IN RE ALIZABETH L.-T. ET AL.*
(AC 44814)

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

Syllabus

Pursuant to statute (§ 46b-129 (g)), at a contested hearing on an order for temporary custody, "credible hearsay evidence regarding statements of the child or youth made to a mandated reporter . . . may be offered by the parties and admitted by the court upon a finding that the statement is reliable and trustworthy and that admission of such statement is reasonably necessary."

The respondent father appealed from the judgments of the trial court sustaining the ex parte orders granting temporary custody of his three minor children to the petitioner, the Commissioner of Children and Families. Following the receipt of an anonymous report that the children were the victims of physical and sexual abuse and possible sexual exploitation, the petitioner filed neglect petitions on their behalf, as

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

well as motions seeking ex parte orders of temporary custody. The trial court granted the ex parte orders of temporary custody and, after the children were removed from the family home, held a contested hearing on the motions. At that hearing, the petitioner offered testimony from Z, the children's adult sister-in-law, and B, a social worker for the Department of Children and Families. Z testified, inter alia, that she was a mandated reporter, and the court allowed her to testify, pursuant to § 46b-129 (g), as to certain discussions she had with the children in which they disclosed that they were physically and sexually abused by the respondent mother and her boyfriends. B also testified with respect to discussions she had with the children, in which they disclosed to her instances of abuse, and a forensic interview that she conducted with one of the children, A. The court also admitted certain exhibits, over the hearsay objections of the father's counsel, including a copy of B's affidavit, which had accompanied the petitioner's filings and contained the children's hearsay statements, photographs of cell phone screenshots showing text messages between the children and Z, and a copy of a text message from Z to B that memorialized a conversation that Z had with A. On the respondent father's appeal, *held*:

1. The trial court improperly admitted hearsay statements of the minor children under § 46b-129 (g) because, before the court could rely on that statutory exception to the hearsay rule to admit the challenged statements, the petitioner had the burden of establishing some reasonably necessary basis as to why the children should not be required to testify at the contested hearing:

   a. Because the term "reasonably necessary," as used in § 46b-129 (g), was ambiguous, this court reviewed extratextual evidence, and especially the legislative history of the statute, to conclude that a trial court is not required to find that children declarants are unavailable to testify as a prerequisite to admitting hearsay statements they made to a mandated reporter but, instead, is required to consider a number of factors in light of the specific circumstances of the case before it, including the age of the child involved, the materiality of the offered hearsay statement, the likelihood of prejudice to the respondent parent due to the inability to cross-examine the child regarding the hearsay statement, any difficulties in obtaining the in-person testimony of the child, and whether in-court testimony could result in emotional or mental harm to the child; moreover, considering those factors will require trial courts to weigh various interests, namely, the state's interest in conducting hearings on orders of temporary custody in a timely and efficient manner, protecting the procedural rights of the respondent parents to challenge the evidence presented by the petitioner, and ensuring that the children who are the subject of the proceeding are protected from unnecessary psychological harm.

   b. The trial court abused its discretion in admitting the testimony of Z and B, each of whom recounted various out-of-court statements made

by the children: the court made no finding that the children would have suffered psychological harm from testifying or that there was any other reasonable basis for the petitioner not to have presented the in-court testimony of the children, and, although the petitioner's counsel argued that testifying likely would be difficult and potentially harmful to the children, the court was not free to accept that representation without supporting evidence given that counsel for the respondent father contested it, arguing the children were teenagers who easily could be brought to court to testify; moreover, at the contested hearing, the petitioner's counsel focused on the reliability of the statements, apparently believing that that was sufficient, the allegations of physical and sexual abuse all involved the mother or her boyfriends, there was little chance of the children being confronted by her at the hearing, and the court offered no analysis supporting its conclusion that the admission of the hearsay statements was reasonably necessary.

c. The trial court improperly admitted certain exhibits that contained inadmissible hearsay statements or that were authenticated by way of hearsay statements of the children: the exhibits containing the cell phone screenshots showing messages between the children and Z and a text message from Z to B that memorialized a conversation that Z had with A were inadmissible for the same reasons that the hearsay statements of the children offered through the testimony of Z and B were improperly admitted by the court pursuant to § 46b-129 (g); moreover, certain photographs that were offered by the petitioner as corroborating evidence of the alleged physical abuse inflicted on the children by the mother were improperly admitted through Z, who did not have the necessary personal knowledge to authenticate the photographs but, rather, relied entirely on the children's inadmissible hearsay statements in attempting to do so.

d. The court improperly admitted into evidence the affidavit of B, which was filed in support of the neglect petitions and motions for orders of temporary custody: although such an affidavit generally is admissible under the affidavit provision of § 46b-129 (g), B's affidavit was inadmissible to the extent that it contained the children's inadmissible hearsay statements in light of the general prohibition on hearsay within hearsay.

2. The trial court improperly admitted hearsay statements made by A to B during the forensic interview on the alternative ground that they fell under the medical diagnosis or treatment exception to the hearsay rule:

a. The respondent father properly preserved his claim regarding the medical treatment exception: part and parcel of the objection made by the respondent father's counsel to the admission of A's statements was that there was no evidence that any medical treatment occurred as a result of the forensic interview, and counsel's arguments were sufficient to put the court on notice to consider whether all necessary requirements under the medical treatment exception had been satisfied, including whether the petitioner had demonstrated that A understood her statements to have been made in furtherance of medical treatment.

b. The court was not presented with any evidence from which it reasonably could have inferred that A understood the forensic interview to have a medical purpose: the record suggested that the children understood the interview to be for investigatory purposes, as they elected to have only A interviewed by B in order to limit the risk of angering their parents if they were implicated in wrongdoing, thus indicating that A understood the purpose of the forensic interview to be to further the investigation against the parents; moreover, the record was silent as to whether A understood the interview to potentially involve a medical treatment component, and no medical examination or interview with a medical professional occurred in conjunction with the forensic interview conducted by B from which such an understanding might have been inferred.

3. The trial court's evidentiary errors were harmful and, accordingly, this court reversed the judgments of the trial court and remanded the case for a new contested hearing on the ex parte orders of temporary custody: outside of the evidence that this court determined to be inadmissible, there was nothing in the record from which the court reasonably could have found that the children presently were in danger of a serious physical injury or illness, or that they were in immediate physical danger from their surroundings, as all of the evidence of abuse implicated the mother, who was living in Puerto Rico, and, although there was testimony that the father intended to have the mother return to the residence, there was no evidence that her return was imminent; accordingly, without the improperly admitted hearsay testimony and exhibits, it was likely that the outcome of the hearing would have been different.

Argued January 31—officially released June 29, 2022**

Procedural History

Petitions by the Commissioner of Children and Families to adjudicate the respondents' minor children neglected, brought to the Superior Court in the judicial district of Windham, Juvenile Matters, where the court, *Carbonneau*, *J.*, issued ex parte orders granting temporary custody of the children to the petitioner; thereafter, the court, *Chaplin*, *J.*, sustained the orders of temporary custody, and the respondent father appealed to this court. *Reversed*; *further proceedings*.

Robert M. Fitzgerald, for the appellant (respondent father).

