument in their appellate briefs challenging the trial court's determination that the defendants demonstrated the absence of a genuine issue of material fact that they reported, investigated and responded to the bullying complaints in a manner that was consistent with the safe school climate plan and the plaintiffs failed to present the necessary factual predicate to raise a genuine issue of material fact as to whether the defendants acted in bad faith for purposes of § 10-222*l*; moreover, this court deemed abandoned any claim relating to the trial court's determination that the defendants were protected by governmental immunity pursuant to the applicable statute (§ 52-557n (a) (2) (B)) from negligence claims relating to their discretionary acts because, on appeal, the plaintiffs failed to raise a claim challenging such determination and did not even reference the applicability of governmental immunity prior to filing their reply briefs.

3. The trial court properly rendered summary judgment in favor of M, L and Q in the first case and in favor of S, M, L and Q in the second case with respect to the plaintiffs' recklessness claims: the allegations merely used the term "recklessness" to describe the same conduct that the plaintiffs previously described as negligence, which was insufficient as a matter of law to support a claim of recklessness; moreover, the evidence, when viewed in the light most favorable to the plaintiffs, failed to demonstrate the existence of a genuine issue of material fact that the individual defendants intentionally, wilfully, wantonly and recklessly violated the plan, as the defendants submitted evidence demonstrating that they responded to and investigated the acts of bullying reported and took steps to avoid further instances of bullying, and there was no evidence demonstrating that the defendants had notice of any bullying against A and B prior to the gym incident; furthermore, the plaintiffs' claims of retaliation with respect to A were unpersuasive, as he was suspended on the basis of admitted acts, his gym class was changed due to information S received concerning his interactions with another child in the class, and the plaintiffs failed to address how the ordering of a special education planning and placement team meeting for A constituted retaliation, and the allegations of retaliation against B did not rise to the level of recklessness necessary to defeat the motion for summary judgment; accordingly, the conduct of the individual defendants could not be characterized as an extreme departure from ordinary care in a situation where a high degree of danger was apparent.

4. The trial court properly rendered summary judgment in favor of the town and the board with respect to the plaintiffs' claims of respondeat superior liability as it related to the alleged negligence of M, L and Q in the first case and S, M, L and Q in the second case: because the trial court properly granted the motions for summary judgment as to the negligence claims against the individual defendants, there was no individual liability to which vicarious liability against the town or the board could attach.
5. The trial court properly rendered summary judgment in favor of L and the board with respect to the allegations that they retaliated against the plaintiffs for advocating for A and B, as L and the board were protected against the negligence claims by statutory and governmental immunity and there was no genuine issue of material fact that the actions of L did not amount to recklessness.

Argued January 4—officially released June 7, 2022

Procedural History

Action, in each case, 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, where the court, *Bellis*, *J.*, granted the defendants' motion to consolidate the cases; thereafter, the court, *Abrams*, *J.*, transferred the cases to the judicial district of Waterbury, Complex Litigation Docket; subsequently, the court, *Bellis*, *J.*, granted the defendants' motions for summary judgment with respect to certain counts of the complaints and rendered judgments thereon, from which the plaintiffs filed separate appeals to this court. *Affirmed.*

Piper A. Paul filed briefs for the appellants (plaintiffs in each case).

Jonathan C. Zellner, with whom, on the brief, was *Ryan T. Daly*, for the appellees (defendants in each case).

Opinion

BEAR, J. These appeals involve consolidated actions[1] concerning complaints of the bullying of two minor children by some of their classmates, which occurred while

[1] Although the two actions underlying these appeals were consolidated at trial, the plaintiffs in both actions, who are represented by Attorney Piper A. Paul, filed separate appeals with this court. The appeals in both cases,

they attended Coleytown Middle School (middle school) in the town of Westport, and the alleged failures of school staff and administration in addressing those bullying complaints. In Docket No. AC 44153, the plaintiffs, John Doe 1, Jane Doe 1, and Jack Doe 1,[2] appeal from the judgment of the trial court granting, in part, the motion for summary judgment filed by the defendants, the Board of Education of the Town of Westport (board); Micah Lawrence, the vice principal of the middle school; Elliott Landon, the superintendent of schools for the Westport school system; Richard Quiricone, a physical education teacher at the middle school; and the town of Westport (town).[3] On appeal, the Doe 1 plaintiffs claim that the court erred in granting the Doe 1 defen-

although not consolidated, were scheduled to be heard together on January 4, 2022. Paul, without giving this court prior written notice, did not appear for oral argument. Pursuant to Practice Book § 70-3 (b), this court issued an order on January 4, 2022, stating that the appeals would be decided on the basis of the briefs, the record, and the January 4, 2022 oral argument of counsel for the appellees in both appeals. Moreover, although the appeals have not been consolidated, for purposes of judicial economy we write one opinion in which we address the claims raised in both appeals.

[2] John Doe 1 and Jane Doe 1 commenced the underlying action in AC 44153 alleging claims individually and on behalf of their son, Jack Doe 1, who, at all times relevant to this action, was a minor and allegedly was subjected to bullying while attending the middle school. In AC 44153, we refer to the plaintiffs collectively as the Doe 1 plaintiffs and, where necessary, individually by the pseudonyms designated in the revised complaint and as ordered by the court. See Practice Book § 11-20A (h).

[3] The revised complaint in the underlying action in AC 44153 also named as a defendant the principal of the middle school, Kris Szabo. In counts one and two of their revised complaint, the Doe 1 plaintiffs allege claims solely against Szabo for negligence and for assault and battery on Jack Doe 1, respectively. Counts six, seven, and eight also allege claims, in part, against Szabo. Because the court denied the motion for summary judgment as to count two, as it found that there was a genuine issue of material fact concerning the alleged assault and battery, and because there is not yet a final judgment as to Szabo in AC 44153, our decision as to that appeal does not concern counts one or two, or the portions of counts six, seven, and eight of the revised complaint alleging claims against Szabo, who is not involved in that appeal. Therefore, in AC 44153, we refer to the board, the town, Lawrence, Landon, and Quiricone collectively as the Doe 1 defendants and individually by name where necessary.

dants' motion for summary judgment. Specifically, the Doe 1 plaintiffs claim that the court improperly (1) failed to view the evidence in the light most favorable to the Doe 1 plaintiffs, (2) determined that the Doe 1 defendants are immune from liability under General Statutes § 10-222*l* because (a) the allegations of negligence in counts three, four, five, eight, and nine[4] involve issues relating to whether the Doe 1 defendants acted in good faith and adequately reported and investigated the bullying allegations, which are factual issues and should not have been decided on a motion for summary judgment, and (b) the Doe 1 defendants failed to respond to six bullying complaints, (3) rendered summary judgment in favor of Lawrence, Landon, and Quiricone with respect to the claim of recklessness in count six because the claim requires a determination of their intent, which is a question of fact, (4) granted the motion for summary judgment as to count ten, which alleges a claim of respondeat superior liability against the board and the town, and (5) granted the motion for summary judgment when a genuine issue of material fact exists as to whether Landon or the board retaliated against the Doe 1 plaintiffs, as alleged in counts five, six, and nine. We disagree and affirm the judgment of the trial court in AC 44153.

In Docket No. AC 44122, the plaintiffs, John Doe 2, Jane Doe 2, and Jack Doe 2,[5] appeal from the judgment

[4] In their appellate brief, the Doe 1 plaintiffs also claim that the court erred in granting the motion for summary judgment as to count one, which alleges a claim of negligence against Kris Szabo. As we stated previously in this opinion, the claims against Szabo are not involved in the appeal in AC 44153 because there is no final judgment with respect to the claims against Szabo. See footnote 3 of this opinion.

[5] John Doe 2 and Jane Doe 2 commenced the underlying action in AC 44122 alleging claims individually and on behalf of their son, Jack Doe 2, who, at all times relevant to this action, was a minor and allegedly was subjected to bullying while attending the middle school. In AC 44122, we refer to the plaintiffs collectively as the Doe 2 plaintiffs and, where necessary, individually by the pseudonyms designated in the revised complaint and as ordered by the court. See Practice Book § 11-20A (h).

of the trial court granting the motion for summary judgment filed by the defendants, the board, Kris Szabo, Lawrence, Landon, Quiricone, and the town.[6] On appeal, the Doe 2 plaintiffs claim that the court improperly granted the Doe 2 defendants' motion for summary judgment. Specifically, the Doe 2 plaintiffs claim that (1) the court improperly failed to view the evidence in the light most favorable to the Doe 2 plaintiffs, (2) the allegations of negligence involve factual issues that are not susceptible to summary adjudication, (3) the claim of recklessness against Lawrence, Landon, Szabo, and Quiricone in count five requires a determination of their intent, which is a question of fact, (4) the court improperly granted the motion for summary judgment as to the claim of respondeat superior liability against the board and the town in count nine, and (5) a genuine issue of material fact exists as to whether Landon or the board retaliated against the Doe 2 plaintiffs, as alleged in counts four, five, and eight. We disagree and affirm the judgment of the trial court in AC 44122.

Before we address the substance of the claims in both appeals, we first set forth our well settled standard of review of a trial court's decision granting a motion for summary judgment. "The fundamental purpose of summary judgment is preventing unnecessary trials. . . . If a plaintiff is unable to present sufficient evidence in support of an essential element of his cause of action at trial, he cannot prevail as a matter of law. . . . To avert these types of ill-fated cases from advancing to trial, following adequate time for discovery, a plaintiff may properly be called upon at the summary

[6] In AC 44122, we refer to the board, the town, Szabo, Lawrence, Landon, and Quiricone collectively as the Doe 2 defendants and individually by name where necessary. A primary difference between the complaints in each case is that the Doe 1 complaint contains, in count two, a claim against Szabo for the assault and battery of Jack Doe 1. No similar claim is alleged by Jack Doe 2. There is a final judgment in favor of Szabo in AC 44122.

judgment stage to demonstrate that he possesses sufficient counterevidence to raise a genuine issue of material fact as to any, or even all, of the essential elements of his cause of action. . . .

"Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . .

"It is not enough . . . for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court . . . . [T]ypically [d]emonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . . Only if the defendant as the moving party has submitted no evidentiary proof to rebut the allegations in the complaint, or the proof submitted fails to call those allegations into question, may the plaintiff rest upon factual allegations alone. . . .

"[I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for

summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Salamone* v. *Wesleyan University*, 210 Conn. App. 435, 443–44, 270 A.3d 172 (2022).

I

AC 44153

We first address the appeal of the Doe 1 plaintiffs in AC 44153. The record before the court, viewed in the light most favorable to the Doe 1 plaintiffs as the nonmoving parties, reveals the following relevant facts and procedural history.

The Doe 1 plaintiffs filed a revised complaint on April 10, 2019, alleging the following facts. Jack Doe 1 was the victim of bullying in the town's school system from January, 2013, to at least June 22, 2017. During that time, he was called names by fellow students, ridiculed about his athletic ability, and subjected to racial epithets, physical assaults, threats, mental abuse, and repeated and numerous comments about his sexual orientation. On March 18, 2016, Jack Doe 1 was attacked and assaulted by four students during gym class at the middle school. The attack, which occurred in an area of the gym where the substitute gym teacher[7] could not see the students, was not witnessed by a teacher or an administrator. Following that incident, on March 19, 2016, Jack Doe 1 filed with the administration of the middle school a bullying report that detailed the March 18, 2016 assault. Thereafter, on March 22, 2016, John

[7] It is not disputed that Quiricone was not at the middle school on the day of the March 18, 2016 incident.

Doe 1 and Jane Doe 1 filed with the administration several bullying reports that detailed Jack Doe 1's extensive history of being bullied. According to the revised complaint, the Doe 1 defendants never initiated a formal or complete investigation of the March 19, 2016 bullying report filed by Jack Doe 1, and they either failed to investigate or conducted a wholly inadequate investigation of the claims alleged in the March 22, 2016 bullying reports.

Subsequently, John Doe 1 and Jane Doe 1 were informed by Szabo that two bullying complaints had been filed against Jack Doe 1. After those allegations were sustained, Jack Doe 1 received two days of in-school suspension, which the Doe 1 plaintiffs allege was done in retaliation for their complaints of the bullying of Jack Doe 1.

Thereafter, on April 11, 2016, Jack Doe 1 was bullied and called a derogatory name by another student. Jack Doe 1 was very upset by the incident and asked Szabo if he could speak to his guidance counselor, but Szabo refused and, instead, insisted that he write down what happened. Jack Doe 1 then requested to speak with his father, but Szabo refused and, in a hostile manner, grabbed Jack Doe 1's arm and shook it. The April 11, 2016 incident was never investigated, and, on April 12, 2016, Szabo issued a two day out-of-school suspension to Jack Doe 1,[8] which the Doe 1 plaintiffs claim was

[8] The suspension stemmed from the conduct of Jack Doe 1 during the April 11, 2016 incident with Szabo. In her affidavit, Szabo attested that, on April 11, 2016, "another child reported that Jack Doe 1 had said to him that [Jack] Doe 1 and his father had initiated a criminal investigation against [the other child] and [Szabo]." Szabo investigated that incident by interviewing Jack Doe 1 in the presence of the school counselor, Ellen Redgate. Szabo further attested that, after Jack Doe 1 admitted to making that statement and others to the other child, he was asked "to write down what he said. He began to do so, but then stopped and asked to speak with his father. . . . Redgate and [Szabo] told him he could call his father, but [that they] needed for him to write down what had happened." In response, "[Jack] Doe 1 became angry, scratched out something he had begun to write, and then said that he had lied. He screamed, 'You didn't do your fucking job. You're going to lose your job.' "

retaliatory in nature. In February, 2018, the Doe 1 plaintiffs commenced the underlying action in AC 44153 against the Doe 1 defendants.

In counts three, four, five, and nine[9] of the revised complaint, the Doe 1 plaintiffs allege claims of negligence against the Doe 1 defendants. The claims are premised on the failure of those defendants to comply with a bullying prevention and intervention policy that had been adopted by the board, as well as a safe school climate plan (plan) that the town's public schools had developed and implemented at the direction of the board and in accordance with General Statutes (Rev. to 2015) § 10-222d.[10] As alleged in the complaint, the plan, which prohibits bullying within the town's public schools, requires the following: "(a) The principal of each school [is] to intervene in order to address incidents of bullying against a single individual; (b) the principal, or their designee, of each school [is] to serve as the safe school climate specialist; (c) the school [is] to accept reports of bullying from students and parents; (d) the safe school climate specialist [is] to investigate or supervise the investigation of reported acts of bullying; (e) school employees who witness acts of bullying or receive reports of bullying [are] to notify a school administrator not later than one (1) day after witnessing said act and to file a written report within two (2) days of said act; (f) the school [is] to notify the parents of all students involved in a report of bullying regarding the nature of said report; (g) the school [is] to invite the parents of all students involved in a verified report of bullying to a meeting to communicate the measures being taken to ensure the safety of the victim and the

[9] Because counts one and two are alleged against Szabo only and the court denied the motion for summary judgment as to count two, those counts are not at issue in the appeal in AC 44153. See footnote 3 of this opinion.

[10] All references in this opinion to § 10-222d are to the 2015 revision of the statute.

policies and procedures in place to prevent further acts of bullying; (h) the school [is] to develop a student safety support plan for the victim of a verified act of bullying; (i) the school [is] to develop a specific written intervention plan to address repeated incidents of bullying against a single individual; (j) the school [is] to counsel students, when discipline is not reasonably required, regarding bullying; and (k) the school [is] to only issue an in-school suspension after informing the perpetrator of a verified act of bullying, and providing them with the opportunity to respond."

According to the Doe 1 plaintiffs, the Doe 1 defendants negligently violated the terms of the plan by "issuing suspensions to Jack Doe 1 without providing him with the details of the complaint against him and an opportunity to respond," and by failing (1) to intervene to address the repeated acts of bullying against Jack Doe 1, (2) to accept reports of bullying from the Doe 1 plaintiffs, (3) to "investigate reports of bullying against Jack Doe 1," (4) "to report acts of bullying witnessed by staff members," (5) "to disclose to the [Doe 1] plaintiffs the details of reports of bullying made against Jack Doe 1," (6) "to invite the [Doe 1] plaintiffs to a meeting with school officials to communicate the measures being taken to ensure the safety of the victim and the policies and procedures in place to prevent further acts of bullying," (7) "to develop a student safety support plan for Jack Doe 1," (8) "to develop a specific written intervention plan to address repeated incidents of bullying against Jack Doe 1," and (9) "to counsel Jack Doe 1 regarding bullying prior to issuing discipline . . . ."

With respect to Landon, the town, and the board, the Doe 1 plaintiffs also allege that they were negligent in allowing retaliation against Jack Doe 1. They further allege that Lawrence, Quiricone, and Landon breached a duty of care owed to Jack Doe 1 by failing to detect, to investigate, and to remediate bullying against him,

by failing to supervise students in gym class, and by allowing a hostile environment where bullying thrived, and that the town and the board breached their duties under the plan to Jack Doe 1 through the actions and omissions of their employees, agents, and officers. Finally, as to the claims of negligence, the Doe 1 plaintiffs allege that the duties of the Doe 1 defendants under the plan are ministerial in nature and that, as a result of the negligence of the Doe 1 defendants, the Doe 1 plaintiffs have incurred expenses and fees, and suffered and will continue to suffer mental and emotional distress, and that Jack Doe 1 suffered physical injuries and was negatively affected by the suspensions imposed by the middle school that were entered in his school transcript.

Count six of the revised complaint alleges a claim of recklessness against Landon, Lawrence, and Quiricone. Specifically, count six alleges that those defendants "had a duty to detect, prevent, investigate, and remediate bullying within [the middle school] in accordance with the . . . [p]lan," "knew, or should have known, of the dangerous impact of a failure to follow the . . . [p]lan would have on students, including Jack Doe 1," and "acted in a wanton, reckless, wilful, intentional, and/or malicious manner by failing to detect, prevent, investigate, and remediate bullying within [the middle school] in accordance with the . . . [p]lan and . . . [§] 10-222d." Count six further alleges that those defendants acted with reckless disregard to the safety of Jack Doe 1, placed him in a situation of imminent harm, and "acted in a wanton, reckless, wilful, intentional, and/or malicious manner by retaliating against the [Doe 1 plaintiffs], including, but not limited to, ordering a [special education planning and placement team meeting] for Jack Doe 1 [even though he had exceptional grades], changing his class schedule, and suspending [him] twice."

Count eight[11] of the revised complaint alleges against the Doe 1 defendants a claim for negligent infliction of emotional distress. Specifically, the Doe 1 plaintiffs allege that the conduct of the Doe 1 defendants "involved an unreasonable risk of causing emotional distress to Jack Doe 1, a minor," and "was done with a conscious disregard for the rights and safety of Jack Doe 1," that the emotional distress suffered by Jack Doe 1 was "reasonable in light of the conduct perpetrated by the [Doe 1] defendants," and that the Doe 1 defendants "knew, or should have known, that their conduct involved an unreasonable risk of causing emotional distress to Jack Doe 1," who suffered emotional distress as a result of their conduct. Finally, in count ten, the Doe 1 plaintiffs allege a claim of respondeat superior liability against the town and the board, claiming that they are responsible for the negligent acts or omissions of their employees.

In response to the revised complaint, the Doe 1 defendants filed an answer and two special defenses: the first special defense alleges that they are entitled to statutory immunity under § 10-222*l*, and the second special defense alleges that, because the acts as alleged in the revised complaint are discretionary in nature, they are entitled to governmental immunity under General Statutes § 52-557n (a) (2) (B). The Doe 1 plaintiffs filed a general denial of the special defenses. Thereafter, the Doe 1 defendants filed a motion for summary judgment, which the court granted as to all counts except for count two. The appeal in AC 44153 followed. Additional facts and procedural history will be set forth as necessary.

[11] Count seven of the revised complaint alleges a claim for intentional infliction of emotional distress against Landon, Lawrence, and Quiricone. The court granted the motion for summary judgment as to count seven, and the Doe 1 plaintiffs have not challenged that decision on appeal. Accordingly, we do not address the court's decision rendering summary judgment as to the claim of intentional infliction of emotional distress in count seven.

A

The Doe 1 plaintiffs' first claim is that the court, in deciding the motion for summary judgment, improperly failed to view the evidence in the light most favorable to the Doe 1 plaintiffs. In support of this claim, the Doe 1 plaintiffs cite general principles governing motions for summary judgment, including the principle that, in deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. See *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 11, 938 A.2d 576 (2008); see also *Lasso* v. *Valley Tree & Landscaping, LLC*, 209 Conn. App. 584, 592, 269 A.3d 202 (2022). After citing those general principles, however, the Doe 1 plaintiffs follow with a conclusory statement that "the trial court failed to consider the full factual record in the light most favorable to the [Doe 1] plaintiffs when it granted [the Doe 1] defendants' motion for summary judgment." Their appellate brief is devoid of any analysis of this claim and fails to explain how, or to set forth any specific instance in which, the court failed to construe the evidence in the light most favorable to the Doe 1 plaintiffs.

"[A] claim must be raised and briefed adequately in a party's principal brief, and . . . the failure to do so constitutes the abandonment of the claim. . . . We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle *without analyzing the relationship between the facts of the case and the law cited*."

(Citation omitted; emphasis added; internal quotation marks omitted.) *DeJesus* v. *R.P.M. Enterprises, Inc.*, 204 Conn. App. 665, 707, 255 A.3d 885 (2021); see also *Rousseau* v. *Weinstein*, 204 Conn. App. 833, 855, 254 A.3d 984 (2021) ("[c]laims that are inadequately briefed generally are considered abandoned" (internal quotation marks omitted)). Accordingly, we deem this inadequately briefed claim abandoned and decline to review it.

B

The Doe 1 plaintiffs next challenge the court's decision granting the motion for summary judgment as to the counts of the revised complaint alleging negligence and negligent infliction of emotional distress against the Doe 1 defendants, which include counts three, four, five, eight, and nine.[12] With respect to the negligence allegations in those counts that are premised on the failure of the Doe 1 defendants to comply with the plan, the court granted the motion for summary judgment in favor of Lawrence, Quiricone, Landon, and the board on the ground that those individual defendants and the board are entitled to statutory immunity under § 10-222*l*. To the extent that the negligence allegations in those counts concern the discretionary duties to supervise the gym class or to manage and supervise school employees, rather than a violation of the plan, the court concluded that the Doe 1 defendants are protected by governmental immunity pursuant to § 52-557n (a) (2) (B). We address the court's conclusions regarding statutory and governmental immunity in turn.

1

Statutory Immunity

The Doe 1 plaintiffs raise two arguments concerning the court's ruling that Lawrence, Quiricone, Landon,

[12] See footnote 4 of this opinion.

and the board are entitled to statutory immunity for the claims alleged in counts three, four, five, eight, and nine. Specifically, they argue that (1) counts three, four, five, eight, and nine involve factual issues relating to whether the Doe 1 defendants acted in good faith and adequately reported and investigated the bullying allegations, as required under § 10-222*l* for immunity to apply, and that those factual issues should not have been decided on a motion for summary judgment, and (2) the court improperly determined that the Doe 1 defendants are immune from liability under § 10-222*l* when those defendants failed to respond to six bullying complaints. We disagree with both claims.

Before we address the substance of the court's decision granting the motion for summary judgment on the basis of statutory immunity, we first set forth the language of the relevant statutes and general principles that guide us in our analysis of these claims.

Pursuant to § 10-222d (b), "[e]ach local and regional board of education shall develop and implement a safe school climate plan to address the existence of bullying . . . in its schools. . . ." General Statutes (Rev. to 2015) § 10-222d (b). Under subsection (b) of § 10-222d, each plan "shall" contain certain requirements, as set forth in subdivisions (1) through (18). "These requirements, generally, enable the reporting of instances of bullying, mandate school officials to forward and investigate these reports to a specialist, who would then notify the parents of the students, and direct the adoption of a comprehensive prevention and intervention strategy." *Palosz* v. *Greenwich*, 184 Conn. App. 201, 210–11, 194 A.3d 885, cert. denied, 330 Conn. 930, 194 A.3d 778 (2018). Under subsection (c) of § 10-222d, "each local and regional board of education . . . shall submit a safe school climate plan to the [D]epartment [of Education] for review and approval . . . ." General Statutes (Rev. to 2015) § 10-222d (c). "Section 10-222d

(d) compels each board of education to require each school in the district to complete and submit an assessment of its policy to the Department of Education pursuant to General Statutes § 10-222h." *Palosz* v. *Greenwich*, supra, 211.

In the present case, the Doe 1 plaintiffs do not dispute and, in fact, allege that the Doe 1 defendants complied with the development and implementation requirements of § 10-222d by developing the plan in accordance with the bullying prevention and intervention policy that had been adopted by the board. Their main contention is that the Doe 1 defendants did not comply with the terms of the plan. We, thus, must examine § 10-222*l*, which affords immunity to school employees and the board when acting in accordance with a safe school climate plan. Specifically, § 10-222*l* (a) provides in relevant part: "No claim for damages shall be made against a school employee, as defined in section 10-222d, who reports, investigates and responds to bullying . . . in accordance with the provisions of the safe school climate plan, described in section 10-222d, if such school employee was acting in good faith in the discharge of his or her duties or within the scope of his or her employment. The immunity provided in this subsection does not apply to acts or omissions constituting gross, reckless, wilful or wanton misconduct." Likewise, subsection (c) of § 10-222*l* affords immunity to a "board of education that implements the safe school climate plan, described in section 10-222d, and reports, investigates and responds to bullying . . . if such local or regional board of education was acting in good faith in the discharge of its duties. The immunity provided in this subsection does not apply to acts or omissions constituting gross, reckless, wilful or wanton misconduct."

Thus, for statutory immunity under § 10-222*l* to apply to the defendant school employees—Lawrence, Quiri-

cone, and Landon—they must have (1) reported, investigated, and responded to bullying, (2) in accordance with the provisions of the plan, (3) in good faith, and (4) in the discharge of their duties or within the scope of their employment. Similarly, for it to apply to the board, the board must have (1) implemented a safe school climate plan, (2) reported, investigated, or responded to bullying, (3) in good faith, and (4) in the discharge of its duties. Here, the parties do not dispute that the board implemented the plan and that the actions taken by the Doe 1 defendants were done in the discharge of their duties and within the scope of their employment. The primary issue before the court in deciding the motion for summary judgment was whether a factual predicate existed to raise a genuine issue of material fact regarding whether Lawrence, Quiricone, Landon, and the board reported, investigated, and responded to bullying in good faith.

a

The Doe 1 plaintiffs first claim that they "set forth a significant amount of evidence to show that [the Doe 1] defendants were negligent and did not act in good faith, easily raising a genuine issue of material fact. For this reason, the trial court erred when it granted [the motion for] summary judgment [in favor of the Doe 1] defendants . . . ." They cite the following evidence as demonstrating that they met their burden of showing the existence of a disputed issue of material fact as to the bad faith of the Doe 1 defendants: (1) Szabo, as the safe school climate specialist, did not refer the complaints of bullying based on sexual orientation to a Title IX[13] coordinator, as required under the plan,[14] (2) the

[13] See Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.

[14] The court addressed the Doe 1 plaintiffs' claim regarding a Title IX coordinator in its memorandum of decision, stating: "In the [Doe 1] plaintiffs' memorandum of law in opposition [to the motion for summary judgment], the plaintiffs, for the first time, mention Title IX [with regard] to their claims for negligence and recklessness. Any allegations concerning Title IX

specific written intervention plan developed by the Doe 1 defendants was generic in nature and did not address the repeated incidents of bullying against Jack Doe 1, as required under the plan, (3) the board did not conduct an informal hearing before suspending Jack Doe 1, (4) Szabo suspended Jack Doe 1 on the basis of anonymous bullying reports, in violation of the plan, (5) a meeting with John Doe 1 and Jane Doe 1 to discuss measures to prevent further incidents of bullying did not take place as required under the plan, (6) the Doe 1 defendants were aware that a curtain used in the gym created

deficiencies have not been alleged in the revised complaint, all discrimination counts based on Title IX have been removed [to federal court] and, therefore, are not properly before the court. The [Doe 1] defendants' evidence supports that prior claims of Title IX discrimination were withdrawn and the [Doe 1] plaintiffs conceded during oral argument that Title IX and discrimination were only being mentioned as another example of how the [Doe 1] defendants did not follow the plan. Nevertheless, the [Doe 1] defendants' evidence supports that reports of bullying that included discriminatory statements were investigated and not substantiated and/or not reported at all, and the [Doe 1] plaintiffs [did] not put forth any evidence to create a genuine issue of material fact that the [Doe 1] defendants' failure to contact the Title IX coordinator was unreasonable or an extreme departure from ordinary care. The court agrees that the [Doe 1] defendants have met their burden and that no genuine issue of material fact exists as to this issue." On appeal, the Doe 1 defendants argue that the claim of the Doe 1 plaintiffs regarding a failure to refer the bullying allegations based on sexual orientation to a Title IX coordinator is not properly before this court because it was abandoned and is an unpleaded theory of liability. They further argue that, even if this court considers the issue, the record does not support the claim that Jack Doe 1 was bullied on the basis of his sexual orientation. In their reply brief, the Doe 1 plaintiffs have not addressed the abandonment issue and argue, instead, that the failure of the Doe 1 defendants to refer the bullying complaints based on sexual orientation demonstrates bad faith on their part and that one of the ministerial duties that the Doe 1 defendants did not follow was the mandate of the plan that a Title IX coordinator participate in bullying investigations that involve a legally protected classification. We agree with the court and the Doe 1 defendants that any claim regarding the failure to involve a Title IX coordinator in the bullying investigation was not properly before the court, as the revised complaint was devoid of any allegations concerning Title IX. Moreover, on appeal, the Doe 1 plaintiffs have not addressed the court's determination to that effect. Accordingly, we deem any claim relating to Title IX abandoned and decline to consider

a blind spot for supervision of students, which created a hazardous condition, and (7) Landon and the board have a legal duty to ensure that school employees follow the plan and, thus, there is a genuine issue of material fact as to whether Landon and the board are liable. We are not persuaded.

We agree with the court's conclusion that the evidence presented by the Doe 1 plaintiffs failed to raise a genuine issue of material fact regarding the good faith efforts of the Doe 1 defendants. We first note that the negligence counts in the revised complaint do not allege that the Doe 1 defendants acted in bad faith by deceiving or misleading the Doe 1 plaintiffs or that they acted with a dishonest purpose or improper motive. Rather, they allege that Lawrence, Quiricone, Landon, and the board breached a duty owed to Jack Doe 1, acted with disregard for the rights and safety of the Doe 1 plaintiffs, failed to exercise reasonable care, and failed to comply with the plan. In their memorandum of law in opposition to the Doe 1 defendants' motion for summary judgment, the Doe 1 plaintiffs argued that the Doe 1 defendants were not immune from liability under § 10-222*l* because they failed to act in good faith, stating: "[The] defendants acted recklessly and intentionally when they failed or refused to follow the plan, properly investigate bullying . . . prevent bullying, failed to investigate Jack Doe 1 being called a [derogatory name], create[d] an unsafe space in the gymnasium and when they retaliated against Jack Doe 1. Furthermore . . . [the Doe 1] defendants did not act in good faith when they violated the plan, conducted or failed to conduct investigations, enacted preventative measures and retaliated against Jack Doe 1 . . . ." Thus, the Doe 1 plaintiffs, in making their bad faith argument, simply restated their allegations of recklessness and negligence.

it as a basis for showing bad faith by the Doe 1 defendants or the existence of a ministerial duty that was violated.

"It is the burden of the party asserting the lack of good faith to establish its existence . . . ." *Habetz* v. *Condon*, 224 Conn. 231, 237 n.11, 618 A.2d 501 (1992). "[B]ad faith is defined as the opposite of good faith, generally implying a design to mislead or to deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation not prompted by an honest mistake as to one's rights or duties . . . . [B]ad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity . . . it contemplates a state of mind affirmatively operating with furtive design or ill will." (Internal quotation marks omitted.) *Buckman* v. *People Express, Inc.*, 205 Conn. 166, 171, 530 A.2d 596 (1987).

In *Wadia Enterprises, Inc.* v. *Hirschfeld*, 224 Conn. 240, 250, 618 A.2d 506 (1992), our Supreme Court addressed an argument regarding bad faith claims similar to the one raised in the present case by the Doe 1 plaintiffs, stating: "The plaintiff further claims that bad faith is a factual question and as such is not appropriately determined by a motion for summary judgment. The plaintiff relies on cases in which we have held that issues of motive, intent and good faith are not properly resolved on a motion for summary judgment. . . . We have also held, however, that even with respect to questions of motive, intent and good faith, the party opposing summary judgment must present a factual predicate for his argument in order to raise a genuine issue of fact." (Citations omitted.) Similarly, in *Dinnis* v. *Roberts*, 35 Conn. App. 253, 261, 644 A.2d 971, cert. denied, 231 Conn. 924, 648 A.2d 162 (1994), this court concluded that the plaintiffs, in opposing a motion for summary judgment, "failed to present the necessary factual predicate to raise a genuine issue as to the defendants' bad faith" where they simply referred to the allegations of bad faith in their complaint and failed

to submit supporting documentation showing bad faith on the part of the defendants. See also *Wadia Enterprises, Inc.* v. *Hirschfeld*, 27 Conn. App. 162, 170, 604 A.2d 1339 ("[m]ere statements of legal conclusions . . . and bald assertions, without more, are insufficient to raise a genuine issue of material fact capable of defeating summary judgment" (citation omitted)), aff'd, 224 Conn. 240, 618 A.2d 506 (1992).

In the present case, the Doe 1 plaintiffs did not set forth a factual predicate to raise an issue of material fact as to whether the Doe 1 defendants acted in bad faith; instead, they make conclusory assertions that are not based on any evidence in the record. "While the court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion [for summary judgment] . . . a party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." (Citation omitted; internal quotation marks omitted.) *Mountaindale Condominium Assn., Inc.* v. *Zappone*, 59 Conn. App. 311, 315–16, 757 A.2d 608, cert. denied, 254 Conn. 947, 762 A.2d 903 (2000); see also *Sidorova* v. *East Lyme Board of Education*, 158 Conn. App. 872, 893 n.20, 122 A.3d 656 ("[s]ummary judgment is proper . . . where the plaintiff has failed to allege facts to support its cause of action"), cert. denied, 319 Conn. 911, 123 A.3d 436 (2015); *Rafalko* v. *University of New Haven*, 129 Conn. App. 44, 52, 19 A.3d 215 (2011) (trial court properly rendered summary judgment in favor of defendants where plaintiff failed to demonstrate evidence of bad faith). As our Supreme Court previously has stated, bad faith is not simply negligence and implies something more, such as a conscious wrongdoing with a dishonest purpose. See *Buckman* v. *People Express, Inc.*, supra, 205 Conn. 171. We conclude that the Doe 1 plaintiffs failed to present a factual predi-

cate in opposition to the motion for summary judgment to demonstrate the existence of a genuine issue of material fact as to whether the Doe 1 defendants acted in bad faith for purposes of § 10-222*l*.

b

The Doe 1 plaintiffs also claim that the court improperly determined that the Doe 1 defendants are immune from liability under § 10-222*l* when those defendants failed to respond to six bullying complaints. According to the Doe 1 plaintiffs, because the Doe 1 defendants did not respond to or investigate those bullying complaints, they could not avail themselves of the immunity afforded by § 10-222*l*. The following additional facts are relevant to this claim.

On April 6, 2016, John Doe 1, on behalf of Jack Doe 1, filed six bullying complaints. Those complaints concerned separate acts of bullying that allegedly took place in September/October, 2015, on January 29, 2016, and on February 11, 18, 19 and 25, 2016. The Doe 1 plaintiffs allege that the acts of bullying in those six complaints took place in the gym class taught by Quiricone, who they allege saw the incidents and told students to stop picking on Jack Doe 1. They further allege that no investigation was conducted with regard to the bullying complaints filed on April 6, 2016.

In support of their motion for summary judgment, the Doe 1 defendants submitted an affidavit from Szabo, in which she acknowledged receiving additional reports of bullying on April 6, 2016. Szabo attested that (1) those reports involved the same students against whom Jack Doe 1 previously had made bullying complaints and concerned bullying incidents that happened in gym class prior to the March 18 incident, (2) "Jack Doe 1's parents failed to complete a consent form to disclose the facts of Jack Doe 1's complaints despite being asked

on more than one occasion that they do so," (3) the "additional written complaints were the same or similar in substance to what Jack Doe 1 had previously verbally described in the course of [Szabo's] discussions with him," (4) her notes indicated that she asked questions about the incidents during interviews with children, and (5) "[t]he additional written complaints of bullying matched what Jack Doe 1 had reported to [Szabo] following the March 18 incident and . . . were part of the subject of [Szabo's] interviews with students throughout March of 2016." Szabo's affidavit indicates that she accepted receipt of the complaints and generally investigated their substance, even though John Doe 1 and Jane Doe 1 failed to complete certain consent forms, which were necessary to protect Jack Doe 1's identity and for the Doe 1 defendants to investigate the complaints.

We agree with the court that the Doe 1 defendants met their burden of establishing the absence of a genuine issue of material fact that they properly handled the April 6, 2016 complaints. The Doe 1 plaintiffs did not present evidence to raise a genuine issue of material fact to support their contradictory claim that the complaints were never investigated. See *Hassiem* v. *O & G Industries, Inc.*, 197 Conn. App. 631, 650, 232 A.3d 1139 ("[t]o oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents" (internal quotation marks omitted)), cert. denied, 335 Conn. 928, 235 A.3d 525 (2020). Moreover, even though the revised complaint alleges that a bullying incident occurred on April 11, 2016, during which Jack Doe 1 was called a racially derogatory name, Szabo attested that Jack Doe 1 never told her about the incident, despite the fact that he had a meeting with Szabo that same day to discuss statements he had made about another student. The Doe 1 plaintiffs

did not put forth any evidence demonstrating that a report of that incident had been made.[15]

[15] On appeal, the Doe 1 plaintiffs have not challenged the court's conclusion that the Doe 1 defendants demonstrated the absence of a genuine issue of material fact that their alleged actions constituted, at a minimum, some form of reporting, investigation, and response with respect to the bullying complaints filed on March 19 and 22, 2016. We, nevertheless, note our agreement with the court's conclusion. The evidence in the record includes multiple investigation reports regarding various bullying complaints; notes that had been compiled from interviews with students and faculty; deposition transcripts and affidavits; evidence showing that the Doe 1 plaintiffs had been notified of the incidents and the findings of the investigations and were invited to a meeting to discuss the incidents and punishments imposed, although no such meeting ever occurred; deposition testimony from Jack Doe 1 in which he stated that he could not remember reporting any incidents of bullying prior to March 18, 2016, and that he met with Szabo multiple times to discuss what happened and potential consequences for his actions; evidence showing that Szabo contacted faculty from Jack Doe 1's elementary school to see if there were any incidents between Jack Doe 1 and other students prior to the March 18, 2016 incident, and they could not remember any incidents concerning Jack Doe 1; deposition testimony from John Doe 1 acknowledging that he had cancelled some meetings scheduled with school officials; deposition testimony from Jane Doe 1 that Jack Doe 1 was offered counseling services by Szabo; deposition testimony from Quiricone that he was unaware of any conflict involving Jack Doe 1 and the other students involved prior to the March 18, 2016 incident and that he met with Szabo to discuss the class dynamics after that incident; and Szabo's deposition testimony that she had not received any bullying complaints prior to the March 18, 2016 incident, that after her investigation she issued disciplinary consequences to six students, including Jack Doe 1, that she notified the parents about her findings after she completed her investigation and offered to meet with John Doe 1 and Jane Doe 1, that she changed the schedule of one student involved by changing seven of his classes to prevent him from interacting with Jack Doe 1, that she moved Jack Doe 1 to a different gym class due to his interactions with another child after the March 18, 2016 incident, and that she developed a safe plan for Jack Doe 1 and suggested remediation measures.

The evidence presented by the Doe 1 defendants in support of their motion for summary judgment shows the actions taken by Szabo, as the safe school climate specialist under the plan, following her receipt of the bullying complaints filed by the Doe 1 plaintiffs after the March 18, 2016 incident in the middle school gym, as well as the bullying complaints filed against Jack Doe 1 after that incident. It is apparent from the allegations of the revised complaint that the Doe 1 plaintiffs do not believe that the response of the Doe 1 defendants was adequate, and the court even acknowledged that it may "not have been perfect"; the record, nevertheless, shows that the Doe 1 defendants reported, investigated, and responded to the bullying complaints made known to them, as required under § 10-222*l* for immunity to apply.

The court, therefore, properly determined that Lawrence, Quiricone, Landon, and the board are protected by statutory immunity for the claims of negligence alleged against them for violations of the plan and granted the motion for summary judgment in their favor as to counts three, four, five, eight, and nine with respect to those claims relating to the plan.

2

Governmental Immunity

The court also rendered summary judgment in favor of the Doe 1 defendants on the ground of governmental immunity[16] under § 52-557n (a) (2) (B) with respect to

As the court explained, the allegations of the Doe 1 plaintiffs essentially concerned the adequacy of the actions taken by the Doe 1 defendants, rather than a complete failure of the Doe 1 defendants to respond at all, and, thus, they exemplified the type of negligence for which the statutory immunity under § 10-222*l* was created.

Although the revised complaint alleged that Jack Doe 1 had been the victim of bullying in the town's school system since January, 2013, when Jack Doe 1 was in fourth or fifth grade in elementary school, there was no evidence submitted in support of or in opposition to the motion for summary judgment demonstrating the existence of any bullying complaints prior to the March 18, 2016 incident or that the Doe 1 defendants knew that Jack Doe 1 had been bullied prior to that incident. Furthermore, Jack Doe 1 testified in his deposition that the bullying started when he was in fourth or fifth grade and that he was made fun of by his peers on a daily basis, although he could not recall a particular date or incident. When asked if he ever told a teacher, he replied: "No, I had assumed that the teachers had seen it because they were everywhere, and I was confident that they had seen it happening, so I assumed they'd have reported it themselves." He also could not recall whether he ever told his parents about what was happening to him at the elementary or middle school, nor could he recall ever reporting to a responsible adult at the middle school that he was being bullied at recess during sixth grade. In summary, he could not recall ever reporting bullying, either to his parents or to a responsible adult at school, before the March 18, 2016 incident. He also acknowledged that, before the March 18, 2016 incident, he never reported to anyone the names and slurs about his sexual orientation and ethnicity that he was being called at school. Although it is unfortunate that Jack Doe 1 never spoke up about the bullying that he had been subjected to over the years, the Doe 1 defendants cannot be found to have violated the plan for failing to respond to incidents of bullying about which they were never made aware.

[16] Under the common law, a municipality traditionally was immune from liability for tortious acts. See *Lewis* v. *Newtown*, 191 Conn. App. 213, 221–22,

the allegations of negligence in counts three, four, five, eight, and nine to the extent that the allegations are not based on the plan but, instead, concern duties to supervise classrooms and to supervise and manage school employees, and in favor of the town for negligence regarding the plan in counts eight and nine.[17] "Under § 52-557n (a) (2) (B), a municipality and its agents are not liable for violations of discretionary duties, but are liable for violations of ministerial duties." (Emphasis omit-

214 A.3d 405, cert. denied, 333 Conn. 919, 216 A.3d 650 (2019). The common-law rule of governmental immunity has been abrogated by § 52-557n (a) (2). See id., 222. General Statutes § 52-557n (a) (2) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." "This provision incorporates our prior common-law jurisprudence extending immunity to those acts requiring the exercise of judgment on the part of the municipal actor. Discretionary acts are distinct from those that are ministerial; a ministerial act involves prescribed conduct that does not afford the actor the ability to use his own judgment. Pursuant to § 52-557n (a) (2) (B), a municipality is extended immunity from liability for discretionary acts but not for ministerial acts." (Emphasis omitted.) *Williams* v. *Housing Authority*, 159 Conn. App. 679, 690, 124 A.3d 537 (2015), aff'd, 327 Conn. 338, 174 A.3d 137 (2017). "Although the determination of whether official acts or omissions are ministerial or discretionary is normally a question of fact for the fact finder . . . there are cases where it is apparent from the complaint . . . [that the nature of the duty] and, thus, whether governmental immunity may be successfully invoked pursuant to . . . § 52-557n (a) (2) (B), turns on the character of the act or omission complained of in the complaint. . . . Accordingly, where it is apparent from the complaint that the defendants' allegedly negligent acts or omissions necessarily involved the exercise of judgment, and thus, necessarily were discretionary in nature, summary judgment is proper. . . . The issue of governmental immunity is simply a question of the existence of a duty of care, and [our Supreme Court] has approved the practice of deciding the issue of governmental immunity as a matter of law." (Citation omitted; internal quotation marks omitted.) Id., 699–700; see also *Lewis* v. *Newtown*, supra, 221 ("[t]he determination of whether a governmental or ministerial duty exists gives rise to a question of law" (internal quotation marks omitted)).

[17] We note that the court's memorandum of decision, which renders summary judgment in favor of the town on the ground of governmental immunity as to "counts seven and eight," contains a scrivener's error, as the claims of negligence against the town are contained in counts eight and nine.

ted.) *Williams* v. *Housing Authority*, 159 Conn. App. 679, 697, 124 A.3d 537 (2015), aff'd, 327 Conn. 338, 174 A.3d 137 (2017). In the present case, the court concluded that, because the alleged acts or omissions of the Doe 1 defendants regarding the supervision of classrooms and the management, supervision, and retention of the school employees involved duties that are discretionary[18] and not ministerial[19] in nature, and because the Doe 1 plaintiffs failed to identify any statute or rule that imposed a ministerial duty on the Doe 1 defendants,[20] the Doe 1 plaintiffs did not demonstrate the

[18] Our Supreme Court, "[i]n addressing the question of whether the general supervision of public school employees is a discretionary or ministerial function . . . has concluded that the administrators' 'duty to ensure that school staff members adequately discharged their assignments [is] discretionary because it [is] encompassed within their general responsibility to manage and supervise school employees.' *Strycharz* v. *Cady*, 323 Conn. 548, 569, 148 A.3d 1011 (2016), overruled in part on other grounds by *Ventura* v. *East Haven*, 330 Conn. 613, 637 and n.12, 199 A.3d 1 (2019)." *Lewis* v. *Newtown*, 191 Conn. App. 213, 231, 214 A.3d 405, cert. denied, 333 Conn. 919, 216 A.3d 650 (2019); see also *Light* v. *Board of Education*, 170 Conn. 35, 39, 364 A.2d 229 (1975) ("[i]t has been recognized that matters concerning the employment of teachers require the board of education to exercise a broad discretion").

[19] "[O]ur courts consistently have held that to demonstrate the existence of a ministerial duty on the part of a municipality and its agents, a plaintiff ordinarily must point to some statute, city charter provision, ordinance, regulation, rule, policy, or other directive that, *by its clear language*, compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion. . . . *Cole* v. *New Haven*, [337 Conn. 326, 338, 253 A.3d 476 (2020)]. A ministerial duty need not be written and may be created by oral directives from superior officials, the existence of which are established by testimony. . . . In contrast, descriptions of general practices or expectations that guide an employee's exercise of discretion do not create a ministerial duty." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Doe* v. *Madison*, 340 Conn. 1, 31–32, 262 A.3d 752 (2021).

[20] In its memorandum of decision, the court stated: "The only source the plaintiffs allege in their revised complaint that could create a ministerial duty is the plan, but a plain reading of the plan reveals that it does not limit the defendants' exercise of discretion in their supervision and management of the employees and students. Nothing in the plan specifically discusses supervision in classrooms. The plan specifically provides strategies for prevention and intervention that 'may include' various options, and notes in

existence of a genuine issue of material fact that the allegations of negligence against the Doe 1 defendants involved ministerial, and not discretionary, acts.

Accordingly, the court concluded that the Doe 1 defendants are protected by governmental immunity under § 52-557n (a) (2) (B) for the negligence claims in these counts involving discretionary acts unless an exception to that immunity applies.[21] The Doe 1 plaintiffs, however, did not plead an exception to governmental immu-

many places that the school employees 'shall' investigate reported incidents of bullying, meet with students, notify and invite a meeting with parents, and develop a safety support and intervention plan. The plan, however, does not specify exactly how these actions should be carried out and grants discretion to the defendants. Moreover, the plan acknowledges that '[b]ullying behavior . . . can take many forms and can vary dramatically in the nature of the offense and the impact the behavior may have on the victim and other students. Accordingly, there is no one prescribed response to verified acts of bullying . . . . While conduct that rises to the level of "bullying" . . . will generally warrant traditional disciplinary action against the perpetrator of such bullying . . . whether and to what extent to impose disciplinary action . . . is a matter for the professional discretion of the building principal . . . .' The plan also recognizes that '[w]hile no specific action is required, and school needs for specific prevention and intervention strategies may vary from time to time,' various prevention and intervention strategies are available for the defendants to utilize.

"Inherent in the plan is the defendants' use of discretion to determine if an action by a student resembles bullying and requires an investigation, discretion is required to 'verify' a bullying complaint, and how the bullying situation is resolved and remediated is discretionary. . . . Further, the plan requires that students and parents be notified of the plan, and that school employees be trained on identification and prevention of bullying, but does not provide how that is to be done." (Footnote omitted.)

[21] Our Supreme Court "has recognized three exceptions to governmental immunity, each of which, when proven, demonstrates that, despite the discretionary nature of the officer's acts or omissions, the officer's duty to act was clear and unequivocal so as to warrant imposing liability on the municipality." (Internal quotation marks omitted.) *Borelli* v. *Renaldi*, 336 Conn. 1, 28, 243 A.3d 1064 (2020). "First, liability may be imposed for a discretionary act when the alleged conduct involves malice, wantonness or intent to injure. . . . Second, liability may be imposed for a discretionary act when a statute provides for a cause of action against a municipality or municipal official for failure to enforce certain laws. . . . Third, liability may be imposed when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable

nity in their general denial to the special defenses filed by the Doe 1 defendants, and the allegations of their revised complaint assert that the duties of the Doe 1 defendants in relation to the plan are ministerial in nature, which precludes discretionary act governmental immunity from applying. Instead, for the first time in their memorandum in opposition to the motion for summary judgment, they argued that, even if the duties of the Doe 1 defendants are discretionary, the identifiable person-imminent harm exception to governmental immunity applies. The court declined to consider whether the identifiable person-imminent harm exception applies as a result of the failure of the Doe 1 plaintiffs to raise it in their revised complaint or in their reply to the special defenses.[22]

person to imminent harm . . . .'' (Citations omitted; internal quotation marks omitted.) *Doe* v. *Petersen*, 279 Conn. 607, 615–16, 903 A.2d 191 (2006).

[22] This court addressed a similar situation in *Lewis* v. *Newtown*, 191 Conn. App. 213, 228, 214 A.3d 405, cert. denied, 333 Conn. 919, 216 A.3d 650 (2019). In *Lewis*, the complaint contained allegations that the defendants and the faculty and staff of an elementary school had a ministerial duty to create and implement guidelines for school security. Id. This court noted, however, ''that nowhere [did] the complaint contain any allegations that the implementation of guidelines by either the defendants or the faculty and staff was *discretionary*. The plaintiffs, rather, asserted for the first time in their opposition to the motion for summary judgment that the identifiable person-imminent harm exception applied *if the acts or omissions of the faculty and staff were discretionary*. This assertion is not applicable to the plaintiffs' argument because the identifiable person-imminent harm exception applies only to discretionary act immunity under § 52-557n (a) (2) (B), which the plaintiffs failed to raise in their complaint. . . . In sum, the viability of the plaintiffs' complaint can fairly be assessed only on the basis of the plaintiffs' claims, set forth in the complaint, that the defendants' development and implementation of school security protocols were ministerial in nature and, therefore, not protected by governmental immunity, and that the faculty and staff present in the school breached ministerial duties regarding implementation of the school security protocols.'' (Citation omitted; emphasis in original.) Id., 228–29. This court concluded in *Lewis* that, ''[b]ecause the plaintiffs failed to allege the applicability of the identifiable person-imminent harm exception to the discretionary acts of the defendants in the operative complaint . . . the [trial] court was not required to address this claim at summary judgment. In sum, newly fashioned allegations asserting an alternative basis for recovery in defense of a motion for summary judgment are

On appeal, the Doe 1 plaintiffs have not raised any claims challenging the court's decision regarding governmental immunity or its failure to address whether the identifiable person-imminent harm exception to that immunity applies. The Doe 1 plaintiffs' only reference to governmental immunity is in their reply brief, in which they argue that the question of whether governmental immunity under § 52-557n (a) (2) (B) applies is one for the jury to decide and should not have been decided by way of summary judgment. We decline to address that contention. See *Anketell* v. *Kulldorff*, 207 Conn. App. 807, 822, 263 A.3d 972 (declining to address claim raised for first time on appeal in reply brief), cert. denied, 340 Conn. 905, 263 A.3d 821 (2021); *Radcliffe* v. *Radcliffe*, 109 Conn. App. 21, 27, 951 A.2d 575 (2008) ("[i]t is a well established principle that arguments cannot be raised for the first time in a reply brief" (internal quotation marks omitted)). Moreover, we deem abandoned any claim relating to the court's ruling regarding governmental immunity. See *Bayview Loan Servicing, LLC* v. *Gallant*, 209 Conn. App. 185, 187 n.2, 268 A.3d 119 (2021) (because brief was devoid of argument or analysis relating to underlying foreclosure judgment, any claim related thereto was deemed abandoned).

C

The Doe 1 plaintiffs next claim that the court improperly rendered summary judgment in favor of Lawrence, Landon, and Quiricone with respect to the claim of recklessness in count six because the claim requires a determination of their intent, which is a question of fact. We do not agree.

We first set forth the following additional facts and general principles governing claims of recklessness that guide our resolution of this issue. Count six of the revised

improper and may not substitute for a timely filed amended complaint." (Footnote omitted.) Id., 237.

complaint alleges the following against Lawrence, Landon, and Quiricone: (1) "Th[ose] defendants had a duty to detect, prevent, investigate, and remediate bullying within [the middle school] in accordance with the . . . [p]lan," (2) they were aware of that duty by virtue of their having created the bullying prevention and intervention policy and the plan, (3) they knew or should have known that their failure to follow the plan would have a dangerous impact on students, including Jack Doe 1, (4) they failed to follow the plan when "they failed to detect, prevent, investigate or properly investigate, and/or remediate the bullying of Jack Doe 1," (5) they "acted in a wanton, reckless, wilful, intentional, and/or malicious manner by failing to detect, prevent, investigate, and remediate bullying within [the middle school] in accordance with the . . . [p]lan and . . . [§] 10-222d," (6) they "acted with a reckless disregard of the rights and/or safety of Jack Doe 1 by refusing to comply with their obligations under the . . . [p]lan," (7) they "acted in a wanton, reckless, wilful, intentional, and/or malicious manner by retaliating against the [Doe 1 plaintiffs]," and (8) as a result of their acts or omissions, Jack Doe 1 was placed in imminent harm.

"Recklessness requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man, and the actor must recognize that his conduct involves a risk substantially greater . . . than that which is necessary to make his conduct negligent. . . . More recently, we have described recklessness as a state of consciousness with reference to the consequences of one's acts. . . . It is more than negligence, more than gross negligence. . . . The state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness

to avoid danger to others or to take reasonable precautions to avoid injury to them. . . . Wanton misconduct is reckless misconduct. . . . It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action. . . . Reckless conduct must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simply inattention . . . or even an intentional omission to perform a statutory duty . . . . [In sum, reckless] conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." (Citation omitted; internal quotation marks omitted.) *Maselli* v. *Regional School District No. 10*, 198 Conn. App. 643, 669–70, 235 A.3d 599, cert. denied, 335 Conn. 947, 238 A.3d 19 (2020).

In the present case, the allegations of recklessness in count six are based on the same allegations in support of the negligence counts, namely, that Landon, Lawrence, and Quiricone did not follow the plan and failed to detect, prevent, investigate, and/or remediate the bullying of Jack Doe 1. As this court previously has stated, "[m]erely using the term recklessness to describe conduct previously alleged as negligence is insufficient as a matter of law." (Internal quotation marks omitted.) *Northrup* v. *Witkowski*, 175 Conn. App. 223, 249, 167 A.3d 443 (2017), aff'd, 332 Conn. 158, 210 A.3d 29 (2019). Even when we view the evidence in the light most favorable to the Doe 1 plaintiffs, it does not demonstrate the existence of a genuine issue of material fact that Landon, Lawrence, and Quiricone intentionally, wilfully, wantonly, and recklessly violated the plan. In support of their motion for summary judgment, those defendants submitted investigation reports, affidavits, and deposition transcripts, all of which showed the many actions taken by them with respect to the reported

bullying incidents, including responding to and verifying the acts of bullying reported, conducting interviews of students and teachers, communicating with parents, holding meetings with students and parents, taking measures to avoid further instances of bullying, and imposing punishments to those involved. Moreover, there was no evidence submitted demonstrating that the Doe 1 defendants had notice of bullying against Jack Doe 1 prior to the incident on March 18, 2016, as Jack Doe 1 testified in his deposition that he could not recall reporting any bullying to school officials prior to the March 18, 2016 incident. See footnote 15 of this opinion.

The Doe 1 plaintiffs also allege in count six that Landon, Lawrence, and Quiricone acted recklessly, wilfully, intentionally, and maliciously by retaliating against the Doe 1 plaintiffs. Their claim of retaliation is premised on the facts that Jack Doe 1 was suspended twice, his gym class was changed, and a special education planning and placement team meeting was ordered for Jack Doe 1. We are not persuaded by this claim. First, Jack Doe 1 was suspended on the basis of his admitted acts of bullying against another student and his inappropriate behavior and outburst against Szabo relating to an incident on April 11, 2016.[23] Moreover, Szabo attested in her affidavit that she decided to move Jack Doe 1 to another gym class because of information she had learned concerning his interactions with another child in the class. Finally, the Doe 1 plaintiffs have failed to address in their appellate brief how the ordering of a special education planning and placement team meeting for Jack Doe 1 constituted retaliation, or reckless or malicious behavior.

Viewing the evidence in the light most favorable to the Doe 1 plaintiffs, we conclude that the conduct of

[23] See footnote 8 of this opinion.

Landon, Lawrence, and Quiricone simply cannot be characterized as an "extreme departure from ordinary care, in a situation where a high degree of danger is apparent." (Internal quotation marks omitted.) *Maselli* v. *Regional School District No. 10*, supra, 198 Conn. App. 670. The recklessness claim of the Doe 1 plaintiffs is premised on the same facts on which they base their negligence claims. See *Di Teresi* v. *Stamford Health System, Inc.*, 142 Conn. App. 72, 91, 63 A.3d 1011 (2013) (trial court properly rendered summary judgment with respect to cause of action alleging recklessness when "recklessness cause of action [was] essentially a recapitulation of . . . allegations of negligence"). The court, therefore, properly rendered summary judgment in favor of those defendants on the recklessness claim in count six of the revised complaint.