** June 29, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Andrei Tarutin, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Evan O'Roark*, assistant attorney general, for the appellee (petitioner).

Sharon A. Peters, for the minor children.

Opinion

PRESCOTT, J. The respondent father, Benjamin L.,[1] appeals from the judgments of the trial court sustaining ex parte orders granting temporary custody of his minor children, Alizabeth L.-T., Tanisha L., and Alyson L.-T.,[2] to the petitioner, the Commissioner of Children and Families. The respondent father raises several evidentiary claims on appeal, including that, at the contested hearing, the court improperly (1) admitted certain hearsay statements of the children under a statutory exception to the hearsay rule codified in General Statutes § 46b-129 (g),[3] and (2) admitted hearsay statements

[1] The respondent mother, Bernice T., has not contested the temporary custody orders and has not participated in the present appeal.

[2] The children were, respectively, sixteen, fifteen, and thirteen years old at the time of the contested hearing on the motions for orders of temporary custody.

[3] General Statutes § 46b-129 (g) provides: "At a contested hearing on the order for temporary custody or order to appear, credible hearsay evidence regarding statements of the child or youth made to a mandated reporter or to a parent may be offered by the parties and admitted by the court upon a finding that the statement is reliable and trustworthy and that admission of such statement is reasonably necessary. A signed statement executed by a mandated reporter under oath may be admitted by the court without the need for the mandated reporter to appear and testify unless called by a respondent or the child, provided the statement: (1) Was provided at the preliminary hearing and promptly upon request to any counsel appearing after the preliminary hearing; (2) reasonably describes the qualifications of the reporter and the nature of his contact with the child; and (3) contains only the direct observations of the reporter, and statements made to the reporter that would be admissible if the reporter were to testify to them in court and any opinions reasonably based thereupon. If a respondent or the child gives notice at the preliminary hearing that he intends to cross-examine the reporter, the person filing the petition shall make the reporter available for such examination at the contested hearing."

made by Alizabeth during a forensic interview under the medical diagnosis or treatment exception to the hearsay rule.[4] See Conn. Code Evid. § 8-3 (5). We agree with both claims and conclude that these evidentiary errors, considered together, were not harmless because, without the improperly admitted hearsay testimony and exhibits, it is likely that the outcome of the hearing would have been different. Accordingly, we reverse the judgments of the court and remand the case for a new contested hearing.

The record reveals the following procedural history. On May 13, 2021, the Department of Children and Families (department) received an anonymous report regarding allegations that Alizabeth, Tanisha, and Alyson were the victims of physical and sexual abuse as well as possible sexual exploitation. Specifically, the report alleged that the respondent mother had permitted boyfriends with whom she was having extramarital affairs to sexually assault the children and had directed Alyson and Tanisha to lose weight so that she could sell photographs of them. The report also alleged physical abuse of the children by the respondent mother, and that the respondent father was aware of the alleged abuses by

[4] The respondent father also claims on appeal that the court improperly failed to allow him to cross-examine the children's sister-in-law, who was called as a witness by the petitioner and was the current foster parent of the children, about whether she had ever provided the children with marijuana in the past or to make an offer of proof regarding the same. The petitioner's counsel had objected to this line of questioning on relevance grounds, arguing that placement of the children was an administrative decision by the department and that the witness' ability to care for the children was not an issue before the court at the contested hearing. The petitioner concedes on appeal that the court should have permitted the respondent father's counsel to make an offer of proof with respect to the relevance of the line of questioning. See *Filippelli* v. *Saint Mary's Hospital*, 319 Conn. 113, 150–51, 124 A.3d 501 (2015). Because, however, we reverse the court's judgments and remand the case for a new hearing on the basis of the other two evidentiary claims and are not convinced that the respondent father's third claim is likely to arise again on remand, we do not reach the merits of this claim.

the respondent mother but had instructed the children to lie if they were questioned by the department or law enforcement about the abuse. On May 21, 2021, following an investigation by the department into the allegations, the petitioner filed neglect petitions on behalf of the children and motions seeking ex parte orders of temporary custody. An affidavit by a department social worker, Kristy Borders, in which she detailed the various allegations and preliminary investigatory findings of the department, was attached to the petitioner's filings. The court, *Carbonneau*, *J.*, granted the ex parte orders of temporary custody that same day and set a preliminary hearing date for May 25, 2021.

The petitioner, on obtaining the ex parte orders, immediately removed the children from the respondent parents' home and placed them in the temporary care of the children's older brother, Jamie C., and his wife, Zesmery F. Zesmery works at an area hospital and is a mandated reporter;[5] see General Statutes § 17a-101 (b); and she was the person who had alerted the department of the suspected abuse and neglect.

At the May 25, 2021 preliminary hearing, the respondent father appeared and indicated that he intended to contest the orders of temporary custody.[6] The respondent father waived his right to a hearing within ten days; see General Statutes § 46b-129 (c) (4); and the court, *Chaplin*, *J.*, set a contested hearing date for June 17, 2021.

At the contested hearing, the petitioner offered testimony from Zesmery and Borders, and five exhibits, all

[5] In arguing that the court improperly applied the hearsay exception in § 46b-129 (g), the respondent father does not challenge whether Zesmery was a mandated reporter as defined in General Statutes § 17a-101 (b) at the time the children made the statements to her that are the subject of this appeal.

[6] The respondent mother never appeared at either the preliminary hearing or the contested hearing and eventually was defaulted by the court.

of which were admitted in full by the court over the objections of the respondent father's counsel. Exhibit A was a copy of Borders' affidavit that had accompanied the neglect petitions. Exhibit B consisted of photographs of cell phone screenshots showing text messages exchanged between Zesmery and Tanisha. Exhibit C was a photograph purporting to show an injury to Alizabeth's ear. Exhibit D was a photograph of damage to a door purportedly caused when the respondent mother pushed one of the children into it. Exhibit E was a copy of a text message from Zesmery to Borders memorializing a conversation that Zesmery had with Alyson. The respondent father testified on his own behalf but offered no exhibits of his own. As previously noted, the respondent mother did not appear for the contested hearing. The children were represented at the hearing by appointed counsel.

Following the presentation of the evidence and closing arguments, the court rendered a brief oral ruling from the bench sustaining the ex parte orders of temporary custody. The court stated that the allegations of both sexual and physical abuse of the children were "very, very concerning"; the court, however, did not initially delineate who committed the sexual and physical abuse. It also noted the existence of additional allegations that the respondent parents had coached the children to lie to the department during its initial investigation. Finally, the court stated that "[t]here's also concerns whether or not there is any accuracy as to the reported nature of the composition of the home currently, whether [the respondent mother] intends to return, has the capacity to return, and whether or not there has been sufficient attention shown to the care of the girls, their condition, and the allegations that they've provided . . . ." In summary fashion, the court then concluded: "Based upon all the information provided to the court, the evidence that's been before the

court, the court does find that there has been sufficient credible evidence presented to the court to demonstrate that there was immediate physical danger; therefore, the court does find that the reason for commitment or at least the order of temporary custody existed at the time and has yet been rectified. Continuation . . . in the home, or returning to the home, is not in the best interest of the children, it is contrary to their welfare, and it is in the best interest of the children that the [orders of temporary custody] be sustained." The respondent father timely filed the present appeal.