D

The Doe 1 plaintiffs next claim that the court improperly granted the motion for summary judgment as to count ten, which alleges a claim of respondeat superior liability against the board and the town. Our resolution of this claim requires little discussion.

Count ten of the revised complaint alleges that the board and the town breached their duty to the Doe 1 plaintiffs through the actions and omissions of their employees, agents, and officers and that, pursuant to § 52-557n, they are responsible for the negligent acts or omissions of their employees. The allegations of vicarious liability of the town and the board in count ten are premised on the doctrine of respondeat superior. Under that doctrine, liability attaches "to a principal merely because the agent committed a tort while acting within the scope of his employment." *Larsen Chelsey Realty Co.* v. *Larsen*, 232 Conn. 480, 505, 656 A.2d 1009 (1995). Liability under the doctrine of respondeat superior is derivative in nature, in that any liability of the

principal derives from liability attaching to the agent. See *Daoust* v. *McWilliams*, 49 Conn. App. 715, 730, 716 A.2d 922 (1998). It necessarily follows that, if there is no liability that attaches to an individual or agent, there can be no derivative liability that attaches to the principal. See id.

In the present case, in their principal appellate brief, the Doe 1 plaintiffs argue that "[t]he trial court dismissed counts one through eight (except [count] two) as to the individual defendants, despite there being sufficient facts to present to a jury and without allowing [the Doe 1] plaintiffs an opportunity to present them. If this court agrees that those actions were not appropriate, then it must permit count [ten], for respondeat superior, to proceed." We, however, do not agree with the Doe 1 plaintiffs and have concluded that the court properly granted the motion for summary judgment as to the claims of negligence against Landon, Lawrence, and Quiricone in counts three, four, five, and eight of the revised complaint. We, therefore, agree with the court's conclusion that, "[b]ecause the[se] individual defendants have met their burden of establishing the absence of a genuine issue of material fact that they are not liable for negligence, there is no individual liability to which vicarious liability against the town or the board can attach." The court properly rendered summary judgment in favor of the town and the board with respect to count ten as it pertains to the alleged negligence of Landon, Lawrence, and Quiricone.

E

The final claim of the Doe 1 plaintiffs is that the court improperly granted the motion for summary judgment when a genuine issue of material fact exists as to whether Landon or the board retaliated against the Doe 1 plaintiffs for advocating for Jack Doe 1, as alleged in counts five, six, and nine. In light of our determination

that summary judgment was properly rendered in favor of Landon and the board as to those counts, as Landon and the board are protected by statutory and governmental immunity for the negligence claims in counts five and nine and there is no genuine issue of material fact that the actions of Landon did not amount to recklessness as alleged in count six, this claim of the Doe 1 plaintiffs fails.

In conclusion, we affirm[24] the summary judgment rendered in favor of the Doe 1 defendants with respect to the appeal in AC 44153.

II

AC 44122

We now address the appeal of the Doe 2 plaintiffs in AC 44122. The record before the court, viewed in the light most favorable to the Doe 2 plaintiffs as the nonmoving parties, reveals the following relevant facts and procedural history.

The Doe 2 plaintiffs filed a revised complaint on April 10, 2019, alleging the following facts. Jack Doe 2 was the victim of bullying in the town's school system from January, 2013, through at least June 22, 2017. During that time, he was called names by fellow students, ridiculed about his athletic ability, and subjected to physical assaults, threats, mental abuse, and repeated and numerous comments about his sexual orientation. On March 18, 2016, Jack Doe 2 was attacked and assaulted by four students during gym class at the middle school. The attack, which is the same one that involved Jack Doe 1, occurred in an area of the gym where the substitute gym teacher could not see the students and was not witnessed by a teacher or an administrator. Following that incident, on March 22, 2016, Jack Doe 2 filed

[24] In light of our decision, we need not address the alternative grounds for affirming the judgment raised by the Doe 1 defendants.

a bullying report with the administration of the middle school, which detailed the March 18, 2016 assault. Thereafter, on March 29 and 31, 2016, bullying reports were filed against Jack Doe 2. On or about April 5, 2016, the Doe 2 defendants substantiated that Jack Doe 2 was bullied, although there was no admission that slurs regarding Jack Doe 2's sexual orientation were used, and that same day, Szabo informed John Doe 2 and Jane Doe 2 that the allegations of bullying by Jack Doe 2 were substantiated, which resulted in Jack Doe 2 receiving a two day in-school suspension. According to the revised complaint, the Doe 2 defendants never initiated a formal or complete investigation of the bullying report filed by Jack Doe 2, and they either failed to investigate or conducted a wholly inadequate investigation of the claims alleged in the March 22, 2016 bullying report.

On or about April 29, 2016, Jack Doe 2, again, was bullied and called names, which made him extremely upset. When he attempted to report the incident to his guidance counselor, Szabo refused to allow him to do so and insisted that he speak with Szabo instead. Because Jack Doe 2 was uncomfortable speaking with Szabo, he returned to class. That afternoon, when John Doe 2 and Jane Doe 2 arrived at school to pick up Jack Doe 2, he "was visibly distraught and crying." Although John Doe 2 attempted to speak with faculty or staff at the middle school, no one was available. In February, 2018, the Doe 2 plaintiffs commenced the action underlying the appeal in AC 44122 against the Doe 2 defendants.

In counts one, two, three, four, and eight of the revised complaint, the Doe 2 plaintiffs allege claims of negligence against the Doe 2 defendants. Those claims are premised on the failure of the Doe 2 defendants to comply with a bullying prevention and intervention policy that had been adopted by the board, as well as the plan that prohibits bullying within the town's public

schools, which had been developed and implemented at the direction of the board and in accordance with § 10-222d. According to the Doe 2 plaintiffs, the Doe 2 defendants were negligent under the plan by "issuing an in-school suspension to Jack Doe 2 without providing him with the details of the complaint against him and an opportunity to respond," and by failing (1) to intervene to address the repeated acts of bullying against Jack Doe 2, (2) to accept reports of bullying from the Doe 2 plaintiffs, (3) to "investigate reports of bullying against Jack Doe 2," (4) "to report acts of bullying witnessed by staff members," (5) "to disclose to the [Doe 2] plaintiffs the details of reports of bullying made against Jack Doe 2," (6) "to invite the [Doe 2] plaintiffs to a meeting with school officials to communicate the measures being taken to ensure the safety of the victim and the policies and procedures in place to prevent further acts of bullying," (7) "to develop a student safety support plan for Jack Doe 2," (8) "to develop a specific written intervention plan to address repeated incidents of bullying against Jack Doe 2," and (9) "to counsel Jack Doe 2 regarding bullying prior to issuing discipline . . . ."

With respect to Szabo, Landon, the town, and the board, the Doe 2 plaintiffs also allege that they were negligent in allowing retaliation against Jack Doe 2. They further allege that Szabo, Lawrence, Quiricone, and Landon breached a duty of care owed to Jack Doe 2 by failing to detect, to investigate, and to remediate bullying against him, by failing to supervise students in gym class, and by allowing a hostile environment where bullying thrived, and that the town and the board breached their duties under the plan to Jack Doe 2 through the actions and omissions of their employees, agents, and officers. Finally, as to the claims of negligence, the Doe 2 plaintiffs allege that the duties of the Doe 2 defendants under the plan are ministerial in

nature and that, as a result of the negligence of the Doe 2 defendants, the Doe 2 plaintiffs have suffered and will continue to suffer mental and emotional distress and have incurred expenses and fees, and that Jack Doe 2 suffered physical injuries and was negatively affected by the suspensions imposed by the middle school that were entered in his school transcript.

Count five of the revised complaint alleges a claim of recklessness against Landon, Szabo, Lawrence, and Quiricone. Specifically, count five alleges that those defendants "had a duty to detect, prevent, investigate, and remediate bullying within [the middle school] in accordance with the . . . [p]lan," "knew, or should have known, of the dangerous impact [that] a failure to follow the . . . [p]lan would have on students, including Jack Doe 2," and "acted in a wanton, reckless, wilful, intentional, and/or malicious manner by failing to detect, prevent, investigate, and remediate bullying within [the middle school] in accordance with the . . . [p]lan." Count five further alleges that those defendants acted with reckless disregard to the safety of Jack Doe 2, placed him in a situation of imminent harm, and "acted in a wanton, reckless, wilful, intentional, and/or malicious manner by retaliating against the [Doe 2 plaintiffs], including, but not limited to, suspending Jack Doe 2."

Count seven[25] of the revised complaint alleges a claim for negligent infliction of emotional distress against the Doe 2 defendants. Specifically, the Doe 2 plaintiffs allege that the conduct of the Doe 2 defendants "involved an unreasonable risk of causing emotional distress to Jack

[25] Count six of the revised complaint alleges a claim for intentional infliction of emotional distress against Landon, Szabo, Lawrence, and Quiricone. The court granted the motion for summary judgment as to count six, and the Doe 2 plaintiffs have not challenged that decision on appeal. Accordingly, we do not address the court's decision rendering summary judgment as to the claim of intentional infliction of emotional distress in count six.

Doe 2, a minor," and "was done with a conscious disregard for the rights and safety of Jack Doe 2," that the emotional distress suffered by Jack Doe 2 was reasonable in light of the conduct perpetrated by the Doe 2 defendants, and that the Doe 2 defendants "knew, or should have known, that their conduct involved an unreasonable risk of causing emotional distress to Jack Doe 2," who suffered emotional distress as a result of their conduct. Finally, in count nine, the Doe 2 plaintiffs allege a claim of respondeat superior liability against the town and the board, claiming that they are responsible for the negligent acts or omissions of their employees.

In response to the revised complaint, the Doe 2 defendants filed an answer and two special defenses: the first special defense alleges that they are entitled to statutory immunity under § 10-222*l* for their good faith conduct in reporting, investigating, and responding to the bullying complaints, and the second special defense alleges that, because the acts alleged in the revised complaint are discretionary in nature, they are entitled to governmental immunity under § 52-557n (a) (2) (B). The Doe 2 plaintiffs filed a general denial of the special defenses. Thereafter, the Doe 2 defendants filed a motion for summary judgment, which the court granted as to all counts. The appeal in AC 44122 followed. Additional facts and procedural history will be set forth as necessary.

A

The Doe 2 plaintiffs' first claim is that the court, in granting the motion for summary judgment, improperly failed to view the evidence in the light most favorable to the Doe 2 plaintiffs as the nonmoving parties. In support of this claim, the Doe 2 plaintiffs, similarly to the Doe 1 plaintiffs, cite general principles governing motions for summary judgment, including the principle

that, in deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. See *Ramirez* v. *Health Net of the Northeast, Inc.*, supra, 285 Conn. 11. That citation to general principles, however, is followed by a conclusory statement that "the trial court failed to consider the full factual record in the light most favorable to the [Doe 2] plaintiffs when it granted [the Doe 2] defendants' motion for summary judgment." The appellate brief of the Doe 2 plaintiffs is devoid of any analysis of this claim and fails to explain how, or to set forth any specific instance in which, the court failed to construe the evidence in the light most favorable to the Doe 2 plaintiffs. Accordingly, we deem this inadequately briefed claim abandoned and decline to review it. See *DeJesus* v. *R.P.M. Enterprises, Inc.*, supra, 204 Conn. App. 707 ("parties may not merely cite a legal principle *without analyzing the relationship between the facts of the case and the law cited*" (emphasis added; internal quotation marks omitted)); see also *Rousseau* v. *Weinstein*, supra, 204 Conn. App. 855 ("[c]laims that are inadequately briefed generally are considered abandoned" (internal quotation marks omitted)).

B

The Doe 2 plaintiffs next challenge the court's granting of the Doe 2 defendants' motion for summary judgment as to the counts alleging negligence. Specifically, the Doe 2 plaintiffs claim that because the allegations of negligence involve factual issues, they are not susceptible to summary adjudication. This claim applies to counts one, two, three, four, seven, and eight of the revised complaint. With respect to the negligence allegations in those counts that are premised on the failure of the Doe 2 defendants to comply with the plan, the court granted the motion for summary judgment in favor of Szabo, Lawrence, Quiricone, Landon, and the board on the ground that those individual defendants

and the board are entitled to statutory immunity under § 10-222*l*. To the extent that the negligence allegations in those counts concern the discretionary duties to supervise the gym class or to manage and supervise school employees, rather than a violation of the plan, the court concluded that the Doe 2 defendants are protected by governmental immunity pursuant to § 52-557n (a) (2) (B). We address the court's conclusions regarding statutory and governmental immunity in turn.

1

Statutory Immunity

In challenging the court's ruling that Szabo, Lawrence, Quiricone, Landon, and the board are entitled to statutory immunity under § 10-222*l*, the Doe 2 plaintiffs argue that their negligence claims involve factual issues relating to whether the Doe 2 defendants acted in good faith and adequately reported and investigated the bullying allegations, as required under § 10-222*l* for immunity to apply, and that those factual issues should not have been decided on a motion for summary judgment. We do not agree.

As we stated previously in this opinion, § 10-222*l* affords immunity to school employees and the board when acting in accordance with a safe school climate plan. Specifically, § 10-222*l* (a) provides in relevant part: "No claim for damages shall be made against a school employee, as defined in section 10-222d, who reports, investigates and responds to bullying . . . in accordance with the provisions of the safe school climate plan, described in section 10-222d, if such school employee was acting in good faith in the discharge of his or her duties or within the scope of his or her employment. The immunity provided in this subsection does not apply to acts or omissions constituting gross, reckless, wilful or wanton misconduct." Similarly, subsection (c) of § 10-222*l* affords immunity to a "board

of education that implements the safe school climate plan, described in section 10-222d, and reports, investigates and responds to bullying . . . if such local or regional board of education was acting in good faith in the discharge of its duties. The immunity provided in this subsection does not apply to acts or omissions constituting gross, reckless, wilful or wanton misconduct."

Thus, for statutory immunity under § 10-222*l* to apply to the defendant school employees—Szabo, Lawrence, Quiricone, and Landon—they must have (1) reported, investigated and responded to bullying, (2) in accordance with the provisions of the plan, (3) in good faith, and (4) in the discharge of their duties or within the scope of their employment. Similarly, for it to apply to the board, the board must have (1) implemented a safe school climate plan, (2) reported, investigated, or responded to bullying, (3) in good faith, and (4) in the discharge of its duties. Here, the parties do not dispute that the board implemented the plan and that the actions taken by the Doe 2 defendants were done in the discharge of their duties and within the scope of their employment. The primary issue before the court in deciding the motion for summary judgment was whether a factual predicate existed to raise a genuine issue of material fact regarding whether Szabo, Lawrence, Quiricone, Landon, and the board reported, investigated, and responded to bullying in good faith.

In granting the motion for summary judgment as to the negligence counts on the ground of statutory immunity, the court concluded that the Doe 2 defendants demonstrated the absence of a genuine issue of material fact that their alleged actions constituted, at a minimum, some form of reporting, investigation, and response, consistent with the plan. The court concluded that, "[a]lthough the reporting, investigation, and response to the bullying complaints here might not have been

perfect, the [Doe 2] defendants . . . demonstrated the absence of a genuine issue of material fact that an investigation was, in fact, conducted on the actual bullying reports filed by the [Doe 2] plaintiffs and those against Jack Doe 2 . . . .'' Because the allegations of the Doe 2 plaintiffs essentially concerned the adequacy of the actions of the Doe 2 defendants, rather than a complete failure of the Doe 2 defendants to respond at all, the court concluded that they exemplified the type of negligence for which the statutory immunity in § 10-222*l* was created.

On appeal, the Doe 2 plaintiffs argue that the liability of the Doe 2 defendants for the negligence claims hinges ''on whether they were acting in good faith *and* [whether they] adequately reported, executed, and investigated the bullying allegations,'' both of which must be demonstrated for immunity under § 10-222*l* to apply. (Emphasis added.) The Doe 2 plaintiffs, however, have not set forth any argument in their appellate brief challenging the court's determination that the Doe 2 defendants demonstrated the absence of a genuine issue of material fact that they reported, investigated, and responded to the bullying complaints concerning Jack Doe 2 consistent with the plan. We, thus, focus our analysis on their claim that a factual issue exists as to whether the Doe 2 defendants acted in good faith.[26]

[26] We do note, however, our agreement with the court's determination that the Doe 2 defendants demonstrated the absence of a genuine issue of material fact that they reported, investigated, and responded to the bullying complaints concerning Jack Doe 2 consistent with the plan. The evidence submitted by the Doe 2 defendants in support of their motion for summary judgment included multiple investigation reports attached to various bullying complaints, notes of interviews conducted of faculty and students, and correspondence with the Doe 2 plaintiffs and parents of children involved in the March 18, 2016 incident and the incidents that followed. Moreover, the Doe 2 plaintiffs did meet with several of the Doe 2 defendants to discuss the bullying complaints and the punishment imposed. Following the March 18, 2016 incident, Szabo recommended to Jack Doe 2 that he file a bullying report and she met with him multiple times to discuss the incident. The record also shows that Lawrence was present at one of those meetings. The

Specifically, the Doe 2 plaintiffs argue that they "set forth a significant amount of evidence to show that [the Doe 2] defendants were negligent and did not act in good faith, easily raising a genuine issue of material fact. For this reason, the trial court erred when it granted [the motion for] summary judgment [in favor of the Doe 2] defendants . . . ." In support of their claim that they met their burden of showing the existence of a disputed issue of material fact as to the bad faith of the Doe 2 defendants, the Doe 2 plaintiffs cite the same evidence as that cited by the Doe 1 plaintiffs, namely, (1) Szabo, as the safe school climate specialist, did not refer the complaints of bullying based on sexual orientation to a Title IX coordinator, as required under the plan,[27] (2)

deposition testimony of John Doe 2 further demonstrates that he communicated with Landon and that he had spoken on the phone with Szabo and Lawrence and met with them in person as well, during which time they discussed how to deal with the bullying issues at school. Even though Quiricone was not at school on the day of the incident and testified in his deposition that he was not aware of any prior conflicts involving Jack Doe 2 and the students involved in the March 18, 2016 incident, he did meet with Szabo to discuss the class dynamics. Finally, we note that Jack Doe 2 stated in his deposition that, prior to the March 18, 2016 incident, he had not reported any incidents of bullying to the Doe 2 defendants. Thus, although the revised complaint alleges that Jack Doe 2 had been bullied since January, 2013, the evidence submitted in support of and in opposition to the motion for summary judgment does not support a finding that the Doe 2 defendants were notified of any incidents of bullying prior to the one on March 18, 2016. It follows that the Doe 2 defendants could not have responded to and investigated incidents of bullying of which they had not been made aware.

[27] With respect to this claim, the court concluded that, because the revised complaint did not contain any allegations concerning Title IX or discrimination, such allegations were not properly before the court. The Doe 2 plaintiffs conceded at oral argument before the trial court that their references to Title IX were for the purpose of demonstrating how the Doe 2 defendants did not comply with the plan. The court concluded, nevertheless, that the evidence presented by the Doe 2 defendants demonstrated that any "reports of bullying that included discriminatory statements were investigated and not substantiated, and [that] the [Doe 2] plaintiffs [did] not put forth any evidence to create a genuine issue of material fact that the [Doe 2] defendants' failure to contact the Title IX coordinator was unreasonable or an extreme departure from ordinary care." On appeal, the Doe 2 defendants argue that the Doe 2 plaintiffs abandoned any claim of discrimination in

the specific written intervention plan developed by the Doe 2 defendants was generic in nature and did not address the repeated incidents of bullying against Jack Doe 2, as required under the plan, (3) the board did not conduct an informal hearing before suspending Jack Doe 2, (4) Szabo suspended Jack Doe 2 on the basis of anonymous bullying reports, in violation of the plan, (5) a meeting with John Doe 2 and Jane Doe 2 to discuss measures to prevent further incidents of bullying did not take place as required under the plan, (6) the Doe 2 defendants were aware that a curtain used in the gym created a blind spot for supervision of students, which created a hazardous condition, and (7) Landon and the board have a legal duty to ensure that school employees follow the plan and, thus, there is a genuine issue of material fact as to whether Landon and the board are liable. We are not persuaded.

We conclude that the Doe 2 plaintiffs have not set forth a factual predicate to raise a genuine issue of material fact as to whether the Doe 2 defendants acted in bad faith. As we stated in part I B 1 a of this opinion,

violation of Title IX when the action was initially removed to federal court and that "the trial court properly disregarded this [unpleaded] theory of liability in deciding the . . . motion for summary judgment because the claim was not properly before it." The Doe 2 defendants further argue that the issue is not properly before this court. In their reply brief, the Doe 2 plaintiffs do not address the abandonment issue and argue, instead, that the failure of the Doe 2 defendants to refer the bullying complaints based on sexual orientation demonstrates bad faith on their part and that one of the ministerial duties that the Doe 2 defendants did not follow was the mandate of the plan that a Title IX coordinator participate in bullying investigations that involve a legally protected classification. We agree with the court and the Doe 2 defendants that any claim regarding the failure to involve a Title IX coordinator in the bullying investigation was not properly before the court, as the revised complaint was devoid of any allegations concerning Title IX. Moreover, on appeal, the Doe 2 plaintiffs have not addressed the court's determination to that effect. Accordingly, we deem any claim relating to Title IX abandoned and decline to consider it as a basis for showing bad faith by the Doe 2 defendants or the existence of a ministerial duty that was violated.

"[b]ad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity . . . it contemplates a state of mind affirmatively operating with furtive design or ill will." (Internal quotation marks omitted.) *Buckman* v. *People Express, Inc.*, supra, 205 Conn. 171. As the parties asserting bad faith by the Doe 2 defendants, the Doe 2 plaintiffs had the burden of establishing its existence. See *Habetz* v. *Condon*, supra, 224 Conn. 237 n.11. The evidence on which the Doe 2 plaintiffs rely to show bad faith does not meet that burden. Counts one, two, three, and four of the revised complaint do not contain allegations that the Doe 2 defendants acted in bad faith by deceiving or misleading the Doe 2 plaintiffs, or that they acted with a dishonest purpose or improper motive. Rather, they allege that Szabo, Lawrence, Quiricone, and Landon breached a duty owed to Jack Doe 2, acted with disregard for the rights and safety of the plaintiffs, failed to exercise reasonable care, and failed to comply with the plan. Count eight makes similar allegations of negligence against the board. Their conclusory assertion that the same conduct underlying their negligence allegations demonstrates bad faith by the Doe 2 defendants is not sufficient to establish the existence of a genuine issue of material fact. See *Dinnis* v. *Roberts*, supra, 35 Conn. App. 261 (in opposing motion for summary judgment, plaintiffs "failed to present the necessary factual predicate to raise a genuine issue as to the defendants' bad faith" where they simply referred to allegations of bad faith in their complaint and failed to submit supporting documentation showing bad faith by defendants).

Moreover, their claim that the issue of bad faith involves a factual question that is not properly resolved on a motion for summary judgment is unavailing when, as here, the Doe 2 plaintiffs failed to present the necessary factual predicate to raise a genuine issue as to the

bad faith of the Doe 2 defendants. See *Wadia Enterprises, Inc.* v. *Hirschfeld*, supra, 224 Conn. 250 ("even with respect to questions of motive, intent and good faith, the party opposing summary judgment must present a factual predicate for his argument in order to raise a genuine issue of fact"); *Rafalko* v. *University of New Haven*, supra, 129 Conn. App. 52 (trial court properly rendered summary judgment in favor of defendants where plaintiff failed to demonstrate evidence of bad faith). As our Supreme Court previously has stated, bad faith is not simply negligence and implies something more, such as a conscious wrongdoing with a dishonest purpose. See *Buckman* v. *People Express, Inc.*, supra, 205 Conn. 171. Therefore, with respect to the negligence counts, insofar as the negligence allegations are based on violations of the plan, the court properly rendered summary judgment in favor of Szabo, Lawrence, Quiricone, Landon, and the board on the ground that those defendants are protected by statutory immunity under § 10-222*l* for the allegations contained in those counts.

2

Governmental Immunity

The court also granted the motion for summary judgment in favor of the Doe 2 defendants on the ground of governmental immunity under § 52-557n (a) (2) (B) with respect to the allegations of negligence in counts one, two, three, four, seven, and eight to the extent that the allegations are not based on the plan and concern duties to supervise classrooms and to supervise and manage school employees, and in favor of the town for negligence regarding the plan in counts seven and eight. Specifically, the court concluded that, because the alleged acts or omissions of the Doe 2 defendants regarding the supervision of classrooms and the management, supervision, and retention of the school employees are discretionary and not ministerial in nature, and because

the Doe 2 plaintiffs failed to identify any statute or rule that imposed a ministerial duty on the Doe 2 defendants, there is no genuine issue of material fact that the allegations of negligence against the Doe 2 defendants involved ministerial, and not discretionary, acts.

The court, therefore, concluded that the Doe 2 defendants are protected by governmental immunity under § 52-557n (a) (2) (B) for the negligence claims in these counts, which involved discretionary acts, unless an exception to that immunity applies. See footnote 21 of this opinion. The Doe 2 plaintiffs, however, did not plead an exception to governmental immunity in their general denial to the special defenses filed by the Doe 2 defendants, and the allegations of their revised complaint assert that the duties of the Doe 2 defendants in relation to the plan are ministerial in nature, which precludes governmental immunity from applying. They argued for the first time in their memorandum in opposition to the motion for summary judgment that, even if the actions of the Doe 2 defendants are discretionary, the identifiable person-imminent harm exception to governmental immunity applies. The court declined to consider whether that exception applies as a result of the failure of the Doe 2 plaintiffs to raise it in their revised complaint or in their reply to the special defenses.[28] See *Lewis* v. *Newtown*, 191 Conn. App. 213, 237, 214 A.3d 405, cert. denied, 333 Conn. 919, 216 A.3d 650 (2019).

On appeal, the Doe 2 plaintiffs have not raised any claims challenging the court's decision regarding governmental immunity or its failure to address whether the identifiable person-imminent harm exception to that immunity applies. The Doe 2 plaintiffs' only reference to governmental immunity is in their reply brief, in which they argue that the question of whether governmental immunity under § 52-557n (a) (2) (B) applies is

[28] See footnote 22 of this opinion.

one for the jury to decide and should not have been decided by way of summary judgment. For the same reasons we declined to address an identical claim raised by the Doe 1 plaintiffs in the appeal in AC 44153, as stated in part I B 2 of this opinion, we decline to address that contention; see *Anketell* v. *Kulldorff*, supra, 207 Conn. App. 822; *Radcliffe* v. *Radcliffe*, supra, 109 Conn. App. 27; and we deem abandoned any claim relating to the court's ruling regarding governmental immunity. See *Bayview Loan Servicing, LLC* v. *Gallant*, supra, 209 Conn. App. 187 n.2.

C

The Doe 2 plaintiffs next claim that the court improperly rendered summary judgment in favor of Szabo, Lawrence, Landon, and Quiricone with respect to the claim of recklessness in count five because the claim requires a determination of their intent, which is a question of fact. We do not agree.

We first set forth the following additional facts and general principles governing claims of recklessness that guide our resolution of this issue. Count five of the revised complaint alleges the following against Szabo, Lawrence, Landon, and Quiricone: (1) "Th[ose] defendants had a duty to detect, prevent, investigate, and remediate bullying within [the middle school] in accordance with the . . . [p]lan," (2) they were aware of that duty by virtue of their having created the bullying prevention and intervention policy and the plan, (3) they knew or should have known that their failure to follow the plan would have a dangerous impact on students, including Jack Doe 2, (4) they failed to follow the plan when "they failed to detect, prevent, investigate or properly investigate, and/or remediate the bullying of Jack Doe 2," (5) they "acted in a wanton, reckless, wilful, intentional, and/or malicious manner by failing to detect, prevent, investigate, and remediate bullying

within [the middle school] in accordance with the . . . [p]lan," (6) they "acted with a reckless disregard of the rights and/or safety of Jack Doe 2 by refusing to comply with their obligations under the . . . [p]lan," (7) they "acted in a wanton, reckless, wilful, intentional, and/or malicious manner by retaliating against the [Doe 2 plaintiffs]," and (8) as a result of their acts or omissions, Jack Doe 2 was placed in imminent harm.

As we stated previously in this opinion, "[r]ecklessness requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man, and the actor must recognize that his conduct involves a risk substantially greater . . . than that which is necessary to make his conduct negligent. . . . It is more than negligence, more than gross negligence. . . . Reckless conduct must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simply inattention . . . or even an intentional omission to perform a statutory duty . . . . [In sum, reckless] conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." (Citation omitted; internal quotation marks omitted.) *Maselli* v. *Regional School District No. 10*, supra, 198 Conn. App. 669–70.

In the present case, the allegations of recklessness in count six are based on the same allegations in support of the negligence counts, namely, that Szabo, Landon, Lawrence, and Quiricone did not follow the plan and failed to detect, prevent, investigate, and/or remediate the bullying of Jack Doe 2. The Doe 2 plaintiffs merely use the term recklessness to describe the same conduct that they previously described as negligent, which is not sufficient as a matter of law to support a claim of

recklessness. See *Northrup* v. *Witkowski*, supra, 175 Conn. App. 249. The evidence, when viewed in the light most favorable to the Doe 2 plaintiffs, fails to demonstrate the existence of a genuine issue of material fact that Szabo, Landon, Lawrence, and Quiricone intentionally, wilfully, wantonly, and recklessly violated the plan. In support of their motion for summary judgment, those defendants submitted investigation reports, affidavits, and deposition transcripts, all of which showed the many actions taken by them with respect to the reported bullying incidents, including responding to and verifying the acts of bullying reported, conducting interviews of students and teachers, communicating with parents, holding meetings with students and parents, taking measures to avoid further instances of bullying, and imposing punishments to those involved. Moreover, there was no evidence submitted demonstrating that the Doe 2 defendants had notice of bullying against Jack Doe 2 prior to the incident on March 18, 2016, as Jack Doe 2 testified in his deposition that he did not report any bullying to school officials prior to the March 18, 2016 incident. Furthermore, the allegations of retaliation by the Doe 2 plaintiffs do not rise to the level of recklessness necessary to defeat the motion for summary judgment. See footnote 26 of this opinion.

Because, when viewing the evidence in the light most favorable to the Doe 2 plaintiffs, the conduct of Szabo, Landon, Lawrence, and Quiricone cannot be characterized as an "extreme departure from ordinary care, in a situation where a high degree of danger is apparent"; (internal quotation marks omitted) *Maselli* v. *Regional School District No. 10*, supra, 198 Conn. App. 670; the court properly rendered summary judgment in favor of those defendants on the recklessness claim in count five of the revised complaint. Additionally, the recklessness claim of the Doe 2 plaintiffs is premised on the same facts on which they base their negligence claims. See

Di Teresi v. *Stamford Health System, Inc.*, supra, 142 Conn. App. 91 (trial court properly rendered summary judgment with respect to cause of action alleging recklessness when "recklessness cause of action [was] essentially a recapitulation of . . . allegations of negligence").

D

The Doe 2 plaintiffs next claim that the court improperly granted the motion for summary judgment as to count nine, which alleges a claim of respondeat superior liability against the board and the town. Specifically, count nine alleges that the board and the town breached their duty to the Doe 2 plaintiffs through the actions and omissions of their employees, agents, and officers and that, pursuant to § 52-557n, they are responsible for the negligent acts or omissions of their employees. The allegations of vicarious liability of the town and the board in count nine are premised on the doctrine of respondeat superior, pursuant to which liability is derivative in nature and attaches "to a principal merely because the agent committed a tort while acting within the scope of his employment." *Larsen Chelsey Realty Co.* v. *Larsen*, supra, 232 Conn. 505; see also *Daoust* v. *McWilliams*, supra, 49 Conn. App. 730. It necessarily follows that, if there is no liability that attaches to an individual or agent, there can be no derivative liability that attaches to the principal. See *Daoust* v. *McWilliams*, supra, 730.

In the present case, in their appellate brief, the Doe 2 plaintiffs argue that "[t]he trial court dismissed all counts as to the individual defendants, despite there being sufficient facts to present to a jury and without allowing [the Doe 2] plaintiffs an opportunity to present them. If this court agrees that those actions were not appropriate, then it must permit count [nine], for

respondeat superior, to proceed." We rejected an identical claim of the Doe 1 plaintiffs in AC 44153. In light of our conclusion in AC 44122 that the court properly granted the motion for summary judgment as to the negligence claims against the individual defendants—Szabo, Landon, Lawrence, and Quiricone—in counts one, two, three, four, and seven of the revised complaint, there is no individual liability to which vicarious liability against the town or the board can attach. The court properly rendered summary judgment in favor of the town and the board with respect to count nine.

E

The final claim of the Doe 2 plaintiffs is that the court improperly granted the motion for summary judgment when a genuine issue of material fact exists as to whether Landon or the board retaliated against the Doe 2 plaintiffs for advocating for Jack Doe 2,[29] as alleged in counts four, five, and eight. In light of our determination that summary judgment was properly rendered in favor of Landon and the board as to those counts, as Landon and the board are protected by statutory and governmental immunity for the negligence claims in counts four and eight and there is no genuine issue of material fact that the actions of Landon did not amount to recklessness as alleged in count five, the claim of the Doe 2 plaintiffs fails.

[29] According to the Doe 2 plaintiffs, when John Doe 2 and Jane Doe 2 began to advocate vigorously on behalf of Jack Doe 2, Landon directed Szabo and Lawrence not to have contact with the Doe 2 plaintiffs. Apparently, Landon believed that the Doe 2 plaintiffs had filed criminal complaints to the police concerning the bullying incidents. Landon, thus, instructed John Doe 2 and Jane Doe 2 that if they wanted to speak with a member of the school administration, the communication had to go through an attorney. Landon also cancelled a meeting scheduled for April 13, 2016. On April 8, 2016, after Landon was informed that no criminal charges had been filed by the Doe 2 plaintiffs, he reset the meeting for April 13 and stated that he would allow the school administration to speak with John Doe 2 only.

In conclusion, we affirm[30] the summary judgment rendered in favor of the Doe 2 defendants with respect to the appeal in AC 44122.

The judgments are affirmed.

In this opinion the other judges concurred.

DANIEL RUSSBACH *v.* MARISOL YANEZ-VENTURA ET AL.
(AC 44232)

Elgo, Alexander and Suarez, Js.

Syllabus

The plaintiff R, who sustained injuries after he was injured in a motor vehicle collision involving an uninsured motorist, sought to recover uninsured motorist benefits allegedly due under an automobile insurance policy issued by the defendant W Co. At the time of the accident, R was operating a vehicle owned by a car dealership and covered by a commercial garage insurance policy issued by W Co. The trial court granted W Co.'s motion to bifurcate the issues of the insurance coverage limits and damages. A bifurcated trial before the court followed, limited to the issue of uninsured motorist coverage provided by the policy. During the trial, the sole witness, B, the owner of the dealership, testified credibly that he did not have education or formal training on risk loss and insurance purchasing but wanted to have the minimum amounts of uninsured motorist coverage required by state law as the dealership was not in the business of loaning or renting cars. B consulted with an insurance professional, C, to provide him advice, which he considered in determining the scope of coverage for the dealership. B attested that he received a waiver form from C, which listed $100,000 in uninsured motorist coverage, reviewed it, knowingly approved his selection, and signed his name on the last page of the form and sent it back to C. In its memorandum of decision, the court determined, inter alia, that the dealership, the only named insured on the policy, knowingly made an informed decision to reduce the uninsured motorist coverage from $1 million, the amount of liability coverage under the policy, to $100,000 on the waiver form, and, although the waiver form did not contain a statement of premium costs for each of the uninsured motorist coverage

[30] In light of our decision, we need not address the alternative grounds for affirming the judgment raised by the Doe 2 defendants.

options available as required pursuant to the applicable statute (§ 38a-336 (a) (2)), which permits the named insured to request a lesser amount of uninsured motorist coverage in writing, such noncompliance was excused because the policy was for a commercial garage. Thereafter, R moved for an articulation, which the court granted. The court expressly indicated that it had determined, based on B's testimony at trial that the dealership had knowingly selected $100,000 in standard, rather than conversion, uninsured motorist coverage. Subsequently, W Co. filed a motion for summary judgment on the remaining issue of damages, claiming that it was entitled to judgment as a matter of law because R had received workers' compensation benefits in excess of $100,000, which offset the $100,000 in uninsured motorist coverage under the policy. The court granted W Co.'s motion for summary judgment and rendered judgment in its favor. Thereafter, following R's death, the court granted the motion to substitute the coadministrators of R's estate as plaintiffs. Subsequently, the substitute plaintiffs appealed from the judgment of the trial court, claiming that the court improperly concluded that W Co.'s failure to comply with the statutory requirements of § 38a-336 (a) (2) was excused under the particular facts of this case and improperly concluded that the policy in question provided for standard, rather than conversion, insurance coverage. On the substitute plaintiffs' appeal to this court, *held*:

1. The trial court improperly concluded that W Co.'s failure to comply with the statutory requirements of § 38a-336 (a) (2) was excused: contrary to W Co.'s contention that *Frantz* v. *United States Fleet Leasing, Inc.* (245 Conn. 727), *Kinsey* v. *Pacific Employers Ins. Co.* (277 Conn. 398), and *McDonald* v. *National Union Fire Ins. Co. of Pittsburgh, PA* (79 Conn. App. 800), created an exception for every case involving a commercial fleet or garage insurance policy, those cases recognized a limited exception to the statutory requirements of § 38a-336 (a) (2) that were fact-specific and predicated on several factors that distinguished commercial entities from typical purchasers of insurance, including that the policies involved a large commercial entity with departments specializing in legal and insurance matters, were procured by insurance specialists who were fully aware of the relative cost of uninsured motorist coverage, and covered a mass fleet of automobiles used to conduct large-scale commercial activities, the unreasonable and impracticable result of requiring strict adherence to the statutory requirements when there were numerous named insureds on the policy, whether the commercial entity was self-insured, and the premium amounts paid, and the present case differed from *Frantz*, *Kinsey*, and *McDonald*, as the dealership was not a large commercial entity, it was a local business involved in repair and used car sales with only ten to twenty vehicles for sale at that time that remained primarily on the dealership property, it was not self-insured, its annual insurance premium was far less than the premiums paid by large commercial entities, and the dealership was

the only named insured on the policy; moreover, B, who was responsible for procuring insurance for the dealership, had no education or formal training on risk loss and insurance purchasing and was not aware of the availability, relative costs, and benefits of uninsured motorist coverage and, therefore, relied largely on C to advise him, which was further demonstrated by his testimony that he requested the minimum amount of uninsured motorist coverage required by state law from C but procured $100,000 in uninsured motorist coverage—more than double the $40,000 required by state law; accordingly, because the dealership's uninsured motorist coverage was not effectively reduced pursuant to § 38a-336 (a) (2), summary judgment should not have been granted as a triable issue remained as to the amount of damages, as the $1 million liability coverage under the policy exceeded the workers' compensation benefits that R received.

2. The trial court properly determined that the policy provided for standard, rather than conversion, uninsured motorist insurance coverage: the policy was ambiguous as to whether it provided standard or conversion uninsured motorist insurance coverage, and, because the issue of whether the dealership purchased standard or conversion coverage presented a question of historical fact, rather than one of contract construction, an examination of extrinsic evidence determined the parties' intentions, B's testimony at trial having undermined R's claim that the dealership intended to purchase enhanced coverage for an additional premium, as B testified that he wanted to have the minimum amount of insurance coverage required by state law and that he did not know what conversion coverage was and never asked C about it; moreover, this court declined to incorporate by reference language from the preprinted waiver form, which provided that the policy would be issued with the highest level of coverage selected if more than one coverage option was selected, because, as this court determined, the waiver form was an ineffective attempt to reduce the uninsured motorist coverage under the policy and the uncontroverted evidence in the record demonstrated that B did not select any of the boxes for a specific coverage option and did not intend to purchase conversion coverage for the dealership.

Argued January 18—officially released June 7, 2022

Procedural History

Action to recover, inter alia, uninsured motorist benefits allegedly due under an automobile policy issued by the defendant Wesco Insurance Company, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Abrams*, *J.*, granted the defendant Wesco Insurance Company's motion to bifurcate the issues of insurance coverage limits and

damages; thereafter, the matter was tried to the court, *Ozalis*, *J.*, on the issue of the insurance coverage limits; judgment for the defendant Wesco Insurance Company; subsequently, the court, *Abrams*, *J.*, granted the defendant Wesco Insurance Company's motion for summary judgment on the issue of damages; thereafter, Kristina Bakes, coadministrator of the estate of Daniel Russbach, et al. was substituted as the plaintiff; subsequently, the substitute plaintiffs appealed to this court. *Reversed in part*; *further proceedings.*

Chet L. Jackson, for the appellants (substitute plaintiffs).

John W. Cannavino, *Jr.*, with whom, on the brief, was *Ryan T. Daly*, for the appellee (defendant Wesco Insurance Company).

Opinion

ELGO, J. In this insurance coverage dispute, the substitute plaintiffs, Kristina Bakes and Marlene Esposito, coadministrators of the estate of Daniel Russbach (decedent),[1] appeal from the judgment of the trial court in favor of the defendant Wesco Insurance Company.[2] On appeal, the plaintiffs contend that the court improperly concluded that (1) the defendant's failure to comply with the statutory requirements of General Statutes § 38a-336 (a) (2) was excused under the particular facts of this case and (2) the insurance policy in question

[1] The decedent commenced this civil action on March 2, 2016. Following his death in 2019, the court granted the motion to substitute the coadministrators of his estate as the plaintiffs, and all references herein to the plaintiffs are to the substitute plaintiffs.

[2] Also named as defendants in the complaint were United Services Automobile Association and Marisol Yanez-Ventura. Prior to trial, the action against United Services Automobile Association was withdrawn. Yanez-Ventura did not appear before the Superior Court and has not appeared in this appeal. For purposes of clarity, we refer to Wesco Insurance Company as the defendant and Yanez-Ventura by name in this opinion.

provided for standard, rather than conversion, insurance coverage.[3] We affirm in part and reverse in part the judgment of the trial court.

The facts of the underlying automobile accident are not in dispute. On October 26, 2015, the decedent was operating a vehicle in New Haven owned by West Shore Motors (dealership), a used car dealership and repair center in Milford. As the decedent proceeded through a green light, Marisol Yanez-Ventura, an uninsured driver, negligently turned her vehicle into the decedent's lane of traffic, causing a head-on collision that resulted in catastrophic injuries to the decedent.

The decedent thereafter commenced the present action. Relevant to this appeal is the third count of his complaint,[4] which alleged that the vehicle driven by the decedent on October 26, 2015, was insured by the defendant under policy number WPP12545600 (policy). The complaint further alleged that the policy provided $1 million in uninsured motorist coverage.[5] In its answer, the defendant denied the substance of the latter allegation. The defendant also alleged, as special defenses, that any recovery obtained by the decedent must be reduced by all sums received from collateral sources and that such recovery "is limited to the applicable limits of the [policy], namely, $100,000 minus all applicable credits, reductions and offsets."

[3] The plaintiffs also claim that the court improperly concluded that a written request to reduce uninsured motorist coverage executed by an agent of the dealership was valid and the product of a knowing and informed decision. In light of our resolution of their principal contention, we do not address that claim.

[4] The first two counts of the complaint pertained to Yanez-Ventura and United Services Automobile Association, respectively. See footnote 2 of this opinion.

[5] Throughout this opinion, the term uninsured motorist coverage also encompasses underinsured motorist coverage. See *Rydingsword* v. *Liberty Mutual Ins. Co.*, 224 Conn. 8, 14 n.11, 615 A.2d 1032 (1992).

On June 20, 2017, the defendant filed a motion to bifurcate the issue of the insurance coverage limits and the issue of damages, which the court granted. A bifurcated trial before the court followed, limited to the issue of the extent of uninsured motorist coverage under the policy. The sole witness at trial was Jason Kenneth Blake, who owned the dealership at all relevant times, and whose testimony the court ultimately found credible. Blake offered uncontroverted testimony that he was solely responsible for procuring and "making decisions as to insurance coverage" for the dealership. Blake also testified that he did not have "any education or formal training on risk loss and insurance purchasing."

Blake testified that the dealership was "not in the business of loaning cars" and that the dealership had only "ten [or] twenty" cars for sale in the fall of 2015. Blake explained that "the majority of [the dealership's] business was done on the property" and "operated more off our lot, even though we did [allow] test drives on cars . . . we really weren't in the business of doing loaner cars. Occasionally we did, and, so I didn't think we needed a whole lot of [insurance] coverage for that area." Because the dealership was not in the business of loaning or renting cars, Blake testified that he "wanted to have the minimum amounts [of uninsured motorist coverage] required by the state of Connecticut."

Blake testified that, in procuring insurance coverage for the dealership, he consulted with Mike Castellini of McCormick Insurance Agency, an agency located in New Jersey. The policy obtained by the dealership, a copy of which was admitted into evidence at trial, was a commercial garage policy that provided $1 million in liability coverage. The only named insured on the policy was the dealership.

Also admitted into evidence was a copy of a document titled "Connecticut Uninsured/Underinsured Motorists

Coverage Selection and Informed Consent Form" (waiver form) signed by Blake on April 23, 2015.[6] It is undisputed that the waiver form did not specify the amount of liability coverage provided by the policy. The waiver form also did not disclose the premium costs for any of the eighty-two uninsured motorist coverage options listed on pages three and four of that form as required by § 38a-336 (a) (2); the area designated for the "Total Coverage Premium" for each of those options on the form was left blank, as Blake admitted at trial.[7] Nonetheless, a handwritten check mark appeared next to the $100,000 "Combined Single Limit" options on the form, and Blake testified that "$100,000 was what was required [under Connecticut law] and that's what I wanted." As Blake explained, he "wanted the minimum amount of insurance for uninsured motorist" coverage available. Blake also testified that neither the writing on page one of the waiver form—which listed the name of the applicant, the policy's effective date, and the producer of the policy—nor the check marks on certain boxes were made by him.[8] Rather, he testified that the only writing on the waiver form that was his was the signature on page four.

In its January 30, 2018 memorandum of decision, the court found that Blake "was the person responsible for purchasing insurance for [the dealership] in 2015. Blake testified credibly that he consulted with an insurance

[6] That document is a preprinted form that bears the inscription "© Insurance Services Office, Inc., 2011" on the bottom of each of its four pages.

[7] At oral argument before this court, the defendant's counsel conceded that "[t]here is no question that the [waiver form] . . . did not comply strictly with the statute because it . . . was missing the premium amounts."

[8] The waiver form is four pages in length. The top of the third page states: "SELECT ONE OPTION UNDER EITHER STANDARD [UNINSURED MOTORIST] COVERAGE OR CONVERSION [UNINSURED MOTORIST] COVERAGE. Do Not Check More Than One Box Below." Nonetheless, the boxes for $100,000 in coverage were checked on *both* the standard uninsured motorist option on page three and the conversion uninsured motorist option on page four of the waiver form.

professional to provide him advice, which he considered in determining the scope of insurance coverage for the business. Blake wanted low cost insurance and *the lowest possible* [*uninsured motorist*] *coverage that was allowed* and made the decision to obtain less [uninsured motorist] coverage than the bodily liability limits. Blake credibly testified at trial that he received the waiver form which his insurance agent asked him to review, reviewed it, knowingly approved his selection and sent it back to the agent. . . . The waiver form lists $100,000 in [uninsured motorist] coverage. . . . This court further finds Blake's testimony to be credible as to the procurement of this commercial automobile insurance policy and his desire to have *the lowest possible* [*uninsured motorist*] *coverage for such vehicles*. Blake was credible as to his review and understanding of the waiver form and his knowing selection of the lower $100,000 [uninsured motorist] coverage." (Citations omitted; emphasis added.) The court thus concluded that the dealership "knowingly made an informed decision to reduce the [uninsured motorist] coverage to $100,000 from the $1,000,000 bodily injury liability coverage and that the . . . coverage was properly reduced to $100,000."[9] Although it found that the waiver form "did not contain a statement of premium costs," the court concluded that such noncompliance with the statutory requirements of § 38a-336 (a) (2) was excused because the policy was for a commercial garage.

The decedent thereafter filed a motion for articulation, in which he sought clarification as to whether the court had found that the dealership "knowingly selected $100,000 in standard [uninsured motorist] coverage or $100,000 in conversion . . . coverage" and the factual

[9] On February 16, 2018, the decedent filed an appeal of that decision with this court. By order dated May 23, 2018, this court dismissed that appeal for lack of a final judgment.

basis for that determination. The court granted that motion and, in its April 13, 2018 articulation, expressly indicated that the dealership had knowingly selected $100,000 in standard uninsured motorist coverage. The court further stated that the factual basis for that determination was Blake's testimony at trial that he had selected a policy for $100,000 "with standard uninsured motorist coverage . . . and . . . that's what I understood this to mean. . . . I was picking the $100,000 limit for uninsured motorist."

On February 8, 2019, the defendant filed a motion for summary judgment on the remaining issue of damages. The defendant argued that no genuine issue of material fact existed in light of the court's determination that the policy contained $100,000 in uninsured motorist coverage. Because the decedent had received workers' compensation benefits in excess of $100,000,[10] which operate as an offset to the uninsured motorist coverage under the policy, the defendant claimed that it was entitled to judgment as a matter of law.[11] In opposing the motion for summary judgment, the decedent claimed that a genuine issue of material fact existed as to whether the waiver form signed by Blake was valid.

In its August 11, 2020 memorandum of decision, the court first noted the undisputed fact that the decedent had received $292,540.06 in workers' compensation benefits, which "offset the $100,000 in coverage" under

[10] In his November 20, 2018 response to interrogatories, the decedent admitted that he had received $292,540.06 in workers' compensation benefits. A copy of that pleading was appended to the defendant's motion for summary judgment.

[11] Section 38a-334-6 (d) (1) of the Regulations of Connecticut State Agencies provides in relevant part: "The limit of the insurer's liability may not be less than the applicable limits for bodily injury liability specified in subsection (a) of [General Statutes §] 14-112 . . . except that the policy may provide for the reduction of limits to the extent that damages have been . . . (B) paid or are payable under any workers' compensation law . . . ."

the policy. The court then rejected the decedent's challenge to the validity of the waiver form. The court thus rendered summary judgment in favor of the defendant, and this appeal followed.

On appeal, the plaintiffs raise two claims related to the court's determinations following the bifurcated trial, as set forth in its January 30, 2018 memorandum of decision and its April 13, 2018 articulation, on the extent of uninsured motorist coverage under the policy. We address each claim in turn.

I

The plaintiffs first contend that the court improperly concluded that the defendant's failure to comply with the statutory requirements of § 38a-336 (a) (2) was excused. The issue we must decide is whether, as a matter of law, the construction of § 38a-336 (a) (2) articulated by our Supreme Court in *Frantz* v. *United States Fleet Leasing, Inc.*, 245 Conn. 727, 738–43, 714 A.2d 1222 (1998), applies to the uncontroverted factual scenario presented by this case. Our review, therefore, is plenary. Id., 736.

Section 38a-336 (a) (1) (A), the Connecticut uninsured motorist statute, requires in relevant part that "[e]ach automobile liability insurance policy shall provide insurance, herein called uninsured and underinsured motorist coverage, in accordance with the regulations adopted pursuant to section 38a-334 . . . for the protection of persons insured thereunder who are legally entitled to recover damages because of bodily injury, including death resulting therefrom . . . ." As our Supreme Court has explained, "[t]he public policy established by the uninsured motorist statute is to ensure that an insured recovers damages he or she would have been able to recover if the uninsured motorist had maintained a policy of liability insurance." *Sandor* v. *New Hampshire Ins. Co.*, 241 Conn. 792,

800, 699 A.2d 96 (1997); see also *Doyle* v. *Metropolitan Property & Casualty Ins. Co.*, 252 Conn. 79, 84, 743 A.2d 156 (1999) ("the purpose of underinsured motorist coverage is to protect the named insured and other additional insureds from suffering an inadequately compensated injury caused by an accident with an inadequately insured automobile" (internal quotation marks omitted)). In light of "the broad, remedial purpose of the uninsured motorist statute . . . [our Supreme Court has] stated that an insurer may [not] circumvent th[at] public policy . . . ." (Citation omitted; internal quotation marks omitted.) *Tannone* v. *Amica Mutual Ins. Co.*, 329 Conn. 665, 673, 189 A.3d 99 (2018).

At issue in this appeal is subdivision (2) of § 38a-336 (a). That subdivision begins by requiring in relevant part that "each automobile liability insurance policy . . . *shall* provide uninsured and underinsured motorist coverage with limits for bodily injury and death *equal* to those purchased to protect against loss resulting from the liability imposed by law . . . ."[12] (Emphasis added.) General Statutes § 38a-336 (a) (2). It then qualifies that requirement by permitting a "named insured" to request "a lesser amount" in writing. General Statutes § 38a-336 (a) (2). Significantly, the statute mandates that "[n]o such written request for a lesser amount shall be effective unless any named insured has signed an informed consent form that shall contain: (A) An explanation of uninsured and underinsured motorist insurance approved by the commissioner; (B) a list of uninsured and underinsured motorist coverage options available *from the insurer*; and (C) the premium cost for each of the coverage options available *from the insurer* . . . ." (Emphasis added.) General Statutes § 38a-336 (a) (2). Because the plain purpose of such a form is to apprise a purchaser of insurance of that information, the burden necessarily is on the insuring

[12] The policy here provided $1 million in liability coverage per accident.

party to provide the information specified in § 38a-336 (a) (2) to the purchaser.

In *Nationwide Mutual Ins. Co.* v. *Pasion*, 219 Conn. 764, 594 A.2d 468 (1991), our Supreme Court considered the efficacy of a written request to reduce uninsured motorist coverage pursuant to General Statutes (Rev. to 1989) § 38-175c (a) (2), the precursor to § 38a-336 (a) (2).[13] The main issue in that appeal was "whether a written request to reduce uninsured motorist coverage by one of two named insureds on an automobile liability insurance policy is sufficient to satisfy the writing required" under that statute. Id., 765. Although there were two named insureds on the policy in question, a husband and wife, only the husband had signed the request to reduce uninsured motorist coverage. Id., 766. The court first concluded that the statutory language in question was ambiguous because, as applied to the facts of that case, it was unclear whether the term "insured" referred to *any* named insured or to *all* named insureds. Id., 769. The court then reviewed the legislative history of the statute and concluded: "The apparent intent of the legislature . . . was to assure that consumers purchasing automobile liability insurance would be made aware of the low cost of equal amounts of uninsured coverage by requiring any reduction in that coverage to be in writing. . . . [T]o construe the term 'insured' . . . as [the plaintiff insurance company] urges would thwart the intent of the legislature. . . . To permit the signature of one named insured to bind other, possibly uninformed, named insureds would circumvent the legislature's intent that the decision to reduce uninsured motorist coverage by consumers be an informed one." (Citations omitted.) Id., 770–71.

[13] As the Supreme Court has observed, the statutory language construed in *Pasion* "is virtually identical" to the statutory language contained in § 38a-336 (a) (2). See *Frantz* v. *United States Fleet Leasing, Inc.*, supra, 245 Conn. 734 n.16.

Accordingly, the court held that the written request to reduce uninsured motorist coverage "was ineffective to reduce the uninsured motorist benefits available to a third party who had been injured in an accident while a passenger in a vehicle covered under the policy." *Colonial Penn Ins. Co.* v. *Bryant*, 245 Conn. 710, 712, 714 A.2d 1209 (1998), citing *Nationwide Mutual Ins. Co.* v. *Pasion*, supra, 771.

Seven years later, the Supreme Court considered a similar claim in a completely different context. As the court stated, the "issue that we must decide is whether, as a matter of law, the construction of [the precursor to § 38a-336 (a) (2)] that we articulated in [*Pasion*] applies to the different factual scenario presented by this case." *Frantz* v. *United States Fleet Leasing, Inc.*, supra, 245 Conn. 736. *Frantz* involved a lease agreement between United States Fleet Leasing, Inc. (Fleet Leasing), which owned a fleet of passenger vehicles, and General Dynamics Corporation (General Dynamics). Id., 730. As the court emphasized early in its opinion, "[b]oth Fleet Leasing and General Dynamics are large corporations with their own legal and risk management departments." Id., 730 n.6.

On September 11, 1992, one of the vehicles owned by Fleet Leasing and leased by General Dynamics was involved in an accident. Id., 730. That vehicle "was insured under an automobile liability insurance policy that had been issued by the defendant [insurance company] to General Dynamics." Id. That policy "covered approximately 2208 private passenger vehicles that were either owned or leased by General Dynamics and that were located in various states" and "provided liability coverage of $2 million per accident . . . ." Id., 731. Under the policy, "[t]he term 'named insured' . . . include[d], subject to certain limitations, various subsidiaries, affiliates and joint ventures of General Dynamics, the United States of America and 'any other person

or organization for which [General Dynamics] has agreed in writing to provide insurance . . . .' " Id., 732. In procuring that policy, a representative of General Dynamics had submitted a written request to reduce its uninsured motorist coverage to $40,000 per accident. Id., 731, 733.

The plaintiffs, all employees of General Dynamics who were injured in the September 11, 1992 accident, subsequently brought suit against Fleet Leasing and the insurance company to recover uninsured motorist benefits under the fleet insurance policy issued to General Dynamics. Id., 733. They later moved for summary judgment, relying principally on the precedent set in *Pasion* and arguing that "General Dynamics' election of lower uninsured motorist coverage was invalid because it had not been signed by Fleet Leasing, a named insured . . . ." Id., 733–34. The trial court granted that motion, concluding that "the plaintiffs were entitled to uninsured motorist coverage of $2 million under [the Supreme Court's] decision in *Pasion* because Fleet Leasing, a named insured, had failed to submit a written request for a reduction in [uninsured motorist] coverage . . . ." Id., 734.

On appeal, the defendants claimed that "the factual differences between *Pasion* and the present case warrant a different application of § 38a-336 (a) (2). Specifically, they argue[d] that the policy considerations underlying the enactment of § 38a-336 (a) (2) that formed the basis of [the] holding in *Pasion* are inapplicable in the context of commercial fleet insurance. They claim[ed], moreover, that to construe that statutory provision to require the written consent of all named insureds on a commercial fleet policy would place an unreasonable and unintended burden on insurers because, as in this case, the number of prospective insureds under a fleet policy is likely to be substantial." Id., 738.

The Supreme Court agreed with the defendants and articulated a narrow exception to the statutory requirements of § 38a-336 (a) (2). Applying well established principles of statutory construction, the court concluded that "the legislature did not intend to require the written consent of *all* named insureds on a commercial fleet policy as a necessary prerequisite to a reduction in coverage. First, we are not persuaded that requiring Fleet Leasing to provide a written request for a reduction in uninsured motorist coverage under the [insurance] policy would further the legislative goal of ensuring that consumers are informed of the relative cost of this type of insurance. Although a corporation like Fleet Leasing may be considered a 'consumer' of insurance in the broadest sense of that word, we do not believe that a company that, like Fleet Leasing, is covered under a commercial fleet policy, falls within the class of consumers that the legislature sought to protect in requiring the signature of all named insureds under § 38a-336 (a) (2). Fleet Leasing, like many other large corporations covered under commercial fleet policies, has departments that specialize in legal and insurance matters. It is highly likely, therefore, that the Fleet Leasing personnel who negotiated the insurance provisions of the lease contract with General Dynamics were fully aware of the relative cost of uninsured motorist coverage and the implications of their decision to leave to General Dynamics the determination of the amount of uninsured motorist coverage." (Emphasis added.) Id., 738–39.