Following the filing of the appeal, both the petitioner and the respondent father filed motions for articulation asking the trial court to set forth the factual basis for its decision. The trial court granted these motions and filed a written articulation in which it set forth the following factual findings: "Tanisha is the biological child of the respondent parents. Alizabeth and Alyson were placed with the respondent parents by the petitioner in July, 2016, and subsequently [were] adopted by the respondent parents in May, 2019. . . . Jamie and Zesmery are the current foster parents of the children. Zesmery has developed a close relationship with the children over the last year approximately. Zesmery communicates with the children almost daily on social media . . . and they visit in person as well. In early May, 2021, the children were left home alone while the respondent father traveled to Puerto Rico to address marital issues with the respondent mother, who was residing [there] at a home owned by the respondent parents. Specifically, he wanted to discuss the respondent mother's infidelity. Zesmery and Jamie brought the children to stay at their home while the respondent father was in Puerto Rico. During [that] time . . . [the children] disclosed incidents of *sexual abuse and exploitation by the respondent mother*.[7] Jamie called

[7] Zesmery testified at the contested hearing that Alizabeth had disclosed to her that, while the children were in Puerto Rico with their mother,

the respondent father by cell phone to relay the disclosures, and the respondent father directed Jamie not to worry and that he would take care of these concerns.

"The respondent father returned from Puerto Rico the next day and the children returned home. The respondent father informed the children that the respondent mother remained in Puerto Rico and that he would bring her back to their home in [Connecticut]. The respondent father instructed the children . . . to lie to the petitioner. The children informed Zesmery that they were afraid of the respondent mother returning home to Connecticut. Alyson called Zesmery crying and relayed that the respondent parents told her to lie to the petitioner, to recant all of the disclosures, and to tell the petitioner that living with Jamie was unsafe.

"Alizabeth and Alyson disclosed incidents of physical abuse by the respondent mother and provided pictures related to these incidents. They believed such incidents occurred because they [had] told the respondent father of the respondent mother's infidelity with other men. The respondent mother pushed Alyson into a door with such force that the door was damaged. The respondent father was present for this incident and pulled the respondent mother away to stop her from inflicting further physical abuse. In the days after the disclosure to Zesmery, but immediately prior to the petitioner's home visit, the respondent father replaced the damaged door. During the course of the petitioner's removal of the children from the home, the respondent father pulled the children into the bathroom and told them to lie to the petitioner and to recant all of their disclosures.

Alizabeth and Tanisha had been molested by one of the respondent mother's boyfriends and that Alizabeth had been forced to have sex with him. Zesmery also testified that Tanisha had disclosed to her that the respondent mother told Tanisha and Alyson that they needed to lose weight so the respondent mother could sell pictures of them online.

"After the children were removed from the home, the respondent father called Tanisha and told her to call the respondent mother. Tanisha called the respondent mother. During this call, the respondent mother told Tanisha to protect [her], to prioritize [her] over Alizabeth and Jamie, and to lie to the petitioner. The children disclosed to Zesmery and . . . Borders that they are fearful of returning home out of fear of the respondent parents." (Emphasis added; footnote added.)

The court also found that "the children ha[d] disclosed these incidents of sexual abuse and exploitation [by the respondent mother] to the respondent father in April, 2021, prior to their disclosure to Zesmery and Jamie" and that the "respondent father failed to take any appropriate action to protect the children from the respondent mother." The court finally indicated that it did not credit the respondent father's testimony at the contested hearing that "he told the respondent mother not to return [from Puerto Rico] to the family home in [Connecticut]." Additional facts and procedural history will be set forth as necessary.

Before turning to the respondent father's claims of error, we first set forth some overarching legal principles and discuss our standard of review. Section 46b-129 governs petitions to adjudicate a child neglected, uncared for, or abused. This court previously has explained that subsection (b) of § 46b-129 authorizes courts to issue "an order ex parte vesting in some suitable agency or person the child's or youth's temporary care and custody if it appears, on the basis of the petition and supporting affidavits, that there is reasonable cause to believe that (1) the child or youth is suffering from serious physical illness or serious physical injury or *is in immediate physical danger from the child's or youth's surroundings*, and (2) that as a result of said conditions, the child's or youth's safety is endangered and *immediate removal from such surroundings*

is necessary to ensure the child's or youth's safety . . . ." (Emphasis added; internal quotation marks omitted.) *In re Kelsey M.*, 120 Conn. App. 537, 542, 992 A.2d 372 (2010).

"A preliminary hearing on any ex parte custody order . . . issued by the court shall be held not later than ten days after the issuance of such order. . . ." General Statutes § 46b-129 (b). "Connecticut law is clear that, in the context of a hearing for an order of temporary custody pursuant to § 46b-129 (b), a finding of immediate physical danger is a prerequisite to the court's entry of a temporary order vesting custody of a child in one other than the child's parents." (Internal quotation marks omitted.) *In re J.R.*, 161 Conn. App. 563, 573, 127 A.3d 1155 (2015).

Following the preliminary hearing on an ex parte order of temporary custody, "[u]pon request, or upon its own motion, the court shall schedule a hearing on the order for temporary custody . . . to be held not later than ten days after the date of the preliminary hearing." General Statutes § 46b-129 (f). "The proper standard of proof in a [contested hearing] on an order of temporary custody is the normal civil standard of a fair preponderance of the evidence." (Internal quotation marks omitted.) *In re J.R.*, supra, 161 Conn. App. 571; see also Practice Book § 32a-3.

In an appeal taken from a trial court's decision to sustain an ex parte order of temporary custody, the applicable standard of review depends on the nature of the claim raised. "[A]ppellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's [factual] findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding

of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *In re Kelsey M.*, supra, 120 Conn. App. 543.

"Our standard of review regarding [most] challenges to a trial court's evidentiary rulings is that these rulings will be overturned on appeal only where there was an abuse of discretion and a showing . . . of substantial prejudice or injustice. . . . Additionally, it is well settled that even if the evidence was improperly admitted, the [party challenging the ruling] must also establish that the ruling was harmful and likely to affect the result of the trial." (Internal quotation marks omitted.) *In re Tayler F.*, 111 Conn. App. 28, 35, 958 A.2d 170 (2008), aff'd, 296 Conn. 524, 995 A.2d 611 (2010).

Finally, to the extent that a claim of error presents a question of law, such as the proper interpretation of a statute or a provision of the Connecticut Code of Evidence, our review is plenary. See, e.g., *In re Adrian K.*, 191 Conn. App. 397, 403–404, 215 A.3d 1271 (2019); see also *In re Tayler F.*, 296 Conn. 524, 537, 995 A.2d 611 (2010). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the

statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . Importantly, ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation. . . . In other words, statutory language does not become ambiguous merely because the parties contend for different meanings." (Citations omitted; internal quotation marks omitted.) *In re Elianah T.-T.*, 326 Conn. 614, 620–21, 165 A.3d 1236 (2017). With these principles in mind, we turn to the claims on appeal.

I

The respondent father first claims that the court improperly admitted out-of-court statements of the children into evidence at the contested hearing pursuant to a hearsay exception set forth in § 46b-129 (g). He identifies the challenged evidence as falling into four categories: (1) testimony by Zesmery and Borders regarding statements made to them by the children; (2) statements of the children set forth in Borders' affidavit, which was admitted as a full exhibit; (3) statements made by Alizabeth to Borders during a forensic interview;[8] and (4) four other exhibits that, according to the respondent father, either contained inadmissible hearsay statements or improperly "were authenticated by way of hearsay statements of the children." According to the respondent father, the court failed to interpret properly the terms "reasonably necessary" and "reliable and trustworthy" as used in § 46b-129 (g),

[8] The court also admitted statements that Alizabeth made during her forensic interview under the medical treatment exception to the hearsay rule; Conn. Code Evid. § 8-3 (5); the propriety of which we discuss in part II of this opinion.

in a manner consistent with prior appellate court interpretations of nearly identical terms found in the residual, or catchall, exception to the hearsay rule. See Conn. Code Evid. § 8-9.[9] With respect to the "reasonably necessary" requirement in particular, he argues that a proper construction of the statutory hearsay exception should have required the petitioner to establish that the children were "unavailable" to testify at the contested hearing before the court properly could admit their hearsay statements, which the petitioner failed to do. See General Statutes § 46b-129 (g); see also *In re Tayler F.*, supra, 296 Conn. 537.

The petitioner contends, inter alia, that the respondent father's interpretation of § 46b-129 (g) to require the unavailability of the declarant, is not supported by the language of the statute or the statute's legislative history. Furthermore, she contends that interpreting § 46b-129 (g) simply to adopt and incorporate the requirements of the residual hearsay exception, which already existed as a basis for the admission of hearsay at a contested hearing on an ex parte order of temporary custody, would effectively render the statutory language superfluous and, thus, violate a cardinal principle of statutory construction. See, e.g., *In re Jusstice W.*, 308 Conn. 652, 662 n.9, 65 A.3d 487 (2012). For the reasons that follow, we agree with the petitioner that the statute cannot reasonably be construed as merely codifying, in a more limited context, the residual hearsay exception as it existed under our common law at the time the legislature enacted § 46b-129. We nonetheless also agree with the respondent father that we must give effect to the legislature's choice to incorporate the term

[9] Section 8-9 of the Connecticut Code of Evidence provides: "A statement that is not admissible under any of the foregoing exceptions is admissible if the court determines that (1) there is a reasonable necessity for the admission of the statement, and (2) the statement is supported by equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule."

"reasonably necessary" into the statutory hearsay exception. We therefore conclude, under these circumstances and particularly in light of the advanced ages of the children involved in the present case,[10] that, before the court could rely on the statutory hearsay exception to admit the challenged statements, the petitioner had the burden of establishing some "reasonably necessary" basis why the children should not be required to testify at the contested hearing.

A

We first set forth the following additional facts and procedural history, which are relevant to our resolution of this claim. At the contested hearing, the petitioner's counsel first called Zesmery to testify. After answering a series of questions that established that Zesmery was a mandated reporter, the petitioner's counsel asked her how she became involved in the present case. She responded that the children had confided certain information to her. When the petitioner's counsel asked what they had confided to her, the respondent father's counsel objected on hearsay grounds.

In response to that objection, the petitioner's counsel argued that, because Zesmery was a mandated reporter, any credible hearsay statements made to her by the children were admissible for purposes of the contested hearing pursuant to § 46b-129 (g). See footnote 3 of this opinion. The respondent father's counsel responded that the petitioner had yet to establish, however, that the children's statements were "reliable [and] trustworthy" and "reasonably necessary," both of which are required under § 46b-129 (g) and, according to the respondent father's counsel, was language that the legislature

[10] As we have explained herein; see footnote 2 of this opinion; at the time of the contested hearing, the three children were sixteen, fifteen, and thirteen years old.

intended to "track the pre-[Connecticut Code of Evidence] and code understanding of the residual hearsay exception." The respondent father's counsel also argued that our Supreme Court's holding in *In re Tayler F.*, supra, 296 Conn. 524, was instructive with regard to the meaning of both terms and that the court in *In re Tayler F.* had held, in his words, that "it's not enough to have a generalized idea [that] the children shouldn't be able to testify, nor is it even enough that it be in the best interest of the children." The respondent father's counsel contended that the court was required to make a specific determination that the children would sustain psychological harm if they appeared in court before it could admit into evidence the children's statements in their absence.[11]

The petitioner's counsel disagreed with the characterization by the respondent father's counsel of the court's holding in *In re Tayler F.* He first explained that *In re Tayler F.* involved an appeal taken from the adjudication of a neglect petition, not an appeal from an order sustaining an ex parte order of temporary custody. Next, he argued that the court in *In re Taylor F.* specifically addressed the requirements needed to satisfy the residual exception to the rule against hearsay and not the statutory exception on which the petitioner relied

[11] The respondent father's counsel also argued that the admission of the children's hearsay statements "would violate [the respondent father's] rights to confrontation and cross-examination under [General Statutes §] 46b-135, and it would be a denial of due process. . . . [T]he court would have to apply the [balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)] . . . [a]nd . . . the harm that could befall [him] greatly outweighs any advantage of shortcutting any of the rules of evidence." Because we reverse the underlying judgments on the basis of the court's improper evidentiary rulings, we do not address the constitutional arguments of the respondent father's counsel, to the extent that he has adequately raised and briefed them on appeal. See, e.g., *State* v. *Genotti*, 220 Conn. 796, 804, 601 A.2d 1013 (1992) (court should eschew reaching constitutional issues on appeal if claim may be disposed of on evidentiary grounds).

in the present case, which, by its terms, does not apply in a trial on a neglect petition.[12] Although the petitioner's counsel agreed with the respondent father's counsel that, in order to admit hearsay statements pursuant to the statutory exception, the court must first conclude that the proffered statements were reliable and trustworthy and that their admission was reasonably necessary, he disagreed that the court also had to conclude that the children would be harmed psychologically if they were required to testify or that they were otherwise legally unavailable to testify.[13]

The court, at first, sustained the objection of the respondent father's counsel but only to the extent that it agreed with him that more foundation was necessary regarding the reliability and trustworthiness prong. The court otherwise overruled the objection. The petitioner's counsel indicated he was "[h]appy to do that" and continued with his examination of Zesmery.

The petitioner's counsel, through the witness' answers to the additional questions, elicited that Zesmery, as the children's sister-in-law, had known the

[12] General Statutes § 46b-129 (g) provides in relevant part: "*At a contested hearing on the order for temporary custody or order to appear*, credible hearsay evidence regarding statements of the child or youth made to a mandated reporter or to a parent may be offered by the parties and admitted by the court upon a finding that the statement is . . . reliable and trustworthy and that admission of such statement is reasonably necessary." (Emphasis added.)