The court also noted that "the primary legislative purpose in requiring a written request for a reduction in uninsured motorist coverage is to ensure that one named insured not be bound, to his or her detriment, by the unilateral decision of another named insured to seek such a reduction. . . . Furthermore, strict adherence in this case to the rule that we deemed applicable in *Pasion* would have required the written consent not

only of Fleet Leasing, but of all other named insureds on the policy, a result that is both unreasonable and impracticable. Under the terms of the endorsement to the policy, 'named insured' includes any other person or organization for which General Dynamics had agreed in writing to provide insurance and, subject to certain limitations, the United States of America and various joint ventures of General Dynamics, as well as partners, executive officers and directors of those joint ventures. . . . Identifying all such persons and entities and securing their written consent to a reduction in uninsured motorist coverage would have created formidable administrative burdens for General Dynamics or its insurance underwriter, burdens that we believe it is most unlikely our legislature intended to impose under § 38a-336 (a) (2)." (Citations omitted.) Id., 739–40. For those reasons, the court concluded that the holding of *Pasion* was inapplicable to such fleet insurance policies. Id., 740.

Our appellate courts have applied the narrow exception articulated in *Frantz* on two occasions. In *McDonald* v. *National Union Fire Ins. Co. of Pittsburgh, PA*, 79 Conn. App. 800, 801–802, 831 A.2d 310, cert. denied, 266 Conn. 929, 837 A.2d 802 (2003), one of the plaintiffs was injured in an automobile accident while operating a car owned by her employer, Cumberland Farms, Inc., that was insured under a fleet insurance policy issued by the defendant. The plaintiff sought to collect underinsured motorist benefits pursuant to that policy, claiming that "the attempt by Cumberland Farms, Inc., to reduce the underinsured motorists policy limit . . . was ineffective because the informed consent form signed by Cumberland Farms, Inc., did not comply with the requirements of § 38a-336 (a) (2). Specifically, the plaintiffs argue[d] that the form signed by Cumberland Farms, Inc., did not 'contain . . . the premium cost for each of the coverage options available from the insurer,' as required by § 38a-336 (a) (2) (C)." Id., 804.

On appeal, this court agreed with the trial court's determination that Cumberland Farms, Inc., had effectively reduced the limit of underinsured motorist coverage under the policy. Id., 805. The court began by noting that "[o]ne of the guiding principles underlying the requirement of a written rejection of higher limits is to assure that the rejection is the product of a 'purposeful and knowing decision' . . . and that the request is an 'informed one.' " (Citation omitted.) Id., 805. The court then reviewed *Frantz* in detail and reiterated that "large corporations covered under commercial fleet policies [have] departments that specialize in legal and insurance matters" whose "personnel . . . were fully aware of the relative cost of uninsured motorist coverage and the implications of their decision . . . ." (Internal quotation marks omitted.) Id., 806. The court also observed that § 38a-336 (a) (2) "has been interpreted to impose lesser requirements on self-insurers." Id.

This court then concluded that the reasoning of *Frantz* "dictates the resolution of the issue in the plaintiffs' appeal. Cumberland Farms, Inc., is a large commercial entity. Its insurance premiums range from $127,459 to $518,207. Here, as in *Frantz*, [i]t is highly likely . . . that the . . . personnel who negotiated the insurance provisions of the [insurance] contract . . . were fully aware of the relative cost of uninsured motorist coverage and the implications of their decision . . . ." (Internal quotation marks omitted.) Id., 807. The court continued: "The purpose of § 38a-336 (a) (2), including the provision requiring that insurers inform consumers of the premium cost for each of the underinsured motorists coverage options available, is to facilitate consumers' decision-making process and to ensure that they give informed consent to reduced coverage. We do not believe that a company such as Cumberland Farms, Inc., *which insures a fleet of vehicles to carry on a large commercial enterprise*, falls within the class of

consumers that the legislature sought to protect when it mandated the disclosure of premium costs under § 38a-336 (a) (2). Consequently, the fact that the informed consent form in the present case did not contain a statement of premium costs does not defeat the election by Cumberland Farms, Inc., to reduce its underinsured motorists coverage limits . . . .'' (Emphasis added.) Id.

The Supreme Court reached a similar result in *Kinsey* v. *Pacific Employers Ins. Co.*, 277 Conn. 398, 891 A.2d 959 (2006). The issue in that case was whether a written request to reduce uninsured motorist coverage under a fleet insurance policy was effective when ''certain language in the [written] . . . request was [not] made . . . in twelve-point type as required by . . . § 38a-336 (a) (2).'' Id., 400. The plaintiff, ''who was operating a vehicle owned by his employer and insured under a commercial fleet automobile insurance policy issued by the defendant, sustained injuries that were caused by an underinsured motorist.'' Id. As the court emphasized, the plaintiff's employer was ''a corporation with over 2700 employees'' that ''was insured under a commercial fleet automobile insurance policy issued . . . by the defendant. More than 1000 vehicles were covered under the policy.'' Id., 402.

Although the policy contained $1 million in liability coverage, the defendant claimed that ''the total amount of underinsured motorist coverage available under [the] policy was $40,000 . . . . The defendant [claimed] . . . that, prior to the date of the accident in which the plaintiff was injured, [the employer] had submitted to the defendant an 'Informed Consent Form,' signed by [its] vice president of risk, requesting that its uninsured and underinsured motorist coverage limit be reduced to $40,000.'' Id., 402. In response, the plaintiff ''maintained that the request was ineffective because the informed consent form . . . did not comply with § 38a-336 (a)

(2). In particular, § 38a-336 (a) (2) requires the inclusion of certain language, in the form of a heading in twelve-point type, on the informed consent form; it is undisputed that the form that [the employer] had submitted contained the required language, albeit in eight-point type rather than twelve-point type." (Footnote omitted.) Id., 403.

In rejecting the plaintiff's claim, the court in *Kinsey* relied on the precedent set forth in *Frantz* and *McDonald*. After discussing those cases in detail, our Supreme Court stated: "We reach the same result in the present case. For the reasons enumerated in *Frantz* and *McDonald*, there is no reason to require strict adherence to the twelve-point type requirement of § 38a-336 (a) (2) in the context of a commercial fleet policy. . . . [The employer], which had more than 2700 employees and was insured under a commercial fleet policy covering more than 1000 vehicles, is not a member of the class of consumers that the legislature sought to protect when it enacted that typeface requirement. . . . [The employer's] vice president of risk, who signed the informed consent form on behalf of [the employer], attested to the fact that when she endorsed the form, she was 'fully cognizant of the availability, relative costs and benefits of uninsured and underinsured motorist coverage as well as the implications of selecting minimum coverage limits,' and that her endorsement reflected 'a conscious decision,' on behalf of [the employer], 'to select uninsured/ underinsured motorist limits of $40,000 in Connecticut.' Under the circumstances, we are unwilling to conclude that [the employer's] request for a reduction in uninsured and underinsured motorist coverage was ineffective even though, contrary to the dictates of § 38a-336 (a) (2), the heading of the informed consent form in which the request appeared was printed in eight-point type rather than twelve-point type." (Footnote omitted.) Id., 413–14.

Frantz, *McDonald*, and *Kinsey* all recognize a limited exception to the statutory requirements of § 38a-336 (a) (2). Contrary to the defendant's contention, they did not establish a sweeping exception that is categorically available in every case involving a fleet insurance policy. The holdings in those cases were fact-specific and predicated on a number of factors that distinguished the commercial entities in question from the typical purchaser of insurance. In each case, the insurance policy (1) involved a large commercial entity that had "departments that specialize in legal and insurance matters"; *Frantz* v. *United States Fleet Leasing, Inc.*, supra, 245 Conn. 739; (2) was procured by insurance specialists who "were fully aware of the relative cost of uninsured motorist coverage"; id.; see also *Kinsey* v. *Pacific Employers Ins. Co.*, supra, 277 Conn. 414 (policy negotiated by commercial entity's "vice president of risk" who "was fully cognizant of the availability, relative costs and benefits of uninsured and underinsured motorist coverage" (internal quotation marks omitted)); *McDonald* v. *National Union Fire Ins. Co. of Pittsburgh, PA*, supra, 79 Conn. App. 804 (policy negotiated by commercial entity's "risk manager"); and (3) covered a massive fleet of automobiles used to conduct large-scale commercial activities.[14] Id., 807. In addition, the court in those cases considered the "unreasonable and impracticable" result of requiring strict adherence to the statutory requirements of § 38a-336 (a) (2) when there are numerous named insureds on a policy; see *Frantz* v. *United States Fleet Leasing, Inc.*, supra, 740; whether the commercial entity was self-insured; see *McDonald* v. *National Union Fire Ins. Co. of Pittsburgh, PA*, supra,

[14] The insurance policy at issue in *Frantz* covered 2208 vehicles; *Frantz* v. *United States Fleet Leasing, Inc.*, supra, 245 Conn. 731; *Kinsey* involved coverage of "more than 1000 vehicles"; *Kinsey* v. *Pacific Employers Ins. Co.*, supra, 277 Conn. 413; and *McDonald* involved coverage of "a fleet of vehicles [used] to carry on a large commercial enterprise . . . ." *McDonald* v. *National Union Fire Ins. Co. of Pittsburgh, PA*, supra, 79 Conn. App. 807.

806–807; and the amount of insurance premiums paid. Id., 807. In that "different factual scenario"; *Frantz* v. *United States Fleet Leasing, Inc.*, supra, 736; the appellate courts of this state have held that strict compliance with the statutory requirements of § 38a-336 (a) (2) is not required because the "policy considerations underlying [its] enactment are . . . inapplicable . . . ." (Citations omitted.) Id., 738; see also *Kinsey* v. *Pacific Employers Ins. Co.*, supra, 413–14; *McDonald* v. *National Union Fire Ins. Co. of Pittsburgh, PA*, supra, 807, 811.

With those factors in mind, we turn to the undisputed facts of the present case, which are culled largely from Blake's uncontroverted testimony.[15] The dealership was not a large commercial entity but, rather, was a local business engaged in automotive repair and used car sales. As the court found, the dealership was "not in the business of loaning cars" and, unlike the massive fleets of vehicles in *Frantz*, *McDonald*, and *Kinsey*; see footnote 14 of this opinion; the dealership had only ten to twenty vehicles for sale or lease in the fall of 2015. Equally significant, those vehicles were not used to conduct "a large commercial enterprise"; *McDonald* v. *National Union Fire Ins. Co. of Pittsburgh, PA*, supra, 79 Conn. App. 807; but rather remained primarily on the dealership property. As Blake testified, "the majority of our business was done on the property" and "operated more off our lot, even though we did [allow] test drives on cars . . . we really weren't in the business of doing loaner cars. Occasionally we did, and, so I didn't think we needed a whole lot of [insurance] coverage for that area." The dealership also was not self-insured; *McDonald* v. *National Union Fire Ins. Co. of Pittsburgh*, supra, 806–807; and its $11,465 annual insurance premium was

[15] We reiterate that, throughout its memorandum of decision, the court indicated that it had found Blake's testimony to be credible.

far less than the $127,459 to $518,207 in premiums paid by the large commercial entity in *McDonald*. Id., 807.

In *Frantz*, our Supreme Court predicated its decision in part on the fact that the insurance policy in question contained numerous named insureds. *Frantz* v. *United States Fleet Leasing, Inc.*, supra, 245 Conn. 740. Requiring all such named insureds to provide written consent to reduce the amount of uninsured motorist coverage, the court concluded, was "both unreasonable and impracticable" and "would have created formidable administrative burdens for [the commercial entity] or its insurance underwriter, burdens that we believe it is most unlikely our legislature intended to impose under § 38a-336 (a) (2)." Id. Those policy concerns are inapplicable to the present case, as the dealership was the only named insured on the policy here.

Perhaps most importantly, unlike the commercial entities in *Frantz*, *McDonald*, and *Kinsey*, the dealership did not have "departments that specialize in legal and insurance matters" or insurance specialists who "were fully aware of the relative cost of uninsured motorist coverage . . . ." Id., 739. Blake testified that, although he handled insurance matters for the dealership, he did not have "any education or formal training on risk loss and insurance purchasing." His uncontroverted testimony demonstrates that Blake was more akin to the typical purchaser of insurance.

On direct examination, Blake admitted that he relied on his insurance broker to advise him as to the costs relative to the policy and conceded that he was not familiar with the coverage limits in the policy. Blake also admitted that he had never read the policy in full, but "read the bold and the highlighted areas as I think most people would." Blake similarly testified that he did not read the waiver form "word for word"; instead,

he "read the portions that were filled in, and [he] looked it over in general, and [he] signed it."

Blake also testified that he did not know the difference between liability coverage and uninsured motorist coverage and that he did not know what conversion coverage was. Although he admitted to approving an election for conversion coverage on page four of the waiver form, Blake qualified that statement by noting, "I don't exactly understand how conversion coverage works." When asked if he knew how much "it would cost to have had an equal amount of liability [and uninsured motorist] coverage," Blake admitted that he did not.

Even more revealing is Blake's testimony that he "wanted to have the minimum amounts [of uninsured motorist coverage] required by the state of Connecticut." In its memorandum of decision, the court specifically found that Blake wanted "the lowest possible [uninsured motorist] coverage that was allowed" under Connecticut law. That finding is difficult to reconcile with the fact that the policy Blake ultimately procured contained $100,000 in uninsured motorist coverage—*more than double* the $40,000 statutory minimum required under Connecticut law. See General Statutes (Rev. to 2015) § 14-112 (a). On cross-examination, Blake testified that he did not know that the statutory minimum was $40,000 in 2015. Upon learning that the statutory minimum was $40,000, Blake again confirmed that he had requested the minimum amount of uninsured motorist coverage from his insurance agent and stated, "up until [what counsel] just said, I was under the impression that the minimum was $100,000. That was what I thought it was at the time." That uncontroverted testimony demonstrates that, unlike the insurance specialists who negotiated the fleet insurance policies in *Frantz*, *McDonald*, and *Kinsey*, Blake was not "fully cognizant of the availability, relative costs and benefits

of [uninsured] motorist coverage . . . .'' (Internal quotation marks omitted.) *Kinsey* v. *Pacific Employers Ins. Co.*, supra, 277 Conn. 414.

As this court has noted, ''[t]he purpose of § 38a-336 (a) (2), including the provision requiring that insurers inform consumers of the premium cost for each of the underinsured motorists coverage options available, is to facilitate consumers' decision-making process and to ensure that they give informed consent to reduced coverage.'' *McDonald* v. *National Union Fire Ins. Co. of Pittsburgh, PA*, supra, 79 Conn. App. 807. At its essence, the limited exception recognized in *Frantz* and its progeny is grounded in the presumption that large commercial entities staffed with dedicated insurance specialists do not fall ''within the class of consumers that the legislature sought to protect when it mandated the disclosure of premium costs under § 38a-336 (a) (2).'' Id. As evidenced by Blake's uncontroverted testimony at trial, the dealership was not such an entity.[16]

[16] That Blake was not fully apprised of the uninsured motorist options when signing the waiver form is exemplified by the following colloquy on direct examination:

''[The Defendant's Counsel]: [S]ir, you'll notice on pages three and four [of the waiver form], the [lines] for total coverage premium . . . those are all blank, correct?

''[Blake]: . . . [T]hat's correct.

''[The Defendant's Counsel]: [On pages] three and four . . . where premiums would be listed, those are blank, right?

''[Blake]: That's correct.

''[The Defendant's Counsel]: All right. And if those amounts had been listed, would you have selected a different [uninsured motorist] limit?

''[Blake]: No, I mean—

''[The Defendant's Counsel]: And why not?

''[Blake]: Well, the $100,000 was what was required . . . .''

Blake repeatedly testified throughout the trial that he wanted the minimum amount of uninsured motorist coverage allowable under Connecticut law, and the court made such a finding in its decision. Blake also confirmed that he mistakenly believed that the statutory minimum was $100,000 and testified that he did not know that the statutory minimum actually was $40,000 until so informed at trial. That testimony suggests that, if he had been advised

The defendant contends that its noncompliance with the statutory requirements of § 38a-336 (a) (2) should be excused because the policy in question was one for a commercial garage. In so arguing, the defendant overlooks the fact that the limited exception articulated in *Frantz*, *McDonald*, and *Kinsey* was fact-specific and animated by a number of factors, which we already have detailed. At its essence, the defendant's contention asks this court to expand that limited exception to encompass *all* commercial fleet and garage policies. We decline that invitation. If the General Assembly wishes to categorically exclude every fleet and garage policy from the mandate of § 38a-336 (a) (2), it knows how to do so. See *Rutter* v. *Janis*, 334 Conn. 722, 734, 224 A.3d 525 (2020) (noting "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" (internal quotation marks omitted)); *State* v. *Grant*, 294 Conn. 151, 160, 982 A.2d 169 (2009) (legislature knows how to use limiting terms).

We also are mindful that § 38a-336 is a statute with "a broad and remedial purpose"; *Doyle* v. *Metropolitan Property & Casualty Ins. Co.*, supra, 252 Conn. 88 n.5; namely, to "protect the named insured and other additional insureds from suffering an inadequately compensated injury caused by an accident with an inadequately insured automobile." (Internal quotation marks omitted.) Id., 84; see also *Williams* v. *State Farm Mutual Automobile Ins. Co.*, 229 Conn. 359, 373, 641 A.2d 783 (1994) ("our uninsured motorist statute is remedial in nature and designed to protect people injured by uninsured motorists"); *Harvey* v. *Travelers Indemnity Co.*, 188 Conn. 245, 250–51, 449 A.2d 157 (1982) ("it is the intent of the legislature to provide broad coverage to

of the correct statutory minimum and corresponding premium costs, Blake may well have selected a different coverage option.

victims of uninsured motorists"); cf. *Gormbard* v. *Zurich Ins. Co.*, 279 Conn. 808, 824, 904 A.2d 198 (2006) (noting "the important public policy goals of the uninsured motorist statute"). We therefore must apply § 38a-336 (a) (2) "consistent with the maxim that remedial statutes should be construed liberally in favor of those whom the law is intended to protect [and that] exceptions to those statutes should be construed narrowly." (Internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Edge Fitness, LLC*, 342 Conn. 25, 37, 268 A.3d 630 (2022); see also *Johnson* v. *Preleski*, 335 Conn. 138, 145, 229 A.3d 97 (2020) ("[r]emedial statutes must be afforded a liberal construction in favor of those whom the legislature intended to benefit" (internal quotation marks omitted)); *Gohel* v. *Allstate Ins. Co.*, 61 Conn. App. 806, 815, 768 A.2d 950 (2001) (§ 38a-336 is remedial in nature and "should be construed liberally in favor of those whom the law is intended to protect" (internal quotation marks omitted)). The requirements imposed upon insurers under § 38a-336 (a) (2) are intended to protect typical purchasers of insurance like Blake who do not possess insurance expertise and are not fully aware of the coverage options and relative cost of uninsured motorist coverage. See *Kinsey* v. *Pacific Employers Ins. Co.*, supra, 277 Conn. 414; *Frantz* v. *United States Fleet Leasing, Inc.*, supra, 245 Conn. 739; see also *McDonald* v. *National Union Fire Ins. Co. of Pittsburgh, PA*, supra, 79 Conn. App. 807 (purpose of § 38a-336 (a) (2) "is to facilitate consumers' decision-making process").

In light of the foregoing, we conclude that the construction of § 38a-336 (a) (2) articulated by our Supreme Court in *Frantz* does not apply to the different factual scenario presented by this case. The court, therefore, improperly concluded as a matter of law that the defendant's noncompliance with § 38a-336 (a) (2) was excused. Because the dealership's uninsured motorist

coverage was not effectively reduced due to that noncompliance, § 38a-336 (a) (2) dictates that the coverage under the policy was "equal to [the coverage] purchased to protect against loss resulting from the liability imposed by law . . . ." Because the record before us indicates that the liability coverage under the policy exceeded the $292,540.06 in workers' compensation benefits that the decedent received, "a triable issue remains as to the amount of damages that should be awarded [and] summary judgment should not have been rendered on that issue." *Williams* v. *Breyer*, 21 Conn. App. 380, 385, 573 A.2d 765, cert. denied, 215 Conn. 812, 576 A.2d 542 (1990).

II

The plaintiffs also claim that the court improperly determined, in its April 13, 2018 articulation following the bifurcated trial, that the policy provided for standard, rather than conversion, uninsured motorist insurance coverage. We disagree.

At the outset, we note that conversion coverage is an "option [that] is available *for an additional premium* to consumers who wish to purchase it *in lieu of standard underinsured motorist coverage under § 38a-336* [and] provides enhanced protection to victims of underinsured motorists . . . ." (Emphasis in original.) *Florestal* v. *Government Employees Ins. Co.*, 236 Conn. 299, 307, 673 A.2d 474 (1996). "In contrast to traditional underinsured motorist coverage, underinsured motorist conversion coverage is not reduced by the amount of any payment received by or on behalf of the tortfeasor or a third party." *Baranowski* v. *Safeco Ins. Co. of America*, 119 Conn. App. 85, 88, 986 A.2d 334 (2010). As our Supreme Court succinctly explained, "conversion coverage . . . means that any [uninsured] motorist benefits [a plaintiff] is entitled to from the defendant will not be reduced by the amount recovered from the

legally responsible parties." *Tannone* v. *Amica Mutual Ins. Co.*, supra, 329 Conn. 670 n.4.

The question before us is whether the policy provided standard or conversion coverage to the dealership. It is well established that "[a]n insurance policy is to be interpreted by the same general rules that govern the construction of any written contract . . . . In accordance with those principles, [t]he determinative question is the intent of the parties, that is, what coverage the . . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning." (Internal quotation marks omitted.) *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, 311 Conn. 29, 37–38, 84 A.3d 1167 (2014). "As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . The determination of whether an insurance policy is ambiguous is a matter of law for the court to decide." (Citation omitted; internal quotation marks omitted.) *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, 255 Conn. 295, 305–306, 765 A.2d 891 (2001); see also *Cruz* v. *Visual Perceptions, LLC*, 311 Conn. 93, 101, 84 A.3d 828 (2014) (whether contract language is plain and unambiguous "is a question of law subject to plenary review"). Furthermore, "[i]t is a basic principle of insurance law that policy language will be construed as laymen would understand it and not according to the interpretation of sophisticated underwriters . . . . [T]he policyholder's expectations should be protected as long as they are objectively reasonable from the layman's point of view." (Internal quotation marks omitted.) *R.T. Vanderbilt Co.* v. *Continental Casualty Co.*, 273 Conn. 448, 462–63, 870 A.2d 1048 (2005).

The policy here is twenty-one pages in length; twenty-five forms and endorsements spanning approximately one hundred pages are appended to the policy. The policy nonetheless is silent as to whether it provides standard or conversion coverage. Unlike other insurance policies; see, e.g., *Serra* v. *West Haven*, 77 Conn. App. 267, 269 n.3, 822 A.2d 1018 (2003); neither the policy nor the appended materials contain any provision indicating whether standard or conversion coverage applies. The only mention of uninsured motorist coverage at all is in the "GARAGE DECLARATIONS" section,[17] but that section does not specify the nature of the coverage provided. As a result, a reasonable layperson in the position of the purchaser of the policy; see *Israel* v. *State Farm Mutual Automobile Ins. Co.*, 259 Conn. 503, 509, 789 A.2d 974 (2002); would not be able to divine from the written policy the nature of the uninsured motorist coverage contained therein. Accordingly, we conclude that the policy is ambiguous as to whether it provides standard or conversion coverage.

In light of that ambiguity, the plaintiffs contend that the contra proferentem canon of construction requires us to construe the policy against the defendant as drafter of the policy. That canon provides that "ambiguities in contract documents are resolved against the party responsible for its drafting . . . . The party who actually does the writing of an instrument will presumably be guided by his own interests and goals in the transaction. He may choose shadings of expression, words more specific or more imprecise, according to the dictates of these interests. . . . A further, related rationale for the rule is that [s]ince one who speaks or writes, can by exactness of expression more easily

[17] "The declarations page is regarded as part of the insurance contract . . . and contains the terms most likely to have been requested by the insured . . . ." (Internal quotation marks omitted.) *Fiallo* v. *Allstate Ins. Co.*, 138 Conn. App. 325, 336 n.3, 51 A.3d 1193 (2012).

prevent mistakes in meaning, than one with whom he is dealing, doubts arising from ambiguity are resolved in favor of the latter." (Internal quotation marks omitted.) Id., 508–509.

The plaintiffs ignore the fact that "when a policy provision is facially ambiguous, the court should first apply other tools of construction and, if relevant, consult extrinsic evidence of the parties' intentions before construing the [policy] against the drafter." *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 171 Conn. App. 61, 90, 156 A.3d 539 (2017), aff'd, 333 Conn. 343, 216 A.3d 629 (2019); see also *Gold* v. *Rowland*, 325 Conn. 146, 160, 156 A.3d 477 (2017) ("the application of contra proferentem is premature in situations [in which] there has not yet been any attempt to resolve the ambiguity through the ordinary interpretive guides—namely, a consideration of the extrinsic evidence" (internal quotation marks omitted)); *Connecticut Ins. Guaranty Assn.* v. *Drown*, 314 Conn. 161, 195, 101 A.3d 200 (2014) (*Rogers*, *C. J.*, concurring) ("the rule [of contra proferentem] should be applied as a tie breaker only when all other avenues to determining the parties' intent have been exhausted"); 2 S. Plitt et al., Couch on Insurance (3d Ed. Rev. 2010) § 22:16, pp. 22–93 through 22–94 ("since [the] rule of strict construction of an ambiguous policy against insurer is a rule of last resort, and not to be permitted to frustrate parties' expressed intention if such intention could be otherwise ascertained, where there is extrinsic evidence of parties' intention, which is proffered and admissible, and which resolved ambiguity, albeit in favor of noncoverage, the rule of strict construction need not be applied"); M. Taylor et al., Connecticut Insurance Law (2011) § 2-5:1, p. 35 ("[o]nce a determination is made that the policy is ambiguous, then the court may consider any relevant evidence which demonstrates the intent of the parties at the time that they entered into the policy").

Particularly illustrative is *Fiallo* v. *Allstate Ins. Co.*, 138 Conn. App. 325, 51 A.3d 1193 (2012). The insurance policy in that case contained provisions detailing the nature of both standard " 'Uninsured Motorist Insurance Underinsured Motorist Insurance Coverage' " and " 'Uninsured Motorist Insurance Underinsured Motorist Conversion Insurance Coverage' " and provided corresponding codes for each type of coverage. Id., 336–37. The declaration page, however, did not contain a code or explanation to indicate which type of coverage was provided. Id., 337–38. As a result, this court concluded that the policy was ambiguous in that regard. Id., 339.

Because the policy did not specify whether standard or conversion uninsured motorist coverage applied, this court explained that "the issue of whether the plaintiff purchased standard uninsured . . . motorist coverage or . . . conversion coverage presents a question of historical fact, rather than one of contract construction. Accordingly, the canon of contra proferentem need not be applied automatically. . . . The issue in the present case does not require an interpretation of a policy term that is written by the insurer . . . but rather warrants an inquiry into the circumstances of the purchase of the policy to determine which variety of uninsured . . . motorist coverage the plaintiff opted to purchase so that the intentions of the parties may be discovered and put into effect." (Citations omitted; footnote omitted.) Id., 340–41. For that reason, the court concluded that "[t]he determination of what policy was bought may be resolved by examining extrinsic evidence." Id., 341. As it stated: "Because the reasonable expectations of the insured control when enforcing insurance contracts . . . we conclude that the process best suited to effectuate the intent of the parties where the language is ambiguous as to the issue of historical fact whether the insured elected to buy a particular policy is to examine extrinsic evidence to determine the parties' intentions, and if this examination does not resolve the ques-

tion, other canons of construction, including perhaps the doctrine of contra proferentem, may be applied. There is a fundamental distinction between deciding what policy language means, on the one hand, and deciding, on the other hand, whether a particular policy option was bought." (Citation omitted.) Id., 341–42. The court also emphasized that "the issue in the present case called for a factual determination rather than a construction of the terms of the policy drafted by the insurer." Id., 347. Because the trial court had not made "a finding regarding the parties' intentions other than its conclusion that the policy and declarations page were unambiguous," this court "reverse[d] the judgment in part and remand[ed] the case to the [trial] court to determine which coverage the parties intended." Id., 348.

Like *Fiallo*, the present case involves "a factual determination rather than a construction of the terms of the policy drafted by the insurer"; id., 347; for which resort to extrinsic evidence such as trial testimony is appropriate. In considering such evidence, "[t]he determinative question is the intent of the parties . . . ." (Internal quotation marks omitted.) *Connecticut Ins. Guaranty Assn.* v. *Drown*, supra, 314 Conn. 187.

Conversion coverage is an "option [that] is available *for an additional premium* to consumers who wish to purchase it . . . ." (Emphasis in original.) *Florestal* v. *Government Employees Ins. Co.*, supra, 236 Conn. 307; see also General Statutes § 38a-336a (a). At trial, Blake testified that he "wanted to have the minimum amounts [of insurance coverage] required by the state of Connecticut." Blake further testified that he "was trying to find a policy [so] that I could keep the [dealership] ongoing, because . . . we were getting crushed by . . . insurance costs."[18] That evidence undermines the

[18] In light of that testimony, the court made a finding in its memorandum of decision that Blake wanted "the lowest possible [uninsured motorist] coverage that was allowed" under Connecticut law.

plaintiffs' claim that Blake intended to purchase enhanced coverage for an additional premium pursuant to § 38a-336a.