[13] As explained in the commentary to § 8-6 of the Connecticut Code of Evidence, our code of evidence "contains no uniform definition of unavailability." The commentary further provides: "At common law, the definition of unavailability has varied with the particular hearsay exception at issue. . . . More recently, the court has adopted the federal rule's uniform definition of unavailability set forth in rule 804 (a) of the Federal Rules of Evidence." (Citations omitted.) Conn. Code Evid. § 8-6, commentary. Although the potential that a child might suffer psychological harm if required to testify in court was the basis for the assertion of unavailability considered and discussed by the court in *In re Tayler F.*, a court could deem a child unavailable for other reasons, such as the inability of the proponent to procure the witness at a hearing. See Fed. R. Evid. 804 (a); see also *In re Tayler F.*, supra, 296 Conn. 542–43.

children for several years and had a very close relationship with them. In the past, she had visited them at their home and they would visit and stay overnight with her and Jamie at their apartment. They always shared with her what was happening in their lives, whether about friends or school. The children and Zesmery had become particularly close over the past year and communicated with one another almost daily via social media. To her knowledge, the children never had lied to her or provided her with inaccurate information.

The petitioner's counsel next asked Zesmery to explain the circumstances that led her to file her report with the department alleging abuse and/or neglect of the children. She explained that the children had come to stay overnight with her and Jamie at their apartment while the respondent father was in Puerto Rico because Jamie did not feel comfortable having the children stay at the respondent parents' home unsupervised. They were having dinner together when the conversation turned to the children's disclosures.

At this point in Zesmery's testimony, the petitioner's counsel indicated to the court that he believed he had established that the children's disclosures to Zesmery were sufficiently reliable and trustworthy. In particular, he argued that the children's statements were reliable and trustworthy on the basis of Zesmery's testimony that she had known the children for years, she never had any reason to question their veracity, and the statements were made around the dinner table under ordinary circumstances in which the children were staying with them overnight.

With respect to the "reasonably necessary" requirement, the petitioner's counsel argued, without evidentiary support, that because the subject matter of the disclosure involved allegations of sexual abuse, "to put

them on the stand . . . would . . . without a question, would be harmful to them. And that alone makes the admission of these statements reasonably necessary." The petitioner's counsel also seemed to rely on the mere relevancy of the statements to the issue before the court, stating that admitting the statements would be necessary to "allow the court to get the perspective and the necessary background information to explain what unfolded once the statements had been made."

The attorney for the minor child agreed with the petitioner's counsel that he had met his burden of establishing the admissibility of the children's hearsay statements under § 46b-129 (g). The attorney for the minor child also suggested that, in deciding whether to admit the children's hearsay statements, the court should consider Practice Book § 32a-4, which requires any party intending to call a child as a witness to file a motion seeking the permission of the court. See Practice Book § 32a-4 (b).[14] She suggested that the court reasonably could assume that the children effectively were unavailable to testify, at least in part, because neither side had filed such a motion.

The respondent father's counsel argued, with regard to Practice Book § 32a-4, that this rule should weigh in his favor, stating: "[T]he department could have filed a motion to the court that they intended to call the girls to testify. And . . . had the court held a hearing, conducted the inquiry that's required, and ruled that they couldn't call them, then they might have a better argument that it was reasonably necessary [to admit the statements, absent the children's appearance in court]. They chose not to do that; it wasn't my job to."

The respondent father's counsel then focused on whether the admission of the hearsay statements was

[14] Practice Book § 32a-4 (b) provides: "Any party who intends to call a child or youth as a witness shall first file a motion seeking permission of the judicial authority."

reasonably necessary, making no arguments at that time challenging whether the statements were trustworthy and reliable. With respect to the "reasonably necessary" prong, he argued: "The department may think this is necessary in order to prove the allegations in its . . . petition, but that's not what reasonably necessary involves. Reasonably necessary has to do [with] whether . . . there's no other way of getting this evidence in. These are not small children, you know, these are not five year olds, six year olds, eight year olds. A sixteen year old, [a] fifteen year old, and a thirteen year old—you know, when we look at the tender [years] section of . . . the [Connecticut] Code of Evidence—there's a criminal statute—the number of which is escaping me—that has to do with children, and that's under twelve as well.[15] I think that our code of evidence and our statutes, you know, kind of assume . . . that older children and youths are able to testify. It's their obligation under . . . *In re Tayler F.* is the best case we have, and I know that . . . it's about the residual exception, but buried—the language is exactly the same.

"My client has a right to cross-examine the witnesses. All I can do now, if you admit this, is cross-examine someone who's gonna tell me about what someone else said. Cross-examin[ation] is the greatest engine of truth ever invented, I believe Wigmore said, and . . . I claim it here along, of course, with his statutory rights to cross-examination and confrontation and to due process. I express . . . they haven't laid any foundation

[15] Connecticut Code of Evidence § 8-10, which sets forth the "tender years" exception to the hearsay rule applicable in criminal or juvenile proceedings, expressly limits its application to "a statement *by a child twelve years of age or younger* at the time of the statement relating to a sexual offense committed against that child, or an offense involving physical abuse committed against that child by the child's parent or guardian or any other person exercising comparable authority over the child at the time of the offense . . . ." (Emphasis added.)

that allows you to admit this testimony." (Footnote added.)

The court then made the following ruling: "[B]ased upon that foundation provided by the witness regarding the relationship with the children, the nature of that relationship, the duration of that relationship, and the level of what you could call intimacy of that relationship, the court will . . . make requisite findings that the statement will be reliable and trustworthy and that admission of it is reasonably necessary, so the statement is permitted." The comments by the court seem to bear on only the question of the trustworthiness of the statements and not whether it was reasonably necessary to admit them.

The respondent father's counsel indicated to the court that he likely would have the same objection to many other questions going forward, to the extent that they sought to elicit from the witness the content of additional statements made to her by the children. He asked the court: "If I was to say 'same objection' on each one and the court was to understand that it's hearsay, it doesn't meet the statute, that it's cross-examination, confrontation, and his due process, would we be all agreeing?" The court answered affirmatively. The respondent father's counsel indicated that he would let the court know if he had any additional or different grounds for an objection.

Zesmery then testified that the children had indicated to her during dinner that they were afraid that the respondent father would be bringing the respondent mother back with him when he returned from Puerto Rico. When Zesmery asked them why they were afraid, Alizabeth responded that one of the respondent mother's boyfriends had "molested [her and Tanisha] while they were in Puerto Rico," and that she, Alizabeth, "was made to have sex with one of [the respondent mother's]

boyfriends . . . .” Tanisha told Zesmery that the respondent mother had told her and Alyson that they needed to lose weight because they were “too big” and the respondent mother “wanted to sell pictures of them online.” In response to their disclosures, Zesmery told the girls that she may have to contact the department.

Zesmery further testified that Jamie called the respondent father that same night about the children’s allegations, and also spoke with him in person after the respondent father returned from Puerto Rico the following day. According to Zesmery, she waited one week before reporting the allegations to the department because the respondent father had indicated to Jamie that “he would take care of it” but that he never did. Zesmery further stated that the “[respondent mother] was still in Puerto Rico, and [the respondent father] was telling the kids that he was going to bring her home.” Zesmery testified that the children told her that the respondent father had instructed them not to disclose anything to the department. She eventually contacted the department about the allegations.