Also admitted into evidence was a copy of the waiver form. It is undisputed that the defendant failed to disclose to Blake the premium costs for any of the conversion coverage options listed on page four of that document. Although the box for "$100,000 Combined Single Limit" was checked on that page; see footnote 8 of this opinion; Blake testified that he did not check that box. He explained that Castellini, the insurance agent who helped procure the policy, had faxed the waiver form to him with an asterisk on page four where the signature of the named insured was required.[19] Blake testified that the only writing on the waiver form that belonged to him was the signature on page four.

In addition, Blake testified that he did not know what conversion coverage was and did not "understand how conversion coverage works." In his testimony, Blake also confirmed that he did not ask Castellini about conversion coverage. In light of that uncontroverted evidence, we agree with the trial court's determination that Blake did not intend to purchase uninsured motorist insurance conversion coverage for the dealership.

The plaintiffs nevertheless argue that the terms of the waiver form should be deemed part of the policy, relying on *Harlach* v. *Metropolitan Property & Liability Ins. Co.*, 221 Conn. 185, 602 A.2d 1007 (1992). It is a curious position, given their contention in this appeal that the waiver form was invalid and not the product of a knowing and informed decision on the part of the named insured. We conclude that *Harlach* is factually and contextually distinguishable from the present case.

[19] Blake also was asked if any instructions accompanied that correspondence from Castellini. Blake explained that the instructions from Castellini had stated, "Is this what you want and, if so, sign it and send it back to me."

In *Harlach*, our Supreme Court noted that "[i]t is well settled that an insurance contract must be read to include provisions that the law requires be included and to exclude provisions that the law prohibits. . . . Unless the agreement indicates otherwise, [an applicable] statute existing at the time an agreement is executed becomes a part of it and must be read into it just as if an express provision to that effect were inserted therein." (Citation omitted; internal quotation marks omitted.) Id., 191–92. In light of that precept, the plaintiff in *Harlach* argued that a specific statutory provision should be read into the insurance policy in question—namely, the requirement of the precursor to § 38a-336 (a) (2) that uninsured motorist coverage be equal to the limits of liability coverage unless a lesser amount is requested in writing. Id., 191. The court then focused its attention on "uncontroverted" evidence that the plaintiff had submitted an effective request to lower the amount of her uninsured motorist coverage, and did not further discuss the issue of incorporating statutory language into an insurance policy. Id., 192. Notably, the cases relied on by *Harlach* originate from the observation of our Supreme Court in 1940 that "*statutes* existing at the time a contract is made become a part of it and must be read into it just as if an express provision to that effect were inserted therein, except where the contract discloses a contrary intention." (Emphasis added.) *Ciarleglio* v. *Benedict & Co.*, 127 Conn. 291, 293, 16 A.2d 593 (1940).

This case is not *Harlach*. The plaintiffs here are not seeking to incorporate any statutory provision into the policy. Rather, they are seeking to incorporate certain language from a preprinted waiver form; see footnote 6 of this opinion; to compel the conclusion that Blake knowingly selected conversion coverage. That language states in relevant part that "[i]f you check more than one [coverage option] box, your policy will be issued

with the highest level of coverage selected." Because the partially completed waiver form that Castellini sent to Blake had multiple boxes checked; see footnote 8 of this opinion; the plaintiffs argue that this language must be incorporated into the policy and strictly construed as an election of conversion coverage by Blake. Yet the plaintiffs have provided no authority in which a Connecticut court has held that language from a preprinted waiver form—as opposed to a statutory provision—necessarily must be read into an insurance policy. We likewise are unaware of any such authority.

Apart from that shortcoming, *Harlach* is factually distinguishable. Unlike the present case, the named insured in *Harlach*, in addition to signing his name, had "initialed the minimum coverage option" on the written request to reduce uninsured motorist coverage. *Harlach* v. *Metropolitan Property & Liability Ins. Co.*, supra, 221 Conn. 188. By contrast, Blake testified that he did not select *any* of the boxes for a specific coverage option and had simply signed his name on the last page of the form that his insurance agent had provided. Moreover, Blake testified that he did not read the waiver form "word for word"; instead, he "read the portions that were filled in, and [he] looked it over in general, and [he] signed it." Blake also testified that he did not know what conversion coverage was, that he did not "understand how conversion coverage works," and that he did not ask Castellini about conversion coverage.

In addition, the written request to reduce uninsured motorist coverage in *Harlach* "made it very clear that increased amounts of coverage were available at a higher premium . . . ." *Harlach* v. *Metropolitan Property & Liability Ins. Co.*, supra, 221 Conn. 193. In the present case, the waiver form did not provide premium costs for any of the eighty-two coverage options listed on pages three and four of that document; the area designated for the "Total Coverage Premium" for each

of those options on the form was blank. Accordingly, unlike in *Harlach*, the waiver form here did not comply with the statutory requirements governing requests to reduce uninsured motorist coverage. See id., 192.

Furthermore, the plaintiff in *Harlach* was seeking to invalidate a written request that the named insured had signed due to his "mistaken [understanding] as to what coverage he was surrendering . . . ." Id., 190. By contrast, the plaintiffs in the present case seek to invalidate the waiver form signed by Blake due to the failure of the defendant insurer to comply with the statutory requirements of § 38a-336 (a) (2), while paradoxically urging this court to incorporate by reference certain language contained on that preprinted form. Having determined in part I of this opinion that the waiver form was an ineffective attempt to reduce the uninsured motorist coverage under the policy, and in light of the uncontroverted evidence in the record before us, we decline to incorporate the language in question from that preprinted form into the policy. The trial court, therefore, properly concluded that the policy provided for standard, rather than conversion, uninsured motorist insurance coverage.

The judgment is reversed with respect to the issue of uninsured motorist coverage limitations under the policy and the case is remanded to the trial court for further proceedings in accordance with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

BRIAN DOLAN *v.* DEBRA DOLAN
(AC 43602)

Moll, Clark and DiPentima, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court

granting his motion to modify his unallocated alimony and child support obligation. In his motion, the plaintiff requested to modify certain provisions of the parties' separation agreement, which had been incorporated into the judgment of dissolution, on the basis of, inter alia, his loss of employment and decrease in income. The parties' separation agreement provided in relevant part that the plaintiff was required to pay unallocated alimony and child support to the defendant, which was calculated on the basis of the plaintiff's "pre-tax compensation from employment" and included a minimum payment per month. The separation agreement defined "pre-tax compensation from employment" to include any and all earnings of any nature whatsoever actually received by the plaintiff in the form of cash or cash equivalents, or which the plaintiff is entitled to receive, from any and all sources relating to the services rendered by the plaintiff by way of his current or future employment. At a hearing on the plaintiff's motion, the plaintiff claimed that he had no income, but, when asked, testified that he receives interest and dividend income that he had failed to list on his financial affidavit. The court subsequently granted the plaintiff's motion, finding that there was a substantial change in the parties' circumstances. The court ordered, inter alia, that the plaintiff was not required to pay the defendant a minimum amount of unallocated alimony and child support per month. The court also ordered, as proposed by the defendant, that the definition of "pre-tax compensation from employment" set forth in the parties' separation agreement be modified to include income from all sources, including passive income from capital gains, interest and dividends, and income from business interests and other investments. *Held* that the plaintiff could not prevail on his claim that the trial court abused its discretion in modifying the definition of "pre-tax compensation from employment" in the parties' separation agreement: although the plaintiff argued that the court's inclusion of capital gains, interest and dividends, and income from business interests and other investments conflicted with our Supreme Court's decision in *Gay* v. *Gay* (266 Conn. 641), that case was materially different from the present case in that it involved a modification pursuant to statute (§ 46b-86 (a)), which required the court to consider certain statutory (§ 46b-82) criteria and did not involve a separation agreement like the one in the present case, which expressly defined the term "pre-tax compensation from employment" and set forth specific, contractual parameters for modifying that definition; moreover, it was clear that the parties here, in their separation agreement, intended to give the court broad discretion to modify the definition of "pre-tax compensation from employment" to ensure that they were treated fairly in accordance with the spirit of the agreement, not in accordance with the criteria set forth in § 46b-82.

Argued December 7, 2021—officially released June 7, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Stanley Novack*, judge trial referee, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *M. Moore*, *J.*, granted the plaintiff's motion to modify unallocated alimony and child support; subsequently, the court, *M. Moore*, *J.*, denied the plaintiff's motion for reargument and reconsideration, and the plaintiff appealed to this court. *Affirmed.*

Logan A. Carducci, for the appellant (plaintiff).

Samuel V. Schoonmaker IV, for the appellee (defendant).

Opinion

CLARK, J. In this matter arising after the dissolution of the parties' marriage, the plaintiff, Brian Dolan, appeals from the judgment of the trial court granting a postjudgment motion to modify his unallocated alimony and child support obligation to the defendant, Debra Dolan. The sole issue on appeal is whether the court erred in modifying the definition of "pre-tax compensation from employment" in the parties' separation agreement, which was incorporated by reference into the judgment of dissolution, to include "income from all sources, including passive income from capital gains, interest and dividends, and income from business interests and other investments." In the plaintiff's view, the court's modification of the definition ran afoul of our Supreme Court's decision in *Gay* v. *Gay*, 266 Conn. 641, 835 A.2d 1 (2003). We disagree and affirm the judgment of the trial court.

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

married in 1993 and are the parents of four children issue of the marriage.[1] On May 9, 2013, the trial court, *Hon. Stanley Novack*, judge trial referee, rendered judgment dissolving the parties' marriage that incorporated by reference the parties' May 8, 2013 separation agreement (agreement).

Pursuant to the agreement, the plaintiff is required to pay unallocated alimony and child support to the defendant until her death, remarriage, or cohabitation, or until May 14, 2023, whichever occurs first. The percentage of his "pre-tax compensation from employment" that he is required to pay to the defendant each calendar year is based on the amount of pretax compensation from employment that he receives in that given year. Specifically, in accordance with paragraph 4.2 of the agreement, the plaintiff is required to pay the defendant each calendar year as unallocated alimony and child support as follows:

[The Plaintiff's] PTCE	Percentage to [the Defendant]
$0-$250,000	50%
$250,001-$450,000	35%
$450,001-$600,000	25%
$600,000 and above	0%

Paragraph 4.2 further provides that, "[u]nless and until modified by [the] [c]ourt, or agreed to by the [p]arties, the [plaintiff] shall pay the [defendant] a minimum of [$10,416] per month."

Under paragraph 4.4 of the agreement, " 'pre-tax compensation from employment' " is defined as "any and all earnings of any nature whatsoever actually received by the [plaintiff] in the form of cash or cash equivalents,

[1] Only the parties' two youngest children were minors at the time of the hearing on the motion to modify.

or which the [plaintiff] is entitled to receive, from any and all sources relating to the services rendered by the [plaintiff] by way of his current or future employment, including, but not limited to, salary and bonus, exercisable stock options, stock grants, equity units, contract payments, commission payments, voluntary payments to qualified and non-qualified retirement plans, disability income, board of directors' fees, severance payments, excess compensation, consulting fees, director's fees and restricted stock and stock options granted after the date of dissolution of marriage, received by the [plaintiff] from employment. Income from restricted stock and stock options shall be considered [pre-tax compensation from employment] in the year the [plaintiff] must report this income on his federal tax return. Capital gains, interest and dividends and all other income earned by the [plaintiff] due to his investment of assets or sale of stock distributed to him in connection with the divorce proceeding or earned by the [plaintiff] based upon assets acquired outside of his employment by the [plaintiff] in the future shall not be considered in the definition of the [plaintiff's pre-tax compensation from employment] herein."

Paragraph 4.3 of the agreement provides in relevant part that "[t]he alimony payments under the terms of this [a]rticle IV shall be non-modifiable so as to extend the duration of said payments, and any decree of any [c]ourt incorporating any or all of the provisions hereof shall preclude such modification. The amount of the alimony payments under the terms of this [a]rticle IV shall be subject to modification as to amount pursuant to . . . [General Statutes § 46b-86 (a)], except: in any calendar year, the [defendant] shall be entitled to receive [pre-tax compensation from employment] in an amount of [$35,000] or less without such occurrence constituting a substantial change in circumstances. In any hearing for modification of alimony, the court shall

not consider the first [$35,000], of the [defendant's] [pre-tax compensation from employment] in any calendar year in determining whether a substantial change of circumstances has occurred. Proration for any year in which alimony is owed for only part of that year, shall apply to the provisions of this [p]aragraph."

In regard to modifying the definition of "pre-tax compensation from employment," paragraph 4.5 of the agreement provides: "Any court of competent jurisdiction, upon motion by either [p]arty, shall retain jurisdiction to modify the definition of [pre-tax compensation from employment] so as to ensure that both [p]arties are treated fairly in accordance with the spirit of this [a]greement. Neither [p]arty shall be required to demonstrate a substantial change in circumstances with regard to any such modification."

On January 4, 2019, the plaintiff filed the subject motion to modify, requesting that the court "modify articles IV, V, VI, VII, and VIII" of the agreement that was incorporated into the May 9, 2013 dissolution of marriage judgment. In support of that motion, the plaintiff represented to the court that a chronic medical condition forced him to leave his high paying job, which resulted in a dramatic decrease in his income. Accordingly, he requested various changes to the agreement, including, inter alia, that the court delete the provision in article IV of the agreement that requires him to pay the defendant a minimum of $10,416 per month. He argued that modification of this provision was necessary because two of the parties' children had attained the age of majority and completed four year, postsecondary degrees and, "[m]ore importantly, the minimum monthly payment dictated by the above requires [the plaintiff] to pay the defendant over 90 percent of his disability income." The plaintiff also requested that the percentages of pretax compensation from employment he owed to the defendant under the agreement be

reduced, that the amount of life insurance he was required to maintain be lowered, and that the court replace the parenting plan in the dissolution judgment with a new plan as outlined in his motion.

Prior to a hearing on the motion to modify, both parties submitted proposed orders to the court. The plaintiff's proposed orders mirrored the requests he made in the motion to modify. On August 12, 2019, the defendant filed her proposed orders, in which she proposed, inter alia, (1) that the plaintiff's unallocated alimony and child support obligation continue in full force and effect pursuant to the separation agreement, (2) that the definition of "pre-tax compensation from employment" set forth in paragraph 4.4 of the agreement be modified to include income from all sources, including passive income from capital gains, interest and dividends, and income from business interests and other investments, and (3) that the plaintiff will not be required to pay the defendant a minimum of $10,416 per month for a period of one year and, in the event that the plaintiff earns in excess of $600,000, gross, in one year from all sources, he will pay the defendant 20 percent of the gross amount above $600,000 as unallocated alimony and child support. The defendant also made proposals with respect to health insurance for the parties' two minor children, in addition to a parenting plan.

The trial court held a hearing on the motion to modify on August 13, 2019, and issued its order regarding the motion on September 25, 2019. The court found that for years, the plaintiff enjoyed substantial income to the point that he was paying the maximum amount of alimony and child support provided for under the parties' separation agreement. At the time of dissolution in 2013, the plaintiff's gross monthly income was $20,833, and his net monthly income was $14,750. In October, 2018, however, the plaintiff's issues became

overwhelming and he stopped working. The court found that the plaintiff had struggled with mental health issues, and suffered from depression, anxiety, panic attacks, stress, and alcohol abuse for twenty years. He obtained short-term disability payments, but was denied long-term disability payments. At the hearing, the plaintiff testified that he obtained a license to sell real estate; however, he did not know whether he would work in that field. He also was unsure of his plans for the future and was living off his savings. The plaintiff claimed that he had no income, but, when asked, testified that he receives interest and dividend income that he had failed to list on his financial affidavit. The court found that, in 2017, the plaintiff received $12,794 in dividend income and, in 2018, he received $14,387 in qualified dividend income. He has weekly expenses and liabilities of $5586. The total cash value of his assets is $2,173,300.

With respect to the defendant, the court found that she is employed part-time outside the home. On the basis of the child support guidelines calculation, her net income from employment and qualified dividend income is $554 per week. She has $3243 in total net weekly expenses and liabilities and the total cash value of her assets is $1,119,370. The court found that the defendant, too, has suffered from mental health issues and in December, 2018, she was hospitalized. During her hospitalization, the plaintiff assumed the role of primary parent for the parties' minor children.

The court found that there was a substantial change in circumstances since the most recent court order and that it would be unjust or inequitable to hold either party to that order. In granting the plaintiff's motion, the court found that the presumptive amount of child support was $92 per week from the plaintiff to the defendant, but that the application of the guidelines would be inequitable and inappropriate in the present

case. The court therefore deviated from the guidelines on the basis of the coordination of total family support and the parties' shared parenting plan and ordered that "the definition of 'pre-tax compensation from employment' set forth in paragraph 4.4 of the parties' separation agreement will be modified to include income from all sources, including *passive income from capital gains*, *interest and dividends*, *and income from business interests and other investments*. The [unallocated alimony and child support payment] formula set forth in paragraph 4.2 of the separation agreement dated May 8, 2013, will remain in effect, except the [plaintiff] will not be required to pay the [defendant] a minimum amount per month." (Emphasis added.) Additionally, the court ordered the plaintiff to provide to the defendant: (1) notice of any job offers or acceptances; and (2) documentation of any determination that he has become completely disabled, along with copies of his first three disability checks. Furthermore, the court reduced the amount of life insurance the plaintiff was required to maintain from $1,250,000 to $500,000, and modified the parenting plan.

On October 9, 2019, the plaintiff filed a motion for reargument and reconsideration of the court's order. In his motion, the plaintiff acknowledged that the defendant rightly had brought to the court's attention income from dividends and interest that he had not included on his financial form, but stated that there was no evidence that he has a steady stream of revenue from capital gains. He contended that the court had misapplied the controlling law by modifying the term "pre-tax compensation from employment" to include capital gains, including those from passive investments in business, in violation of *Gay* v. *Gay*, supra, 266 Conn. 647–48. He asked the court to delete "capital gains" and the phrase "and income from business interests and other

investments" from its order.[2] The court summarily denied the plaintiff's motion for reargument and reconsideration.

The defendant, too, filed a motion for reargument and reconsideration of the court's September 25, 2019 order. She argued that the court should have taken into account the assets of the parties and the plaintiff's earning capacity, not only the income from the plaintiff's assets. The court summarily denied the defendant's motion for reargument and reconsideration as well.[3] The plaintiff timely appealed.[4]

We begin by setting forth the legal principles that inform our discussion and the standard of review pertinent to the plaintiff's claim. Section 46b-86 (a) provides in relevant part: "*Unless and to the extent that the decree precludes modification*, any final order for the periodic payment of permanent alimony or support, an order for alimony or support pendente lite or an order requiring either party to maintain life insurance for the other party or a minor child of the parties may, at any time thereafter, be continued, set aside, altered or modified

[2] The plaintiff requested that the court amend its order as follows: "The court modifies the separation agreement as follows: the definition of 'pretax compensation from employment' set forth in paragraph 4.4 of the parties' separation agreement will be modified to include income from all sources, including passive income from interest and dividends."

[3] The defendant has not appealed from the denial of her motion for reargument.

[4] On March 10, 2020, the plaintiff filed a motion for articulation with the trial court. The plaintiff requested that the court articulate its decision to modify the definition of pretax compensation from employment in the separation agreement. The court denied the motion for articulation. Thereafter, the plaintiff filed a motion for review with this court. This court granted the motion for review, but denied the relief requested. This court sua sponte ordered the trial court to "rectify the record to include the parties' proposed orders, referred to [in the transcript of the hearing held on August 19, 2019, which were] not included in the trial court file or exhibits. If the parties stipulate and provide copies of the proposed orders, the trial court may approve the stipulation and rectify the record without a hearing." The trial court approved the parties' stipulation on October 29, 2020.

by the court upon a showing of a substantial change in the circumstances of either party . . . .'' (Emphasis added.)

When the parties in a dissolution matter have a separation agreement that has been incorporated into a dissolution decree, interpretation of that separation agreement is ''guided by the general principles governing the construction of contracts.'' (Internal quotation marks omitted.) *Issler* v. *Issler*, 250 Conn. 226, 235, 737 A.2d 383 (1999). ''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 be given effect according to its terms.'' (Internal quotation marks omitted.) Id. ''A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous.'' (Citation omitted; internal quotation marks omitted.) *Eckert* v. *Eckert*, 285 Conn. 687, 692, 941 A.2d 301 (2008). ''The construction of a contract to ascertain the intent of the parties presents a question of law when the contract or agreement is unambiguous within the four corners of the instrument.'' (Internal quotation marks omitted.) *Taylor* v. *Taylor*, 117 Conn. App. 229, 231–32, 978 A.2d 538, cert. denied, 294 Conn. 915, 983 A.2d 852 (2009).

Moreover, ''[a]n appellate court will not disturb a trial court's orders in domestic relations cases unless the

court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action." (Internal quotation marks omitted.) *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 372, 999 A.2d 721 (2010). "[T]o conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did." (Internal quotation marks omitted.) *Emerick* v. *Emerick*, 170 Conn. App. 368, 378, 154 A.3d 1069, cert. denied, 327 Conn. 922, 171 A.3d 60 (2017).

In the present case, the plaintiff argues that the court abused its discretion when it modified the definition of "pre-tax compensation from employment" in the parties' separation agreement, which was incorporated by reference into the judgment of marriage dissolution, to include "income from all sources, including passive income from capital gains, interest and dividends, and income from business interests and other investments." In his view, *Gay* v. *Gay*, supra, 266 Conn. 647–48, as a matter of law, precluded the court from doing so. We disagree.

In *Gay*, after a thirty-two year marriage, the plaintiff wife brought an action seeking a dissolution of the marriage. Id., 642–43. The court rendered a judgment of dissolution that incorporated by reference a stipulation entered into by the parties dated December 20, 1996. Id., 643. The judgment provided, inter alia, that the defendant husband must pay alimony to the plaintiff in the amount of $730 per month. Id. On September 29, 1999, the defendant moved for a modification of the alimony payments. Id. In his motion, the defendant claimed that his retirement, and the accompanying decrease in income, constituted a substantial change

in circumstances. Id. Furthermore, he noted that the plaintiff's income and assets had dramatically increased so that her circumstances had changed for the better. Id. After hearing arguments on the matter, the court reduced the defendant's alimony obligation to $1 per year and ordered the parties to exchange copies of their respective federal tax returns for the following three years. Id. The court articulated the basis for its conclusion that the parties' income was now in parity and, therefore, the alimony award should be modified. Id. After making certain adjustments to the net income reflected on the plaintiff's financial affidavit, the court found that the defendant had a net income of $1268 per week and the plaintiff had a net income of $1323 per week. Id. In its articulation, the court indicated that it had included both short-term and long-term capital gains in determining the plaintiff's income for purposes of the modification. Id. The court further indicated that, in assessing the plaintiff's income for 1999, it disregarded capital losses from a prior year that the plaintiff had, for the purpose of calculating income tax, carried over into 1999. Id.

On appeal to this court, we concluded that the trial court had improperly included all of the plaintiff's capital gains as income without determining how much, if any, of those gains were generated from assets that were acquired after the dissolution. Id., 644. As a result, this court reversed the order of the trial court, and remanded the case with an instruction to determine whether the plaintiff had realized capital gains from assets acquired after the dissolution. Id. The plaintiff then petitioned our Supreme Court for certification to appeal, which our Supreme Court granted. Id.

Our Supreme Court held that, "[a]t least where, as is generally the case, capital gains do not represent a steady stream of revenue, the fact that a party has enjoyed such gains in a particular year does not provide

a court with an adequate basis for assessing that party's long-term financial needs or resources." (Footnote omitted.) Id., 647. The court concluded "that capital gains are not income for purposes of modification of an order for continuing financial support if those gains do not constitute a steady stream of revenue. This is true without regard to whether the assets from which those gains are derived were acquired before or after the dissolution." Id., 647–48. The court went on to explain that "[t]he fact that capital gains on property distributed at dissolution may not be considered income under [General Statutes] § 46b-82 does not mean, however, that changes in the value of such property, whether realized or not, may never be taken into consideration by a court in considering a modification of alimony. The fact that the trial court has no authority to modify the assignment of property made at dissolution; see General Statutes § 46b-86 (a); does not mean that the court cannot consider a change in the value of that property in determining whether there has been a substantial change of circumstances justifying the modification of an alimony award." (Emphasis omitted.) Id., 648. Accordingly, the court affirmed this court's reversal of the judgment of the trial court on alternative grounds and ordered this court to remand the case to the trial court for a new hearing on the defendant's motion for modification. Id., 648–49.

Although the plaintiff contends that our Supreme Court's decision in *Gay* is "on all fours" with the issue presented here, we find *Gay* materially different from the facts of the present case. *Gay* involved a modification of alimony pursuant to § 46b-86 (a), which requires a court to consider the criteria set forth in § 46b-82[5]

[5] General Statutes § 46b-82 (a) provides: "At the time of entering the decree, the Superior Court may order either of the parties to pay alimony to the other, in addition to or in lieu of an award pursuant to section 46b-81. The order may direct that security be given therefor on such terms as the court may deem desirable, including an order pursuant to subsection (b) of this section or an order to either party to contract with a third party

after a determination that there has been a substantial change in circumstances. See General Statutes § 46b-86 (a) ("[i]f a court finds that a substantial change in circumstances of either party has occurred, the court shall determine what modification of alimony, if any, is appropriate, considering the criteria set forth in section 46b-82"). Our Supreme Court held that capital gains should not be considered income under § 46b-82 if those gains do not constitute a steady stream of revenue. See *Gay* v. *Gay*, supra, 266 Conn. 647–48.

Gay did not involve a separation agreement like the one incorporated by reference into the divorce decree in the present case, expressly defining the term "pre-tax compensation from employment" and setting forth specific, contractual parameters for modifying that definition. In the present case, paragraph 4.5 of the parties' agreement provides: "Any court of competent jurisdiction, upon motion by either [p]arty, shall retain jurisdiction to modify the definition of [pre-tax compensation from employment] so as to ensure that both [p]arties are treated fairly *in accordance with the spirit of this* [*a*]*greement*. Neither [p]arty shall be required to demonstrate a substantial change in circumstances with regard to any such modification." (Emphasis added.)

It is clear that the parties, vis-à-vis paragraph 4.5, intended to give the court broad discretion to modify

for periodic payments or payments contingent on a life to the other party. The court may order that a party obtain life insurance as such security unless such party proves, by a preponderance of the evidence, that such insurance is not available to such party, such party is unable to pay the cost of such insurance or such party is uninsurable. In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment."

the definition of "pre-tax compensation from employment" to ensure that the parties are "treated fairly *in accordance with the spirit of* [*the*] [*a*]*greement.*" (Emphasis added.) Nothing in paragraph 4.5 of the agreement references § 46b-82 or otherwise demonstrates an intent to require a court to modify the definition of that term in accordance with § 46b-82. See *Clark* v. *Clark*, 66 Conn. App. 657, 665, 785 A.2d 1162 ("[t]he court is not required, however, to consider all of the § 46b-82 criteria when modification of alimony is sought pursuant to a dissolution agreement"), cert. denied, 259 Conn. 901, 789 A.2d 990 (2001); see also *Fazio* v. *Fazio*, 162 Conn. App. 236, 243–44, 131 A.3d 1162 ("a separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts" (internal quotation marks omitted)), cert. denied, 320 Conn. 922, 132 A.3d 1095 (2016). The parties here clearly foresaw that the definition of "pre-tax compensation from employment" might require modification in the future. The plain language of paragraph 4.5 demonstrates that they intended any such modification be done in accordance with the "spirit of [the] [a]greement" to ensure fairness, not in accordance with the criteria of § 46b-82. The remaining language in paragraph 4.5 buttresses this conclusion. It states that "[n]either [p]arty shall be required to demonstrate a substantial change in circumstances with regard to any such modification." That provision conflicts directly with § 46b-86 (a) and is further evidence that the parties did not intend to be governed by the statutes that otherwise apply to requests for modifications of alimony.

If the parties had wanted to prohibit a court from modifying the agreement's definition of "pre-tax compensation from employment" to include passive income from capital gains, they could have included that limita-

tion in their separation agreement. See *Ceddia* v. *Ceddia*, 164 Conn. App. 266, 274, 137 A.3d 830 (2016) ("[w]hen the parties wished to preclude one aspect of possible periodic alimony modification, they knew how to do so"). For example, in paragraph 4.3 of the agreement, they expressly stated that the duration of alimony payments "shall be non-modifiable . . . ." Moreover, if the parties had wanted a court to modify the definition by taking into consideration all the criteria of § 46b-82, they could have said so in the agreement. *Nation-Bailey* v. *Bailey*, 316 Conn. 182, 197, 112 A.3d 144 (2015) ("[i]ndeed, had the parties intended to import the remedial aspect of § 46b-86 (b), in addition to its definitional portion, they could have used more expansive reference terms such as 'in accordance with' or 'pursuant to' "). They did not do so.

In light of the foregoing, we are persuaded that the parties' agreement brings this case outside the purview of *Gay* v. *Gay*, supra, 266 Conn. 641. As a result, and upon our review of the record before us, we cannot conclude that the court abused its discretion when it modified the definition of pretax compensation from employment to include "income from all sources, including passive income from capital gains, interest and dividends, and income from business interests and other investments."

The judgment is affirmed.

In this opinion the other judges concurred.

MATVEY SOKOLOVSKY *v.* WILLIAM MULHOLLAND ET AL.
(AC 43937)

Moll, Clark and Sheldon, Js.