During her testimony, Zesmery also recounted that, on the day the children were removed from the respondent parents’ care pursuant to the ex parte orders of temporary custody, Alyson called her crying. Alyson told Zesmery that the respondent parents had instructed the children to lie to the department and to tell the department that the allegations of abuse against the respondent parents were untrue and that it was unsafe for them to live with Jamie. The respondent father’s counsel renewed his hearsay objection to that testimony, which the court overruled. Zesmery also testified that she sent a text message to Borders that memorialized what Alyson had told her. The petitioner’s counsel then sought to admit into evidence exhibit E, which was a copy of the text message that Zesmery had sent to Borders. The respondent father’s counsel objected,

arguing that the exhibit was cumulative of Zesmery's testimony of what Alyson had told her and inadmissible as a prior consistent statement offered to bolster or corroborate Zesmery's testimony. See Conn. Code Evid. § 6-11. The court overruled the objections, indicating that it would "give it the appropriate weight it deserves."

The petitioner's counsel next elicited testimony from Zesmery that, prior to contacting the department, she had exchanged messages on Snapchat with Tanisha and Alizabeth that she had decided to screenshot and save to her phone.[16] The petitioner's counsel then sought to admit into evidence exhibit B, which consisted of three photographs of cell phone screenshots showing portions of those messages, which the petitioner's counsel claimed showed the emotional state of the children prior to their removal. Zesmery testified that the photographs were of the saved Snapchat conversations, and that she knew that these messages were coming from the children because they had exchanged numerous messages in the past, their usernames were shown, and she was familiar with their writing style. The respondent father's counsel objected to the admission of the exhibit on hearsay grounds and on the ground that its admission would be more prejudicial than probative, given that it depicted only a part of the Snapchat exchange and, because of the disappearing nature of Snapchat messages, he was prevented from putting the remainder of the exchange into evidence. The court overruled the objection. The exhibit was admitted in full.[17]

[16] Snapchat is a widely used social media application that allows its users to share photographs, videos and messages that disappear from the recipient's device after a set period of time. See *Mahanoy Area School District* v. *B. L.*, U.S. , 141 S. Ct. 2038, 2043, 210 L. Ed. 2d 403 (2021); *State* v. *Njoku*, 202 Conn. App. 491, 501 n.10, 246 A.3d 33 (2021).

[17] The first photograph showed Alizabeth's texting Zesmery, "zesy im scared," to which Zesmery responded, "Dont be baby, its going to be okay. We are going to protect you guys." The second photograph showed Alizabeth texting, "i want to leave i just don't know if I can say anything." Finally, the third photograph showed Tanisha texting, "Dad told me to tell dcf that is not true He's gonna know if I say something And he's gonna hate me."

The petitioner's counsel then asked Zesmery if, before she contacted the department, the children had provided her with any evidence supporting their allegations of physical abuse. Zesmery responded that Alizabeth and Alyson had provided her with photographs. The petitioner's counsel then sought to introduce these photographs into evidence. With respect to exhibit C, Zesmery testified that Alizabeth had told her that the photograph showed an injury to her ear that happened after the respondent mother punched her prior to leaving for Puerto Rico. Alizabeth had explained that the respondent mother was angry because Alizabeth and Tanisha had disclosed her extramarital affairs to the respondent father. With respect to exhibit D, Zesmery testified that Alyson had told her that the photograph showed damage to a door that was caused when her mother pushed her into the door. The respondent father's counsel objected to the admission of these photographs on the ground that the only personal knowledge that Zesmery had regarding what was depicted in the photographs was obtained from the children's hearsay statements, and he renewed his prior objection to the admission of such statements. The court overruled the objection and admitted the photographs as full exhibits.

The petitioner's counsel next called Borders to testify. Borders testified that she spoke with the children during the investigation conducted by the department prior to the removal of the children. She also testified that she had a conversation with the children on the day she removed them from the respondent parents' home. When Borders started to recount what the children had said to her, the respondent father's counsel

Zesmery responded: "He's not going to know if you tell DCF anything . . . they dont tell him what you guys say. Also, he is just trying to scare you guys into protecting your mom." Tanisha replies, "Yeah Ik and it's working."

The foregoing quoted material constitutes a verbatim recital of the Snapchat exchanges contained in exhibit B.

renewed his hearsay objection. In particular, he argued: "[E]ssentially, I have the same argument I had last time with . . . the prior witness. And, again, I come back to, you know, that it's not reasonable and necessary, and it's not reliable and trustworthy. Your Honor made a finding I think last time if I'm not mistaken that the girls' relationship with . . . their . . . sister-in-law rendered the testimony somewhat reliable. I think the court, if you're gonna let this witness testify to what the girls said, it has to go through that same process, and I think [the petitioner] has to lay a foundation that this is reasonably necessary, reliable, and trustworthy."

The petitioner's counsel argued that he believed that he had laid the necessary foundation. With respect to the reasonably necessary prong, the petitioner's counsel stated that "the argument does not change; it's the same as it was for [Zesmery], Your Honor: It is reasonably necessary because we're dealing with kids and because the court should hear the entire story." With regard to whether the statements to Borders were reliable and trustworthy, the petitioner's counsel argued: "I have established that [Borders] is a mandated reporter. I have established that she was assigned to the case. I have established, Your Honor, that she's been trained in interviewing techniques. I have established the particular circumstances surrounding this particular conversation, and I believe that her testimony was that it was a long ride home, that the kids at first were standoffish, that they were listening to the music and not engaging, then they had to stop after a while, they had a meal, and the kids started warming up, and slowly but surely, they first voiced their—or, rather, questioned my client with regard to their concerns; 'What's gonna happen? Where are we going?'; and so on and so forth. And only after that, Your Honor, they also volunteered the statement that's being objected to, which was, you

know, their unease with the possibility of being returned home."

In response, the respondent father's counsel argued: "Your Honor, again, it's not reasonably necessary because the girls were available within the subpoena power of the court. They're, you know, they're in the state of Connecticut. If the department wanted to tell the court what the girls had said, the department could've put them on the stand. The fact that . . . the witness is a mandated reporter brings it [under] the provision . . . of [§] 46b-129 (g). But that provision requires more than, you know, they . . . could've stopped and said, 'Anything that someone says to a mandated reporter comes into evidence.' It didn't stop there. It went on to say, 'as long as it's reasonably necessary and reliable and trustworthy.'

"Again, we go back to *In re Tayler F.*, which sets out the criteria by which we determine whether this kind of stuff is reasonable and necessary. And there has to be a particularized showing of psychological harm in order to allow this testimony. And they, as far as I know, have no—no such evidence. It's more than whether it would be in the best interest of the child. It comes entirely down to whether they would actually be harmed by it. The court's entitled to every witness' testimony unless there's going to be some sort of harm.

"And, so, as a result, as I indicated before, it is—I would return—well, in addition, it's neither reliable nor trustworthy. The witness is an employee of the plaintiff in this lawsuit. She's their principal witness. She's made a determination, she has a vested interest in doing, you know, in—in pursuing it. She was interviewing them—they may not have known this, but she was interviewing them for the purpose of litigation.

"All those things I think would bode against admitting this—this type of testimony. So it's hearsay; it's a violation of my client's due process rights; it's a violation

of his right to confrontation and cross-examination; and, on the basis of all those, I would submit . . . the department hasn't come close to establishing the necessary foundation to ask hearsay questions of this witness."

The court disagreed, stating, "based on what I've heard, the court will find that the department has made a sufficient foundation for this. The court will find it both reliable and trustworthy and reasonably necessary. And the court will admit the testimony."

Borders proceeded to testify that the children told her that they initially were hesitant to speak with her because the respondent parents had advised them "to keep their head down and not speak" to the department. They asked her what information they needed to tell her in order not to be returned home. According to Borders, when she asked them about what information they had already provided, they told her "that they had talked to their sister-in-law and that they had told her that they had been molested and touched by their mother's boyfriends, that they had told her that [the respondent mother] wanted the younger two girls to lose weight in order to take photographs," but that Alizabeth "was already pretty and skinny" and so "she was gonna go on PornHub . . . ." Borders testified that the children also disclosed physical abuse by the respondent mother of Alizabeth and Alyson. They further indicated to her that they had told the respondent father about the abuse. The children told Borders that, although the respondent father initially had said that "he was gonna take care of it," he also indicated that they "needed to protect their mother," and, thus, the children "were concerned that she was gonna come back to the home and they were gonna continue to be exposed to the things that they were exposed to."

Borders testified that she introduced the children "to the forensic interview process," that they were fearful,

and that Tanisha and Alizabeth had said that "they wanted to tell me as little as possible that would meet the threshold for them not to go home because of the chance that they ended up back home, what it would be like for them." Borders testified that the children told her that "their mother was never going to change and that their father wasn't going to change either" because he "was manipulated by their mother and had taken her side previously in disagreements within the household and that they believed he would take her side, she would return, and they would be in the same situation they were removed from."

Borders testified that after the children were placed with Jamie and Zesmery, she had another opportunity to speak with the children during a two day follow up visit. At that time, the children gave her additional information about the claimed abuse. Specifically, they provided her with "additional information as to the specific names of the boyfriends that ha[d] been involved in the sexual abuse. They provided more context to the information regarding the physical abuse. They provided more context to the information that [the respondent mother] wanted to take pictures and videos. They also provided me with locations . . . [at which the sexual and physical abuse] occurred." Borders also indicated that Tanisha had contact with the respondent parents after the removal and that Tanisha told her that they both had encouraged her to lie to the department and to recant her allegations. Throughout Borders' testimony, the respondent father's counsel reiterated his prior hearsay objection, which the court overruled.

The petitioner's counsel next asked Borders about a forensic interview that she conducted of Alizabeth on June 1, 2021. Borders testified that, during that interview, Alizabeth repeated the accusations that the children initially had made regarding physical and sexual

abuse and also provided some new information. When asked by the petitioner's counsel what new information Alizabeth had provided, the respondent father's counsel renewed his hearsay objection, arguing that there was even less indicia of trustworthiness and reliability with respect to the statements made by Alizabeth during the forensic interview because those statements, unlike the earlier ones to Zesmery and Borders, were not made spontaneously or in confidence but, instead, were made in response to questioning in ongoing litigation and with law enforcement present.

The petitioner's counsel responded that the respondent father's argument relied on analysis taken from criminal cases that was not applicable to the present case, under which the hearsay statements to Borders were admissible pursuant to § 46b-129 (g) because she was a mandated reporter. The petitioner's counsel also argued, in the alternative, that courts routinely have determined that hearsay statements made by sexual assault victims during forensic interviews are admissible under the medical treatment exception to the hearsay rule. The court again overruled the hearsay objection of the respondent father's counsel.[18] Borders then testified that Alizabeth had told her during the interview that the children had made the respondent father aware in April, 2021, of the respondent mother's infidelity and the physical and sexual abuse they had suffered but that the respondent father's response to the disclosures was focused on the respondent mother's infidelity, not on the abuse allegations.

[18] In overruling the objection, the court did not indicate whether it was doing so on the basis of the statutory hearsay exception, the medical treatment exception, or both. We resolve that ambiguity by concluding that the court determined that the evidence was admissible under both exceptions offered, in the absence of any statement to the contrary and in light of the fact that the respondent father and the petitioner address the admission of the evidence on both grounds. We address the medical treatment exception in part II of this opinion.

Finally, during Borders' testimony, the petitioner's counsel sought to admit as a full exhibit Borders' affidavit that had accompanied the neglect petitions and motions for ex parte orders of temporary custody, which had been marked for identification as exhibit A. The respondent father's counsel objected that the affidavit was hearsay and that, because Borders was available to testify, there was no reason for the affidavit to be admitted. He further argued that, to the extent that the petitioner was offering the affidavit pursuant to § 46b-129 (g), which allowed the petitioner to admit an affidavit from a mandated reporter without the need for the mandated reporter to appear and testify unless called by a respondent parent or a child, the petitioner's reliance on the statute was misplaced. The respondent father's counsel continued: "[I]t's apparent to me that the statute . . . is designed as a means to streamline the trial. Once the witness has testified . . . I don't think it applies any longer. I can get into that there's hearsay within hearsay in it as well . . . ."

The petitioner's counsel responded that the statute only contemplates that, at a contested hearing, a court may admit into evidence an affidavit from a mandated reporter in lieu of that reporter's live testimony but does not expressly preclude the petitioner from offering both live testimony and an affidavit. As to the issue of hearsay within hearsay, the petitioner's counsel generally relied on the fact that any hearsay statements contained in the affidavit would have been admissible if provided at the hearing by Borders under the § 46b-129 (g) hearsay exception.

The court overruled the objection of the respondent father's counsel and granted the request of the petitioner's counsel to admit the affidavit as a full exhibit. The court agreed with the petitioner's counsel that the express language of § 46b-129 (g) addressed a situation unlike what was currently before the court and, thus,

the statute had "very limited applicability to the situation at hand." The court, however, provided no other legal rationale for its admission of the affidavit. The court allowed the respondent father's counsel to make arguments as to why individual paragraphs of the affidavit should be excluded but overruled each such objection, consistent with its prior rulings, concluding that hearsay statements made to a mandated reporter met § 46b-129 (g)'s admissibility requirements. After the respondent father's counsel concluded his cross-examination of Borders, the petitioner rested. As previously indicated, the respondent father was the sole witness to testify on his behalf, and he offered no exhibits.

B

We turn next to a discussion of legal principles relevant to our consideration of the intended meaning and scope of the hearsay exception in § 46b-129 (g). At the outset, we note that the rules of evidence—including the prohibition on the admission of hearsay statements not covered by an exception—apply to juvenile proceedings, which include child protection matters, to the same extent that they do in other civil proceedings. See General Statutes § 46b-121; see also Conn. Code Evid. §§ 1-1 (b) and commentary (b) (5), and 8-2 (a).[19] "[C]ertain procedural informalities" are authorized in juvenile proceedings under our common law, including "a liberal

[19] Section 1-1 (b) of the Connecticut Code of Evidence provides: "The Code [of Evidence] and the commentary apply to all proceedings in the Superior Court in which facts in dispute are found, except as otherwise provided by the Code, the General Statutes or any Practice Book rule adopted before June 18, 2014, the date on which the Supreme Court adopted the Code." Among the examples given in the commentary, is that "[t]he Code applies . . . to . . . juvenile proceedings . . . ." Conn. Code Evid. § 1-1 (b), commentary (b) (4).