Syllabus

The plaintiff sought to recover damages from the defendants for alleged discriminatory conduct. The plaintiff filed a discrimination complaint

with the Commission on Human Rights and Opportunities alleging that the defendant town of East Lyme discriminated against him on the basis of national origin by denying him equal services and by treating him differently than his neighbors. The commission issued a release of jurisdiction, concluding that the evidence was insufficient to warrant further investigation. The Superior Court granted the plaintiff's application for a waiver of fees, and the plaintiff subsequently served the defendants with a summons and complaint. The defendants filed a motion to dismiss the complaint on the ground that the court lacked subject matter jurisdiction pursuant to statute (§ 46a-101), because the plaintiff commenced the action more than ninety days after he received the release of jurisdiction. The trial court granted the motion to dismiss, concluding that the time limitation in § 46a-101 was subject matter jurisdictional and not subject to equitable tolling. The court determined that, although the plaintiff had filed an application for a waiver of fees, the plaintiff's complaint was commenced, by service of the summons and complaint, beyond the ninety day limitation period. The court also concluded that the plaintiff improperly failed to plead the continuing course of conduct doctrine in his complaint in order for it to consider its affect on the limitation period. On the plaintiff's appeal to this court, *held*:

1. The trial court erred in concluding that the ninety day limitation period for commencing an action pursuant to the applicable statute (§ 46a-100) was subject matter jurisdictional: neither the language of § 46a-101 nor its legislative history revealed any indication that the legislature intended the time limitation of that statute to be jurisdictional, the geneaology of our antidiscrimination laws suggested an ongoing legislative intent to expand a complainant's right to seek a remedy for acts of discrimination, these factors underscored the remedial nature of the statutory scheme and weighed against a conclusion that the legislature intended to make the time limitation in § 46a-101 jurisdictional, and this court located support for its conclusion that the time limitation in § 46a-101 was mandatory and, thus, subject to waiver and equitable tolling, from state and federal case law.

2. The plaintiff could not prevail on his claim that the trial court improperly dismissed his action, which was based on his claim that the court erred by not considering the action commenced on the date that he filed his application for a waiver of fees: pursuant to §§ 46a-100 and 46a-101, the plaintiff had ninety days from the date that he received the release of jurisdiction to commence an action in the Superior Court, and, although the plaintiff filed an application for a waiver of fees, he did not serve the summons and complaint on the defendants until after the statutory limitation period had expired; moreover, the plaintiff did not provide any support for the proposition that the filing of an application for a waiver of fees tolled the limitation period while the application remained pending, and, even if his application did toll the deadline until the date

that the court granted the application, the plaintiff's action would still have been untimely filed.

3. The trial court erred in concluding that the plaintiff was required to plead the continuing course of conduct doctrine in his complaint; this court found nothing in the applicable rule of practice (§ 10-57) that suggested, much less required, that the continuing course of conduct doctrine must be pleaded in the complaint, no special defense raising a limitations defense was filed by the defendants to which the plaintiff could have replied, the defendants raised the ninety day limitation period for the first time in their motion to dismiss, and the plaintiff raised the continuing course of conduct doctrine in his opposition to that motion.

Argued October 13, 2021—officially released June 7, 2022

Procedural History

Action for, inter alia, the defendants' alleged discrimination, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Knox*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Matvey Sokolovsky, self-represented, the appellant (plaintiff).

Ryan J. McKone, for the appellees (defendants).

Michael E. Roberts and *Kimberly A. Jacobsen*, human rights attorneys, filed a brief on behalf of the Commission on Human Rights and Opportunities as amicus curiae.

Opinion

CLARK, J. The self-represented plaintiff, Matvey Sokolovsky, appeals from the judgment of the trial court granting a motion to dismiss filed by the defendants, the town of East Lyme; William Mulholland, zoning official; and Mark C. Nickerson, first selectman. Although the plaintiff's claims on appeal are not a model of clarity, he appears to argue that the court erred by concluding that (1) the ninety day time limitation set

forth in General Statutes § 46a-101 (e)[1] for commencing an action in Superior Court pursuant to General Statutes § 46a-100[2] is subject matter jurisdictional, (2) his application for a waiver of fees did not commence the action, and (3) he was required to specially plead the continuing course of conduct doctrine in his complaint in order for the court to consider its effect on the limitation period. We conclude that the time limitation in § 46a-101 (e) is not subject matter jurisdictional but, rather, is mandatory and subject to consent, waiver, and equitable tolling. As a result, we reverse the judgment of the court and remand the case for further proceedings consistent with this opinion.

We begin by setting forth the relevant facts, as found by the trial court, in addition to the procedural history in this case. On September 20, 2017, the plaintiff filed a discrimination complaint with the Commission on Human Rights and Opportunities (commission) alleging that the town of East Lyme had discriminated against him on the basis of national origin by denying him equal services. On November 6, 2018, the commission issued a release of jurisdiction to the plaintiff, concluding that the evidence presented to it was insufficient to warrant further investigation. The release of jurisdiction stated: "The [c]omplainant must bring an action in Superior Court within [ninety] days of receipt of this release and

[1] General Statutes § 46a-101 (e) provides: "Any action brought by the complainant in accordance with section 46a-100 shall be brought not later than ninety days after the date of the receipt of the release from the commission."

[2] General Statutes § 46a-100 provides: "Any person who has filed a complaint with the commission in accordance with section 46a-82 and who has obtained a release of jurisdiction in accordance with section 46a-83a or 46a-101, may bring an action in the superior court for the judicial district in which the discriminatory practice is alleged to have occurred, the judicial district in which the respondent transacts business or the judicial district in which the complainant resides, except any action involving a state agency or official may be brought in the superior court for the judicial district of Hartford."

within two years of the date of filing the complaint with the [c]ommission unless circumstances tolling the statute of limitations are present."

On January 31, 2019, the plaintiff filed an application for a waiver of fees with the Superior Court, which was granted on February 4, 2019. The defendants subsequently were served with a writ of summons and complaint on February 22, 2019, which was returned to the court on February 26, 2019.

On July 10, 2019, the defendants filed a motion to dismiss arguing that the court lacked subject matter jurisdiction pursuant to § 46a-101 (e) because the plaintiff had commenced the action more than ninety days after he had received the release of jurisdiction, also commonly known as a right to sue letter, from the commission. Before the court had rendered a decision, the commission filed an application requesting permission to file an amicus curiae brief addressing the question of whether the ninety day filing requirement in § 46a-101 (e) is subject matter jurisdictional. The court granted the application on November 7, 2019. In its brief, the commission argued that the ninety day time limitation should be interpreted as a mandatory, rather than a jurisdictional, time limitation.[3] The defendants filed a reply brief arguing that the court need not address the jurisdictional issue because there was no dispute as to the mandatory nature of § 46a-101 (e). The court heard oral argument on the motion to dismiss

[3] We note that the commission also filed an application for leave to file a brief in this appeal as amicus curiae, which this court granted. In its brief to this court, the commission indicated that it "does not take any position as to whether the plaintiff's case should ultimately have been dismissed below." It argued, however, that "to the extent . . . that the Superior Court premised its dismissal on the ninety day filing period in . . . § 46a-101 (e) . . . being jurisdictional, and not mandatory subject to equitable tolling, waiver, and consent, the commission submits that this was an error of law." (Footnote omitted.)

on December 16, 2019, and issued its decision on January 15, 2020.

In its memorandum of decision, the court noted that the complaint was written in narrative form and that it had considered carefully the statements contained therein. The court observed that the plaintiff was claiming that the defendants were treating him in a discriminatory manner by treating him differently than his neighbors. The court explained: "First, the plaintiff alleges that, in 2017, the defendants failed to investigate the plaintiff's complaint against his neighbors for moving their shed closer to his property, which he believes does not comply with the town of East Lyme's zoning ordinances. Second, the plaintiff alleges that in May of 2017, Zoning Official William Mulholland, sent him a letter regarding a complaint made by the plaintiff's neighbors about multiple unregistered vehicles on his property in violation of the town of East Lyme's zoning ordinances. . . . Specifically, the plaintiff alleges that he believes he was 'held to a higher standard than [his] neighbors' and that the 'neighbors [were] allowed to violate zoning rules despite clear evidence of their violation.' " (Footnote omitted.)

The court then addressed the defendants' motion to dismiss. The court explained that there was a split of authority on the issue of whether the time limitation in § 46a-101 (e) is subject matter jurisdictional or mandatory and subject to equitable tolling. It noted, however, that the "majority of Superior Courts recognize that a plaintiff's failure to comply with the time limitation in § 46a-101 (e) deprives the court of subject matter jurisdiction." After discussing this apparent split of authority, the court "adopt[ed] the prevailing position among the Superior Courts and conclude[d] that the plaintiff's failure to meet the time limitation" of the statute required dismissal of the action.

The court went on to find that the plaintiff received the release of jurisdiction from the commission on November 6, 2018, but did not serve the defendants with a writ of summons and complaint until February 22, 2019. The court explained that, although the plaintiff had filed an application for a waiver of fees on January 31, 2019, it is well established that an action is commenced when the writ of summons and complaint have been served on the defendant. Accordingly, the court concluded that the plaintiff's complaint was commenced beyond the ninety day time limitation set forth in § 46a-101 (e).

Notwithstanding its determination that the time limitation in § 46a-101 (e) was subject matter jurisdictional and that the plaintiff's action had been untimely commenced, the court also addressed the plaintiff's argument that the continuing course of conduct doctrine tolled the limitation period. The court concluded that the continuing course of conduct doctrine must be pleaded in avoidance of the statute of limitations and that the plaintiff had "failed to plead the continuing course of conduct doctrine in his complaint." The court ultimately dismissed the plaintiff's complaint for lack of subject matter jurisdiction. This appeal followed.

I

We first address whether the ninety day time limitation of § 46a-101 (e) is subject matter jurisdictional. Several factors convince us that the ninety day time limitation for commencing an action in Superior Court pursuant to § 46a-100 is mandatory and not jurisdictional.

We begin by setting forth our standard of review. "Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it." (Internal quotation marks omitted.) *Peters* v. *Dept. of Social Services*, 273

Conn. 434, 441, 870 A.2d 448 (2005). "A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record. . . . Our review of a trial court's ruling on a motion to dismiss is de novo and *we indulge every presumption favoring jurisdiction*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Sempey* v. *Stamford Hospital*, 180 Conn. App. 605, 612, 184 A.3d 761 (2018).

We next turn to the legal principles that underlie the plaintiff's claim. In *Williams* v. *Commission on Human Rights & Opportunities*, 257 Conn. 258, 259–60, 777 A.2d 645 (2001), our Supreme Court considered whether the statutory 180 day period set forth in General Statutes (Rev. to 2001) § 46a-82 (e), now codified at General Statutes § 46a-82 (f), for filing a discrimination complaint with the commission was subject matter jurisdictional. The court held that, although mandatory, "the 180 day time requirement for filing a discrimination petition pursuant to § 46a-82 (e) is not jurisdictional but, rather, is subject to waiver and equitable tolling." Id., 264. In so doing, the court explained that "[a] conclusion that a time limit is subject matter jurisdictional has very serious and final consequences. It means that, except in very rare circumstances . . . a subject matter jurisdictional defect may not be waived . . . [and] may be raised at any time, even on appeal . . . and that subject matter jurisdiction, if lacking, may not be conferred by the parties, explicitly or implicitly. . . . Therefore, we have stated many times that there is a presumption in favor of subject matter jurisdiction, and we require a strong showing of legislative intent that such a time limit is jurisdictional." (Citations omitted.) Id., 266.

The court also recognized that it previously had applied inconsistent approaches in determining whether a time limitation is jurisdictional. Id., 267. "In [some] cases, the court, in discerning the intent of the legislature, at times [has] *equated* the intent of the legislature to create a mandatory limitation with the intent to create a subject matter jurisdictional limit." (Emphasis in original.) Id., 268. In other cases, the court "implicitly [has held] that a conclusion that a time limit is mandatory does not necessarily mean that it is also subject matter jurisdictional, because the notions of waiver and consent are fundamentally inconsistent with the notion of subject matter jurisdiction." Id., 269. The court then went on to clarify the difference between mandatory and jurisdictional time limitations and explained the analysis to be undertaken when deciding whether a time limitation is jurisdictional. Id., 269–70. The court stated: "Although we acknowledge that mandatory language may be an indication that the legislature intended a time requirement to be jurisdictional, such language alone does not overcome the strong presumption of jurisdiction, nor does such language alone prove strong legislative intent to create a jurisdictional bar. In the absence of such a showing, mandatory time limitations must be complied with absent an equitable reason for excusing compliance, including waiver or consent by the parties. Such time limitations do not, however, implicate the subject matter jurisdiction of the agency or the court." Id.

Although *Williams* dealt only with the time limit for filing a complaint of discrimination with the commission, the plaintiff and the amicus curiae argue that *Williams* is pertinent to our analysis of whether § 46a-101 (e) is subject matter jurisdictional.[4] They argue that the

[4] We note that this court previously has recognized a split among the judges of the Superior Court who have addressed the question of whether § 46a-101 (e) is jurisdictional. See *Mosby* v. *Board of Education*, 187 Conn. App. 771, 775 n.5, 203 A.3d 694 ("we note that our Superior Court has been divided over whether the time limit in § 46a-101 (e) is jurisdictional"), cert.

decisions in which our Superior Courts have concluded that § 46a-101 (e) is jurisdictional did not consider or discuss the *Williams* decision in their consideration of the issue. We are persuaded that *Williams* provides the relevant framework for our analysis, keeping in mind that, "[i]n light of the strong presumption in favor of jurisdiction, we require a strong showing of a legislative intent to create a time limitation that, in the event of noncompliance, acts as a subject matter jurisdictional bar." (Internal quotation marks omitted.) Id., 269.

As noted in *Williams*, the question of whether a time limitation implicates a court's subject matter jurisdiction is a question of statutory interpretation. We therefore begin our analysis with the language of the statute itself. See General Statutes § 1-2z;[5] see also *Hartford* v. *Hartford Municipal Employees Assn.*, 259 Conn. 251, 263, 788 A.2d 60 (2002) ("[a]s with any issue of statutory interpretation, our initial guide is the language of the statute itself" (internal quotation marks omitted)). Section 46a-101 (e) provides: "Any action brought by the complainant in accordance with section 46a-100 shall be brought not later than ninety days after the date of the receipt of the release from the commission." Although the word "shall" reflects the legislature's intent to require a complainant to commence an action within the time limitation set forth in the statute, the word "shall" is not by itself clear evidence that the legislature intended the time limitation to be jurisdictional rather than mandatory. See *Commission on*

denied, 331 Conn. 917, 204 A.3d 1160 (2019); *Sempey* v. *Stamford Hospital*, supra, 180 Conn. App. 616 n.8 ("[w]e acknowledge that our Superior Court has been divided over this question"). It was unnecessary, however, for this court to reach that question in those appeals.

[5] General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

Human Rights & Opportunities v. *Savin Rock Condominium Assn., Inc.*, 273 Conn. 373, 380, 870 A.2d 457 (2005) ("[w]e concluded in *Williams* that a determination that a time limit is mandatory does not necessarily mean that it also is subject matter jurisdictional"). Although "mandatory language may be an indication that the legislature intended a time requirement to be jurisdictional, such language alone does not overcome the strong presumption of jurisdiction, nor does such language alone prove strong legislative intent to create a jurisdictional bar." *Williams* v. *Commission on Human Rights & Opportunities*, supra, 257 Conn. 269–70.

As a result, we must look to other sources to determine the legislature's intent. See *Commissioner of Mental Health & Addiction Services* v. *Saeedi*, 143 Conn. App. 839, 850, 71 A.3d 619 (2013) ("Our inquiry, however, does not end with the text of [the statute]. We also have carefully reviewed the legislative history . . . ."). First, our review of the legislative history of § 46a-101 (e) reveals no indication that the legislature intended the time limitation of that statute to be jurisdictional. The only discussion of jurisdiction in the legislative history pertained to the question of whether the commission would retain jurisdiction over a complaint after it granted a release, not whether the deadline for commencing an action in the Superior Court is jurisdictional. See 34 H.R. Proc., Pt. 23, 1991 Sess., p. 8926, remarks of Representative Robert Frankel. The legislative history discloses that an earlier draft of the law; see Substitute Senate Bill No. 292, 1991 Sess.; contained a provision that provided that, "[u]pon granting a release, the commission *may* dismiss the discriminatory practice complaint pending with the commission." (Emphasis added.) Representative Edward Krawiecki, however, drew attention to this provision indicating that "[t]his seems to indicate that there are going to be two [forums] where the action continues to pend. If

the commission decides to have a fight with whoever the person bringing the complaint is, for example, they may very well leave the action pending before the commission and at the same time you're in Superior Court, and through you, Mr. Speaker, it would seem to me that the language should have been it shall be dismissed and I'm just wondering, through you, Mr. Speaker, what the intention of the committee is." See 34 H.R. Proc., supra, pp. 8924–8925, remarks of Representative Edward Krawiecki. Representative Frankel addressed Representative Krawiecki's concern, stating that "[i]n the course of debate a number of us in studying, it does appear that there should not be a jurisdiction presiding in two places in two causes of action. The 'may' should certainly be changed to a 'shall' in line 39. With a view towards receiving an amendment to do that, I move this item be passed temporarily." Id., p. 8926. The bill ultimately passed with an amendment reflecting the change discussed during the debate in the House of Representatives. See Public Acts 1991, No. 91-331, § 2; see also General Statutes § 46a-101 (d). Thus, neither the language of the statute nor its legislative history evinces a clear intent by the legislature to impose a jurisdictional bar to claims brought outside of the time limitation contained in § 46a-101 (e).

Having reviewed the statute's language and the legislative history, we next look to the general purpose and genealogy of Connecticut's antidiscrimination statutes. See *Commission on Human Rights & Opportunities* v. *Savin Rock Condominium Assn., Inc.*, supra, 273 Conn. 380 (in *Williams*, "[we] concluded that, despite statutory language that appeared mandatory, the genealogy and legislative history of the statute, as well as our case law addressing the policy underlying the statute, reflected a legislative intent not to impose a jurisdictional bar to complaints filed after the prescribed

period"). Our Supreme Court has observed that the general remedial purpose of our antidiscrimination statutes "is, in general, to construct a remedy for discrimination 'that will, so far as possible, eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' " *Commission on Human Rights & Opportunities* v. *Board of Education*, 270 Conn. 665, 694, 855 A.2d 212 (2004). Furthermore, our Supreme Court has recognized that the legislative genealogy and history of earlier antidiscrimination laws spanning from the 1960s to the 1980s indicate "an intent to authorize a broad, rather than a limited, scope of damages, including damages protective of the 'dignity' of an individual." Id. The court observed that the legislative genealogy of these laws "[suggests] an ongoing legislative process of expanding the commission's authority to award damages." Id.

Indeed, the genealogy of our antidiscrimination laws in general suggests an ongoing legislative intent of expanding a complainant's right to seek a remedy for acts of alleged instances of discrimination. For example, Public Acts 1991, No. 91-331, § 2, which first introduced the ninety day limitation at the heart of this appeal, expanded the rights of complainants by affording those who filed employment complaints that were still pending with the commission after 210 days the right to request a release from the commission in order to bring a private right of action in Superior Court. Subsequent amendments to the law expanded this right beyond just employment discrimination claims; see Public Acts 1998, No. 98-245, § 6; and decreased the number of days that a complainant must wait in order to obtain a release of jurisdiction from the commission. See Public Acts 2011, No. 11-237, § 14.

More recently, the legislature amended § 46a-82 (f) to provide claimants with more time to file claims of

discrimination with the commission.[6] See Public Acts 2021, No. 21-109, § 5. The law now allows claimants to file all types of discriminatory practice complaints with the commission within 300 days after an alleged act of discrimination that occurs on or after October 1, 2021, whereas earlier iterations of the law required such complaints to be filed with the commission within 180 days. See General Statutes (Supp. 2022) § 46a-82 (f) (2).

The aforementioned legislative history and genealogy, although only one factor in our analysis, underscore the remedial nature of our state's antidiscrimination statutory scheme, including § 46a-101 (e), and weighs against a conclusion that the legislature intended to make the time limitation set forth in § 46a-101 (e) jurisdictional. This remedial nature is similarly highlighted in our case law, where we are reminded that antidiscrimination provisions should be "liberally construed in favor of those whom the legislature intended to benefit." (Internal quotation marks omitted.) *Vollemans* v. *Wallingford*, 103 Conn. App. 188, 197, 928 A.2d 586 (2007), aff'd, 289 Conn. 57, 956 A.2d 579 (2008).

For example, in *Vollemans*, the plaintiff, alleging discriminatory termination on account of his age, was discharged on January 21, 2003. Id., 191. He filed a complaint with the commission on June 3, 2003. Id. The

[6] General Statutes (Supp. 2022) § 46a-82 (f) provides: "(1) Any complaint filed pursuant to this section for an alleged act of discrimination that occurred prior to October 1, 2021, shall be filed within one hundred and eighty days after the date of the alleged act of discrimination, except that any complaint by a person (A) claiming to be aggrieved by a violation of subsection (a) of section 46a-80 that occurred before October 1, 2019, shall be filed within thirty days of the date of the alleged act of discrimination, and (B) claiming to be aggrieved by a violation of section 46a-60, sections 46a-70 to 46a-78, inclusive, or section 46a-80 or 46a-81c, that occurred on or after October 1, 2019, and prior to October 1, 2021, shall be filed not later than three hundred days after the date of the alleged act of discrimination.

"(2) Any complaint filed pursuant to this section for an alleged act of discrimination that occurred on or after October 1, 2021, shall be filed within three hundred days after the date of the alleged act of discrimination."

commission concluded, and the Superior Court agreed, that the plaintiff's claim was barred by the 180 day limitation period in § 46a-82 (e) because he had received "a definite notice of his termination . . . sometime before November 13, 2002 . . . ." (Internal quotation marks omitted.) Id., 191–92. On appeal to this court, the pertinent issue was the proper interpretation of § 46a-82 (e). Id., 195. We stated that our "task [was] to determine, in an age discrimination action in which the allegedly discriminatory practice is the termination of employment, precisely when the alleged act of discrimination transpires." Id. Specifically, we were called on to decide whether the alleged act of discrimination occurred on the final day of the plaintiff's employment or on the date the plaintiff was notified of the termination of his employment. Id., 219. This court concluded that the pertinent date was the final date of the plaintiff's employment. Id. In so doing, we stated that "[l]iberally construing that statutory provision and mindful of the legislature's intent to avoid the defeat of such complaints for filing faults rather than on their merits, we conclude that the filing period contained in § 46a-82 (e) commences upon actual cessation of employment, rather than notice thereof." Id., 218–19. Our Supreme Court affirmed this court's judgment, noting that "the thoughtful and comprehensive opinion of the Appellate Court majority properly resolved the issues in this certified appeal," and that its own discussion "would serve no useful purpose." *Vollemans* v. *Wallingford*, 289 Conn. 57, 61, 956 A.2d 579 (2008).

Similarly, in *Commission on Human Rights & Opportunities* v. *Board of Education*, supra, 270 Conn. 667–69, our Supreme Court was tasked with determining whether the commission has subject matter jurisdiction pursuant to General Statutes § 46a-58 (a), to adjudicate a claim of racial discrimination brought by a student in a public school against a school principal

and a local board of education on the basis of a discrete course of allegedly discriminatory conduct by the principal, or whether exclusive jurisdiction to adjudicate such a claim is vested in the state board of education pursuant to General Statutes §§ 10-4b and 10-15c. In reviewing the language and genealogy of the statutes in question, our Supreme Court held that the jurisdiction of the state board of education under § 10-4b is not exclusive and that the commission also may exercise jurisdiction over such claims under § 46a-58 (a). Id., 722. In reaching this conclusion, the court emphasized that remedial statutes must be construed liberally to effectuate legislative intent, concluding that "the broadly defined subject matter of [§ 46a-58 (a)'s] protection, namely, the deprivation of all of the rights, privileges or immunities secured by both the state and federal laws and constitutions, strongly suggests that it applies to a discrete course of conduct constituting racial discrimination against a student in a public school by educational officials . . . ." Id., 708. The court further stated that "[t]he genealogy of § 46a-58 (a) . . . points strongly in the same direction, because it indicates a consistent history of the statute's retaining its core protection—the rights, privileges or immunities secured by the state or federal laws or constitutions—while expanding both the ways in which its core protection may be enforced and the types of discrimination to which it applies." Id. These cases further underscore the remedial nature of our antidiscrimination laws and weigh against an interpretation of § 46a-101 (e) that would preclude a claimant from making an equitable tolling argument against dismissal of an action that was commenced after the statutory deadline.

Federal antidiscrimination case law provides further support for our conclusion that the time limitation in § 46a-101 (e) is not subject matter jurisdictional. See

Williams v. *Commission on Human Rights & Opportunities*, supra, 257 Conn. 278 ("[w]e have often looked to federal . . . discrimination law for guidance in enforcing our own anti-discrimination statute" (internal quotation marks omitted)). Following the United States Supreme Court's decision in *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982), which held that "filing a timely charge of discrimination with the [Equal Employment Opportunity Commission] is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling," many federal courts were confronted with the question of whether the rationale employed in *Zipes*[7] should be applied to Title VII's[8] ninety day requirement for filing suit in federal court following the receipt of an Equal Employment Opportunity Commission right to sue letter, or whether it should be considered jurisdictional. See 42 U.S.C. § 2000e-5 (f) (1) (2018).[9] It appears that federal courts uniformly have

[7] In *Zipes*, the United States Supreme Court stated that, "[b]y holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer." *Zipes* v. *Trans World Airlines, Inc.*, supra, 455 U.S. 398.

[8] Title VII of the Civil Rights Act of 1964, as amended by Title VII of the Civil Rights Act of 1991, 42 U.S.C. § 2000e et seq. (2018).

[9] Title 42 of the United States Code, § 2000e-5 (f) (1), provides in relevant part: "If a charge filed with the Commission pursuant to subsection (b), is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to

interpreted § 2000e-5 (f), the federal counterpart to § 46a-101 (e), as being nonjurisdictional. See, e.g., *Brown* v. *John Deere Product, Inc.*, 460 Fed. Appx. 908, 909 (11th Cir. 2012); *Crabill* v. *Charlotte Mecklenburg Board of Education*, 423 Fed. Appx. 314, 321 (4th Cir. 2011); *Truitt* v. *Wayne*, 148 F.3d 644, 646–47 (6th Cir. 1998); *Williams-Guice* v. *Board of Education*, 45 F.3d 161, 165 (7th Cir. 1995); *Jarrett* v. *U.S. Sprint Communications Co.*, 22 F.3d 256, 259–60 (10th Cir.), cert. denied, 513 U.S. 951, 115 S. Ct. 368, 130 L. Ed. 2d 320 (1994); *Scholar* v. *Pacific Bell*, 963 F.2d 264, 266 (9th Cir.), cert. denied, 506 U.S. 868, 113 S. Ct. 196, 121 L. Ed. 2d 139 (1992); *Hill* v. *John Chezik Imports*, 869 F.2d 1122, 1124 (8th Cir. 1989); *Mosel* v. *Hills Dept. Store, Inc.*, 789 F.2d 251, 253 (3d Cir. 1986); *Espinoza* v. *Missouri Pacific Railroad Co.*, 754 F.2d 1247, 1250 (5th Cir. 1985); *Johnson* v. *Al Tech Specialties Steel Corp.*, 731 F.2d 143, 146 (2d Cir. 1984); *Fouche* v. *Jekyll Island-State Park Authority*, 713 F.2d 1518, 1525 (11th Cir. 1983); *Rice* v. *New England College*, 676 F.2d 9, 10 (1st Cir. 1982); *Gordon* v. *National Youth Work Alliance*, 675 F.2d 356, 360 (D.C. Cir. 1982).

Having reviewed all of the factors that our Supreme Court analyzed in *Williams* when it determined that the statute at issue in that case was mandatory and not

be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance."

jurisdictional, including the statute's language, legislative history, genealogy, purpose, and relation to other statutes, as well as federal case law interpreting the federal statutory analog to § 46a-101 (e), we are convinced that § 46a-101 (e) is a mandatory time limitation, subject to waiver and equitable tolling. Simply put, none of those factors evinces a clear legislative intent to contravene our long recognized presumption in favor of jurisdiction. On the contrary, interpreting the deadline as jurisdictional would frustrate the remedial purpose of that statute by barring litigants from pursuing claims of discrimination even in cases in which common-law equitable principles would otherwise toll the deadline for bringing such claims.

Having concluded that the time limitation in § 46a-101 (e) is mandatory and not jurisdictional, we next consider whether dismissal was nevertheless appropriate in this case. The plaintiff appears to argue that the court erred by not considering the action commenced for purposes of § 46a-101 (e) on the date he filed his application for a waiver of fees. He argues that he is not a lawyer and questions how an ordinary person would know that, in order to commence an action, he was required to serve a writ of summons and complaint within the statutory deadline rather than simply filing within that time period his application for a waiver of fees. Relatedly, he appears to argue that fairness is at the "core [of his] situation" and that he should be excused from his untimely filing. We disagree.

Pursuant to §§ 46a-100 and 46a-101 (e), the plaintiff had ninety days from the date on which he received the release of jurisdiction from the commission to commence his action in the Superior Court. The plaintiff received the release of jurisdiction from the commission on November 6, 2018.[10] The plaintiff, therefore, was required to commence his action by February 4, 2019.

[10] The plaintiff also claims that the court could not properly have considered the limitation period because there was no evidence as to when he

This court has held that, in order for an action to be timely brought under § 46a-101 (e), it must be *commenced*, as that term is understood under Connecticut law, no later than ninety days after receipt of the release. See *Mosby* v. *Board of Education*, 187 Conn. App. 771, 774, 203 A.3d 694, cert. denied, 331 Conn. 917, 204 A.3d 1160 (2019). It is bedrock principle that, "in Connecticut, an action is commenced not when the writ is returned but when it is served upon the defendant." (Internal quotation marks omitted.) Id.

Although the plaintiff filed his application for a waiver of fees on January 31, 2019, he did not serve the summons and complaint on the defendants until February 22, 2019. It is clear that the plaintiff failed to satisfy the mandate of the statute because he commenced the action after February 4, 2019—the deadline prescribed by the statute. The fact that the plaintiff is self-represented does not excuse him from compliance with the ninety day limitation period. See *Kelsey* v. *Commissioner of Correction*, 202 Conn. App. 21, 42, 244 A.3d 171 (2020) ("ignorance of the limitation period or lack of legal experience generally is insufficient cause to

received the right to sue letter. He argues that "there is no information whatsoever in the case on when I had received the release." We disagree. The record includes clear evidence supporting the trial court's finding that the plaintiff received the release on November 6, 2018. The court had before it an affidavit of Charles Perry, the commission's freedom of information officer, who attested that, on November 6, 2018, the commission transmitted its decision and release of jurisdiction to all parties, including the plaintiff. A copy of the e-mail sent to the parties containing the decision and the release was attached to the affidavit. The plaintiff submitted no evidence to the trial court contesting his receipt of the e-mail and its attachments on November 6, 2018. Moreover, he made no such argument in his opposition to the motion to dismiss. The only reference he made in his opposition with respect to the timing of the release was his statement that "the release happen[ed] on 11/06/2018." On the basis of the record before us, and in light of the reasonable inference that the e-mail was received on the same date it was sent, it was not clearly erroneous for the trial court to conclude that the plaintiff received the release of jurisdiction on November 6, 2018. Accordingly, this claim fails.

excuse an untimely filed [action]"), aff'd, 343 Conn. 424, A.3d (2022).

Furthermore, to the extent the plaintiff's claim can be construed as arguing that the filing of his application for a waiver of fees tolled the limitation period during the time that his application remained pending and undecided by the court, the plaintiff has not directed this court to any authority in support of that proposition.[11] Nevertheless, even if his fee waiver application did toll the deadline from the date he filed his application, January 31, 2019, to the date the court granted the application, February 4, 2019, he would have still been required to commence the action by February 8, 2019, which he failed to do. Accordingly, the plaintiff's argument that he timely commenced the action must be rejected.

II

The plaintiff next argues that the court erred in concluding that he was required to plead the continuing course of conduct doctrine in his complaint. We agree.

Although the court's determination that the time limit in § 46a-101 (e) was jurisdictional should have ended its analysis, the court went further and addressed the plaintiff's argument concerning the continuing course of conduct doctrine and concluded, as a matter of law, that because the plaintiff "failed to plead the continuing

[11] In other contexts, the legislature specifically has indicated that the filing of an application for a waiver of fees tolls the time limits for filing an appeal. See, e.g., General Statutes § 45a-186c (in probate context, when appellant files fee waiver pursuant to § 45a-186c, time limit in § 45a-186 (a) is tolled until judgment on fee waiver is rendered); General Statutes § 4-183 (m) (under Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq., "filing of the application for the waiver shall toll the time limits for the filing of an appeal until such time as a judgment on such application is rendered"); but see General Statutes § 46a-94a (b) (UAPA appeal provisions do not apply if complainant has been granted release pursuant to § 46a-101).

course of conduct doctrine in his complaint," it was precluded from considering whether the doctrine tolled the applicable time limitation.

Because we hold today that the time limit in § 46a-101 (e) is not jurisdictional, and, thus, is subject to equitable tolling, we address the plaintiff's claim because it likely will arise again on remand. See, e.g., *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 164 n.8, 971 A.2d 676 (2009) ("[w]e think it prudent to address the second issue because it is likely to arise on remand"). "The interpretive construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation. . . . The interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary." (Internal quotation marks omitted.) *Disciplinary Counsel* v. *Elder*, 325 Conn. 378, 386, 159 A.3d 220 (2017).

Practice Book § 10-57 provides: "Matter in avoidance of affirmative allegations in an answer or counterclaim shall be specially pleaded *in the reply*. Such a reply may contain two or more distinct avoidances of the same defense or counterclaim, but they must be separately stated." (Emphasis added.) Our Supreme Court has held that, "[u]nder § 10-57, the continuing course of conduct doctrine is a matter that must be pleaded in avoidance of a statute of limitations special defense." (Internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 300, 94 A.3d 553 (2014).

On the basis of our review of the language of Practice Book § 10-57 and the relevant case law pertaining thereto, we have found nothing in that rule that suggests, much less requires, that the continuing course of conduct doctrine be pleaded in the complaint. The rule clearly states that a matter in avoidance must be

pleaded in "the reply." Practice Book § 10-57. Moreover, our Supreme Court expressly has held that matters in avoidance of a statute of limitations "need not be pleaded in the complaint." *Ross Realty Corp.* v. *Surkis*, 163 Conn. 388, 392, 311 A.2d 74 (1972) ("[i]t has been and is the holding of this court that matters in avoidance of the [s]tatute of [l]imitations need not be pleaded in the complaint but only in response to such a defense properly raised"); see also, e.g., *Beckenstein Enterprises-Prestige Park, LLC* v. *Keller*, 115 Conn. App. 680, 691, 974 A.2d 764 ("we conclude that the court properly denied the plaintiffs' offer to prove the applicability of [General Statutes] § 52-592 after the close of evidence when it had not been pleaded in the complaint or as a matter in avoidance of the statute of limitations defense"), cert. denied, 293 Conn. 916, 979 A.2d 488 (2009); *Flannery* v. *Singer Asset Finance Co., LLC*, supra, 312 Conn. 301 ("*Beckenstein Enterprises-Prestige Park, LLC*, does not, however, stand for the proposition that the pleading requirements are so rigid as to require that potentially meritorious claims in avoidance of the statute of limitations be categorically barred in all cases because of pleading lapses"); *Macellaio* v. *Newington Police Dept.*, 145 Conn. App. 426, 430, 75 A.3d 78 (2013) (although plaintiff's reply did not "squarely comply" with Practice Book § 10-57, court was not precluded from reaching merits because plaintiff specifically stated in reply to defendants' motion for summary judgment that "statutes of limitations should be tolled based on the fraudulent concealment and continuing course of conduct doctrines").

In the present case, no special defense raising a limitations defense was filed by the defendants to which the plaintiff could have replied. The defendants raised the ninety day limitation period for the first time in their motion to dismiss, and the plaintiff raised the continuing course of conduct doctrine in his opposition

to that motion to dismiss. Although a plaintiff certainly may choose to plead in his initial complaint a matter in avoidance of the statute of limitations when he knows the applicable statute of limitations has passed, we do not read our rules to require him to do so. Accordingly, we conclude that the court's determination that the plaintiff was required to specially plead the continuing course of conduct doctrine in his complaint in order for the court to consider its effect on the limitation period was erroneous.[12]

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

JAMES SESSA *v.* MATTHEW C. REALE, ADMINISTRATOR (ESTATE OF JOHNSON LEE) (AC 44328)

Prescott, Clark and DiPentima, Js.

Syllabus

The plaintiff appealed to the Superior Court from the decree of the Probate Court denying his application to hear and decide a rejected claim. The plaintiff alleged that certain of his personal property was lost in a fire that destroyed a house owned by an estate that was administered by the defendant. The defendant received insurance proceeds, which included an amount for the personal property loss incurred by the plaintiff. The Probate Court issued a decree permitting the defendant to pay certain of the insurance proceeds to the plaintiff on the condition that he provide an affidavit of ownership for the destroyed items. The plaintiff, however, asserted that he was not notified of the decree and, despite his repeated efforts to obtain payment, the proceeds were never

[12] Because it was not raised or addressed before the trial court, we do not decide whether the continuing course of conduct doctrine applies, as a matter of law, to actions commenced under § 46a-101 (e). See, e.g., *Bowen-Hooks* v. *New York*, 13 F. Supp. 3d 179, 207 (E.D.N.Y. 2014) (collecting cases addressing question of whether continuing violation theory applies to ninety day time limitation set forth in federal statutory analog to § 46a-101 (e)).

distributed. Following the appointment of a successor administrator to the estate, the plaintiff requested that the defendant act on his claim, which the defendant then rejected in its entirety. Thereafter, pursuant to the applicable statute (§ 45a-364 (a)), the plaintiff presented to the Probate Court an application to hear and decide the rejected claim. The Probate Court denied the application, stating that its prior ruling permitting the payment of certain insurance proceeds to the plaintiff was dispositive of the matter. The plaintiff then filed a complaint for appeal from probate in the Superior Court pursuant to statute (§ 45a-186). The defendant filed a motion to dismiss for lack of subject matter jurisdiction, claiming that the plaintiff was not permitted to file a probate appeal following the denial of his application and, instead, should have commenced suit in accordance with § 45a-364. The Superior Court granted the defendant's motion to dismiss, and the plaintiff appealed to this court. *Held*:

1. The Superior Court properly granted the defendant's motion to dismiss because the Probate Court's decree was a denial of the plaintiff's application to hear and decide the rejected claim, and the court, therefore, lacked subject matter jurisdiction to entertain the plaintiff's purported appeal: the plaintiff brought the probate appeal pursuant to § 45a-186, which limits the jurisdiction of the Superior Court to that of a Probate Court, and, as such, the Superior Court was not statutorily conferred with jurisdiction over the appeal because the proper procedure was to commerce suit in the Superior Court pursuant to § 45a-364 (b); moreover, the plaintiff's assumption that the Probate Court did not deny his application but, rather, effectively granted his application and considered his underlying rejected claim on its merits was mistaken, as the Probate Court expressly stated that it denied the application, and the fact that it provided reasoning for its denial by mentioning an earlier decree that it found to be dispositive of the claim did not eliminate that fact.
2. This court declined to engage in a discussion of the plaintiff's alternative argument that the trial court improperly granted the defendant's motion to dismiss because an alleged failure to satisfy the time requirement of § 45a-364 (b) for commencing suit must be raised by way of special defense rather than by a motion to dismiss: the issue of whether the plaintiff's failure to follow the procedures set forth in § 45a-364 (b) deprived the Superior Court of subject matter jurisdiction over his probate appeal was properly presented in the defendant's motion to dismiss because it related to the subject matter jurisdiction of the court, and the plaintiff's hypothetical claim was immaterial because the plaintiff did not file an action pursuant to § 45a-364 (b).

Argued February 2—officially released June 7, 2022

Procedural History

Appeal from the decree of the Probate Court for the district of Darien-New Canaan denying the plaintiff's

application to hear and decide a rejected claim, brought to the Superior Court in the judicial district of Stamford-Norwalk, where Julia Lee, administratrix of the estate of Johnson Lee, was substituted as the defendant; thereafter, the court, *Hon. Kenneth B. Povodator*, judge trial referee, granted the substitute defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

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

Allison M. Near, with whom, on the brief, were *Joseph E. Gasser* and *John L. Ponzini*, for the appellee (substitute defendant).

Opinion

DiPENTIMA, J. The plaintiff, James Sessa, appeals from the judgment of the Superior Court granting the motion of the substitute defendant, Julia Lee,[1] administratrix of the estate of Johnson Lee (estate), to dismiss for lack of subject matter jurisdiction his probate appeal taken from the Probate Court's denial of his application to hear and decide a rejected claim. On appeal, the plaintiff claims that (1) because the Probate Court decided the merits of the rejected claim underlying his application, rather than denying the application, the language in General Statutes § 45a-364 (b) requiring the commencement of suit following a Probate Court's denial of an application to hear and decide a rejected claim did not apply, and, therefore, the Superior Court had subject matter jurisdiction over his probate appeal; and (2) in the alternative, the court improperly granted the defendant's motion to dismiss because an alleged

[1] The complaint in the underlying probate appeal initially named Matthew C. Reale, administrator of the estate of Johnson Lee, as the defendant. In June, 2019, the court granted the motion filed by Julia Lee, as administratrix of the estate of Johnson Lee, to substitute herself as the defendant in place of Reale. All references herein to the defendant are to Julia Lee in her capacity as administratrix.

failure to satisfy the time requirement in § 45a-364 (b) for commencing suit must be raised by way of a special defense rather than by a motion to dismiss. We affirm the judgment of the Superior Court.

The following facts, as alleged in the plaintiff's amended probate appeal or as otherwise undisputed in the record, and procedural history are relevant. Johnson Lee died in 2005, and, in 2008, a fire destroyed his house, which was then owned by the estate. The plaintiff alleged that personal property belonging to him was destroyed in the fire. He further alleged that, in 2008, Donald Gustafson, the then administrator of the estate, submitted to the insurance company a claim for $966,000, which included an amount of personal property loss incurred by the plaintiff as a result of the fire ($188,595.07) as well as amounts of personal property loss incurred by other claimants. Although Gustafson received $966,000 from the insurance company for personal property loss from the fire, the plaintiff alleged that Gustafson did not distribute any of the proceeds to him. From 2009 to 2012, the plaintiff repeatedly and unsuccessfully sought payment from Gustafson of his share of the insurance proceeds. In September, 2010, Gustafson filed an application in the Probate Court for permission to pay certain proceeds of insurance to the plaintiff and Jonathan K. Lee (Gustafson application). On September 27, 2010, the Probate Court issued a decree (2010 decree), permitting the administrator of the estate to pay up to $9210.97 of the insurance proceeds to the plaintiff on the condition that he provide an affidavit of ownership for the personal property items he claimed were destroyed in the fire.

In 2012, following Gustafson's resignation, Matthew C. Reale was appointed as the successor administrator of the estate. The plaintiff alleged that, on or about August 11, 2015, he requested, through counsel, that Reale act on his claim against the estate and that, on

or about August 12, 2015, Reale informed the plaintiff's counsel that his claim against the estate had been rejected in its entirety pursuant to General Statutes § 45a-360.[2]

In November, 2015, pursuant to § 45a-364 (a),[3] the plaintiff presented to the Probate Court an application to hear and decide the rejected claim (2015 application). On January 14, 2016, the Probate Court ruled on the 2015 application and stated: "On September 27, 2010, this court heard and ruled upon a motion for permission to pay certain insurance proceeds to [the plaintiff] and Jonathan K. Lee. That ruling, dated September 27, 2010, is determinative of [the 2015] application. And it is ORDERED AND DECREED that: The Application to Hear and Decide Rejected Claim is hereby denied."

On February 19, 2016, the plaintiff filed a "Complaint for Appeal from Probate" in the Superior Court pursuant to General Statutes § 45a-186.[4] On July 14, 2017, the

[2] General Statutes § 45a-360, which concerns the allowance or rejection of claims, provides: "(a) The fiduciary shall: (1) Give notice to a person presenting a claim of the rejection of all or any part of his claim, (2) give notice to any such claimant of the allowance of his claim, or (3) pay the claim.

"(b) A notice rejecting a claim in whole or in part shall state the reasons therefor, but such statement shall not bar the raising of additional defenses to such claim subsequently.

"(c) If the fiduciary fails to reject, allow or pay the claim within ninety days from the date that it was presented to the fiduciary as provided by section 45a-358, the claimant may give notice to the fiduciary to act upon the claim as provided by subsection (a) of this section. If the fiduciary fails to reject, allow or pay the claim within thirty days from the date of such notice, the claim shall be deemed to have been rejected on the expiration of such thirty-day period."

[3] General Statutes § 45a-364 (a) provides in relevant part: "Whenever a claim has been rejected, in whole or in part, as provided in section 45a-360, the person whose claim has been rejected may, within thirty days from and including the date of such rejection, make application to the Probate Court to hear and decide such claim . . . ."

[4] The version of the statute that was in effect at the time the plaintiff filed his probate appeal provided in relevant part that "any person aggrieved by any order, denial or decree of a Probate Court in any matter, unless otherwise specially provided by law, may . . . appeal therefrom to the Superior Court. . . ." General Statutes (Rev. to 2015) § 45a-186 (a). Since then, that statute

plaintiff filed an amended probate appeal in which he claimed that the Probate Court erred in concluding that the 2010 decree of the Probate Court was determinative of his 2015 application. In support thereof, he asserted that the Gustafson application was not relevant to the merits of his 2015 application, that his right to due process was violated because he was not provided with notice of either the Gustafson application or the 2010 decree, and that his claim against the estate for fire insurance proceeds was not acted on until his 2015 application was rejected by Reale in 2015. In his amended probate appeal, the plaintiff sought relief in the form of vacating the January 14, 2016 decree of the Probate Court (2016 decree) and "[c]onsidering and allowing the [plaintiff's] claim on the merits pursuant to . . . § 45a-364, plus interest."

On October 21, 2019, the defendant filed a motion to dismiss the plaintiff's probate appeal for lack of subject matter jurisdiction. In a memorandum of law in support of the motion to dismiss, the defendant argued that the Superior Court lacked subject matter jurisdiction over the plaintiff's probate appeal because an appeal cannot be brought in the Superior Court following the Probate Court's denial of an application to hear and decide a rejected claim. Rather, in accordance with § 45a-364 (b), the proper procedure following a denial by a court of probate of a claimant's application to hear and decide a rejected claim is to commence suit on that purported claim.

The plaintiff filed an opposition to the defendant's motion to dismiss in which he argued that the Superior

has been amended to read in relevant part that "[a]ny person aggrieved by an order, denial or decree of a Probate Court may appeal therefrom to the Superior Court. . . ." General Statutes § 45a-186 (b). We note that, although the legislature has amended § 45a-186 since the events underlying this appeal; see Public Acts 2016, No. 16-49, § 17; Public Acts 2019, No. 19-47; Public Acts 2021, No. 21-40; Public Acts 2021, No. 21-100, § 8; those amendments have no bearing on the outcome of this appeal. All references herein to § 45a-186 are to the current revision of the statute.

Court had subject matter jurisdiction over his probate appeal. He argued that, "[u]nder normal circumstances involving § 45a-364, the Probate Court denies an application to hear and decide a rejected claim on a standalone basis . . . . Pursuant to § 45a-364 (b), the aggrieved claimant would then 'commence suit within one hundred twenty days from and including the date of the denial of the claimant's application or be barred from asserting or recovering on such claim . . . .' The circumstances in this case are far from normal and do not implicate § 45a-364 as a matter of law. On its face, the 2016 decree did not 'deny' [the 2015] application . . . . Rather, the 2016 decree expressly served to implicate the law of the case doctrine relative to the Probate Court's 2010 decree . . . ."[5] (Citation omitted.) He argued in the alternative that, assuming § 45a-364 was applicable, any failure to comply with that statute did not implicate the subject matter jurisdiction of the Superior Court sitting as a Probate Court on appeal and, additionally, that he had complied with its provisions. On September 29, 2020, the Superior Court rejected the plaintiff's arguments and granted the defendant's motion to dismiss. The court concluded that, because the plaintiff invoked the limited jurisdiction of the Superior Court by commencing a probate appeal

[5] "The law of the case doctrine expresses the practice of judges generally to refuse to reopen what [already] has been decided . . . . New pleadings intended to raise again a question of law which has been already presented on the record and determined adversely to the pleader are not to be favored. . . . [When] a matter has previously been ruled [on] interlocutorily, the court . . . may treat that [prior] decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance. . . . A judge should hesitate to change his own rulings in a case and should be even more reluctant to overrule those of another judge. . . . Nevertheless, if . . . [a judge] becomes convinced that the view of the law previously applied by his coordinate predecessor was clearly erroneous and would work a manifest injustice if followed, he may apply his own judgment." (Citations omitted; internal quotation marks omitted.) *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 322, 63 A.3d 896 (2013).

pursuant to § 45a-186, rather than having invoked the general jurisdiction of the Superior Court by commencing a civil action pursuant to § 45a-364 (b), the Superior Court, sitting as a court of probate, "lacks subject matter jurisdiction over a claim now purported to be before the court under the authority of § 45a-364 (b)." This appeal followed.

I

The plaintiff claims that, because the Probate Court decided his rejected claim on the merits rather than denying the 2015 application, § 45a-364 (b) did not apply. He argues that he was not subject to the language of that statute requiring commencement of suit following a Probate Court's denial of an application to hear and decide a rejected claim. He contends that the Superior Court had subject matter jurisdiction over his probate appeal and that it improperly granted the motion to dismiss. We must therefore determine whether the court decided the merits of the plaintiff's challenge to the rejected claim, which might permit the plaintiff to appeal to the Superior Court pursuant to § 45a-186, or whether, instead, the court denied the application to hear and decide that claim, which would require commencement of suit in the Superior Court in accordance with § 45-364 (b). We conclude that the Probate Court's 2016 decree was a denial of the 2015 application to hear and decide the rejected claim and that the trial court therefore lacked subject matter jurisdiction to entertain the plaintiff's purported appeal pursuant to § 45a-186.

In the present case, because no jurisdictional facts are in dispute, our review of the Superior Court's decision on the motion to dismiss is plenary. See *Bailey* v. *Medical Examining Board for State Employee Disability Retirement*, 75 Conn. App. 215, 219, 815 A.2d 281 (2003).

We begin our analysis with an overview of the statutory procedures available to a party who has a claim against an estate. See *Keller* v. *Beckenstein*, 305 Conn. 523, 533–34, 46 A.3d 102 (2012). A claim against an estate is first presented to the fiduciary.[6] See General Statutes § 45a-358 (a). If the claim is rejected by the fiduciary or is deemed to have been rejected by the fiduciary; see General Statutes § 45a-360; then a claimant has two alternative avenues to pursue to avoid being barred from asserting or recovering on the rejected claim: the claimant may commence suit in the Superior Court within 120 days from the date of rejection or may file an application in the Probate Court pursuant to § 45a-364 to review the rejected claim. See General Statutes §§ 45a-363 (b) and 45a-364 (a). If a claimant files an application in the Probate Court to hear and decide his rejected claim and if the Probate Court denies that application, then, according to § 45a-364 (b), the proper procedure is to commence suit in the Superior Court.

Here, the plaintiff did not follow the procedures set forth in § 45a-364 (b), which explicitly provides in relevant part: "If the application to receive and decide such claim by the court . . . is denied, the claimant shall commence suit within one hundred twenty days from and including the date of the denial of the claimant's application or be barred from asserting or recovering on such claim from the fiduciary, the estate of the decedent or any creditor or beneficiary of the estate." Instead, he brought an appeal under § 45a-186, which limits the jurisdiction of the Superior Court. "In acting on an appeal from probate, the Superior Court does not exercise the jurisdictional powers vested in it by the constitution but, instead, exercises a special and limited

[6] General Statutes § 45a-353 (d) defines " 'claim' " as "all claims against a decedent (1) existing at the time of the decedent's death or (2) arising after the decedent's death, including, but not limited to, claims which are mature, unmatured, liquidated, unliquidated, contingent, founded in tort, or in the nature of exoneration, specific performance or replevin . . . ."

jurisdiction conferred on it by the statutes." (Internal quotation marks omitted.) *Corneroli* v. *D'Amico*, 116 Conn. App. 59, 63, 975 A.2d 107, cert. denied, 293 Conn. 928, 980 A.2d 909 (2009). It is well established that the Probate Court has limited jurisdiction and "can exercise only such powers as are conferred on [it] by statute. . . . [A] court [that] exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." (Internal quotation marks omitted.) *Connery* v. *Gieske*, 323 Conn. 377, 388, 147 A.3d 94 (2016). "It is . . . well established that [t]he right to appeal from a decree of the Probate Court is purely statutory . . . ." (Internal quotation marks omitted.) Id., 390. Thus, when a § 45a-186 appeal is brought to the Superior Court, its jurisdiction is limited to that of the Probate Court, and, as such, a Superior Court is not statutorily conferred with jurisdiction over a probate appeal from a denial of an application to hear and decide a rejected claim because the proper procedure, as set forth in § 45a-364 (b), is to commence suit in the Superior Court following the denial of an application to hear and decide a rejected claim. "A statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in any other way." (Internal quotation marks omitted.) *HUD/Barbour-Waverly* v. *Wilson*, 235 Conn. 650, 657, 668 A.2d 1309 (1995).

The plaintiff argues that the requirement to commence suit in § 45a-364 (b) does not apply because the Probate Court did not " 'deny' " his 2015 application. Rather, he contends, § 45a-186 (b) applies because, instead of denying his 2015 application, the Probate Court decided his 2015 application on the merits by "reaffirming a totally unrelated decision" of the Probate Court concerning the Gustafson application, and, as a result, his only remedy was to file a probate appeal.

The plaintiff does *not* argue that, if the decision of the Probate Court is properly construed as a denial of the 2015 application, then the Superior Court nonetheless had jurisdiction over his appeal. Rather, he argues only that the Probate Court's decision on the 2015 application was "on the merits" so that an appeal pursuant to § 45a-186 (b) was the appropriate remedy. Specifically, he argues: "The language of . . . § 45a-364 (b) indicates that the necessity to file a separate suit within 120 days or be barred from collecting from the estate is only triggered when the Probate Court denies considering the merits of the [2015] application to receive and decide such a claim by the court . . . .

* * *

In short . . . § 45a-364 (b) when properly read turns on whether the Probate Court will decide the merits or substance of a claim rejected by the fiduciary and gives the Probate Court the discretion not to even consider the application to review and decide the rejected claim by the claimant. If the Probate Court does not act or refuses to act, then the claimant's only remedy is to then bring suit on the claim against the estate in the Superior Court. If, however, the Probate Court does act on the merits or substance of the claim, then the only remedy is to appeal that decision under . . . § 45a-186."

Our resolution of the plaintiff's claim requires us to construe the 2016 decree of the Probate Court. "Because [t]he construction of [an order or] judgment is a question of law for the court . . . our review . . . is plenary. As a general rule, [orders and] judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the [order or] judgment. . . . The interpretation of [an order or] judgment may involve the circumstances surrounding

[its] making . . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The [order or] judgment should admit of a consistent construction as a whole." (Citation omitted; internal quotation marks omitted.) *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 91–92, 952 A.2d 1 (2008).

The plaintiff's argument that the Superior Court had subject matter jurisdiction over his probate appeal assumes that the Probate Court did not deny his 2015 application but, rather, effectively granted his 2015 application and considered the underlying rejected claim on its merits. That assumption is mistaken. The Probate Court has the discretion to decide whether to grant or deny an application to hear and decide a rejected claim. See General Statutes § 45a-364 (a) ("[t]he court may, in its discretion, grant the application"). In exercise of that discretion, the Probate Court expressly stated that "it is ORDERED AND DECREED that: The Application to Hear and Decide Rejected Claim is hereby denied."[7] The fact that the Probate Court provided reasoning for its denial of the plaintiff's 2015 application by mentioning an earlier decree that it found dispositive of the claim, essentially invoking the law of the case doctrine,[8] instead of rejecting the 2015 application in a more conclusory fashion, does not eliminate the fact that the court expressly stated that it had "denied" the 2015 application, thereby declining to hear or decide the 2015 application on the merits.

[7] In his "Amended Complaint for Appeal from Probate," the plaintiff appears to admit that the Probate Court's 2016 decree constituted a denial of his 2015 application when he states in the opening paragraph that he "hereby appeals from the decree of the Darien-New Canaan Probate Court . . . dated January 14, 2016 . . . *denying* the 'Application to Hear and Decide Rejected Claim' dated November 18, 2015 . . . ." (Emphasis added.)

[8] We express no opinion as to whether the Probate Court properly applied the law of the case doctrine. Regardless of any reasoning provided by the Probate Court for denying the 2015 application, what is pertinent to our analysis is that the Probate Court denied the 2015 application.

The most reasonable interpretation of the 2016 decree is that the court intended to deny the 2015 application. To construe the 2016 decree of the Probate Court as the plaintiff would suggest, despite its language of the court to the contrary, could constrain Probate Courts from providing reasons for a denial of a claimant's application, which we decline to do. Because the plaintiff's argument is based on a mistaken interpretation of the Probate Court's decision regarding the 2015 application, we reject it.

Additionally, as we noted earlier, the plaintiff is not challenging the applicability of § 45a-364 (b) when a Probate Court denies an application to hear and decide a rejected claim. Because we have determined that § 45a-364 (b) applies so that the Superior Court lacked subject matter jurisdiction, we affirm the Superior Court's decision to grant the motion to dismiss the plaintiff's probate appeal taken from the *denial* of the 2015 application. See, e.g., *Connery* v. *Gieske*, supra, 323 Conn. 388 (Probate Court's jurisdiction is limited by statute); see also General Statutes § 45a-364 (b).

II

The plaintiff alternatively claims that the court improperly granted the motion to dismiss because an alleged failure to satisfy the time requirement in § 45a-364 (b) for commencing suit must be raised by way of special defense rather than by a motion to dismiss. Specifically, he contends that, "even if [he] was supposed to file a lawsuit under . . . § 45a-364 (b), there is long-standing precedent that the remedy is not to dismiss the case but to require the defendant to plead the statute of limitations as a special defense." We decline to engage in such immaterial and hypothetical musings. The plaintiff did not file an action in the Superior Court under § 45a-364 (b); he filed a probate appeal under § 45a-186. The issue decided by the court was whether the

plaintiff's failure to follow the procedures set forth in § 45a-364 (b) after the Probate Court denied his 2015 application deprived the Superior Court of subject matter jurisdiction over his probate appeal. The issue raised by the defendant was properly presented in a motion to dismiss because it related to the subject matter jurisdiction of the court. See, e.g., *Bailey* v. *Medical Examining Board for State Employee Disability Retirement*, supra, 75 Conn. App. 219.

The judgment is affirmed.

In this opinion the other judges concurred.