Section 8-2 (a) of the Connecticut Code of Evidence provides: "Hearsay is inadmissible, except as provided in the Code, the General Statutes or any Practice Book rule adopted before June 18, 2014, the date on which the Supreme Court adopted the Code."

rather than a strict application of the formal rules of evidence, provided due process is observed." (Citation omitted; internal quotation marks omitted.) *In re Juvenile Appeal (85-2)*, 3 Conn. App. 184, 190, 485 A.2d 1362 (1985). Any such looser application of the rules of evidence, however, including the rule against hearsay, is unwarranted "[if] such evidence is likely to be determinative of the matter," in which case, "the court should return to the more formal rules of evidence." (Internal quotation marks omitted.) Id. Given the significant rights that a parent has "in the companionship, care, custody, and management of his or her children . . . laxity in procedural safeguards cannot be swept away by mere reference to the so-called informalities of [j]uvenile [c]ourt procedure." (Citations omitted; internal quotation marks omitted.) *Anonymous* v. *Norton*, 168 Conn. 421, 425, 362 A.2d 532, cert. denied, 423 U.S. 935, 96 S. Ct. 294, 46 L. Ed. 2d 268 (1975). Accordingly, unlike in proceedings in which no adherence to the rules of evidence is required, courts in juvenile proceedings, despite their inherently informal nature, must remain cautious in admitting hearsay statements that go to the very heart of the issue to be decided.

"[O]ut-of-court statements offered to establish the truth of the matter asserted are hearsay. Such statements generally are inadmissible unless they fall within an exception to the hearsay rule. A hearsay statement that does not fall within one of the traditional exceptions to the hearsay rule nevertheless may be admissible under the residual exception to the hearsay rule provided that [1] the proponent's use of the statement is reasonably necessary and [2] the statement itself is supported by equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule." (Internal quotation marks omitted.) *In re Tayler F.*, supra, 296 Conn. 536.

As previously noted in this opinion, § 46b-129 (g) sets forth a limited statutory exception to the hearsay rule that, by its express terms, is applicable only at a contested hearing on an ex parte order of temporary custody. Section 46b-129 (g) was enacted in 1998; see Public Acts 1998, No. 98-241, § 5; *prior to the adoption of the Connecticut Code of Evidence*, and provides in relevant part that "credible hearsay evidence regarding statements of the child or youth made to a mandated reporter or to a parent may be offered by the parties and admitted by the court upon a finding that the statement is *reliable and trustworthy* and that admission of such statement is *reasonably necessary* . . . ." (Emphasis added.) It is the meaning of the term "reasonably necessary," and its application in this context, that is at the heart of the dispute in the present appeal.[20]

Because our resolution of the respondent father's claim requires us to engage in statutory construction, we first look to the statutory language at issue to determine whether its meaning is clear and unambiguous. General Statutes § 1-2z. We conclude that the phrase "reasonably necessary," as used in § 46b-129 (g) as a requisite for the admission of evidence, is ambiguous for the following reasons. First, the phrase "reasonably necessary" is not expressly defined in the statute itself or in any directly related statute. Second, the phrase, in common parlance, is broad, and, as used in this context, it is susceptible to a number of reasonable interpretations. For example, as argued by the petitioner, "reasonably necessary" could plausibly and simply mean that the proffered hearsay statement contains

[20] Although the respondent father also claims on appeal that the court incorrectly determined that the children's statements had adequate indicia of reliability and trustworthiness, he does not claim that the court misconstrued the meaning of the term "reliable and trustworthy" as found in § 46b-129 (g). Nevertheless, we do not reach the respondent father's claim regarding the reliable and trustworthy prong in light of our conclusion that the trial court incorrectly determined that the admission of the hearsay statements was "reasonably necessary."

relevant information needed to prove a material fact at issue. Likewise, "reasonably necessary" could mean that admission of the hearsay statement is permitted because the matter asserted could not be proven by any other available means. Third, our residual hearsay exception, as codified in the Connecticut Code of Evidence, uses the similar, albeit not identical, term "reasonable necessity," which has gained its own meaning and, thus, adds to the ambiguity of the statutory language. Conn. Code Evid. § 8-9. Because the language is ambiguous, we must consider extratextual sources to aid our construction, including available legislative history and similar statutes. See, e.g., *Ledyard* v. *WMS Gaming, Inc.*, 338 Conn. 687, 699, 258 A.3d 1268 (2021).

As already indicated, at the time § 46b-129 was enacted in 1998, an analogous term to "reasonably necessary" already was associated with our common law's residual, or catchall, exception to the hearsay rule. In 1985, our Supreme Court stated that, in considering whether a hearsay statement not admissible under a traditional hearsay exception nonetheless may be admissible under the residual hearsay exception, the proper "analysis must focus on (1) whether there was a *reasonable necessity* for the admission of the statement, and (2) whether the statement was supported by the equivalent guarantees of reliability and trustworthiness essential to other evidence admitted under the traditional hearsay exceptions." (Emphasis added.) *State* v. *Sharpe*, 195 Conn. 651, 664, 491 A.2d 345 (1985). The court explained that reasonable necessity in that context is established by demonstrating that, "unless the hearsay statement is admitted, the facts it contains may be lost, either because the declarant is dead *or otherwise unavailable*, or because the assertion is of such a nature that evidence of the same value cannot be obtained from the same or other sources." (Emphasis added.) Id., 665. The Connecticut Code of Evidence

later adopted the court's language in *Sharpe* in its own statement of the residual hearsay exception. See Conn. Code Evid. § 8-9 and commentary.

In discussing the unavailability requirement of the residual hearsay exception as it was later codified in our code of evidence, the court in *In re Tayler F.*, supra, 296 Conn. 546–47, stated: "If the opposing party makes a hearsay objection to the admission of the child's statement, the party seeking admission of the statement *has the burden to prove the child's unavailability*. . . . The trial court has discretion to accept an uncontested representation by counsel for the offering party that the child is unavailable due to psychological harm. . . . If the other party challenges that representation, proof of psychological harm must be adduced at an evidentiary hearing, either from an expert or another uninterested witness with knowledge of the child or from the court's in camera interview of the child, with or without counsel. . . . Finally, a finding of psychological unavailability requires the court to find that the child will suffer serious emotional or mental harm if required to testify. . . . [A] finding that it is not in the best interest of the child to testify is not equivalent to psychological harm. . . . Rarely will it be in a child's best interest to testify."[21] (Citations omitted; emphasis added; footnotes omitted.) Accordingly, the court in *In re Tayler F.* established that, in order to demonstrate a "reasonable necessity" for the admission of a child's hearsay statement, the proponent of the admission of the hearsay statement had to establish the child's unavailability to testify in person, either due to a risk

[21] We note that § 35a-23 of our rules of practice was adopted in response to *In re Taylor F.*, supra, 296 Conn. 524, and provides procedures that parties and the court must follow whenever a party "seeks the admission of a hearsay statement of a child pursuant to the residual exception to the hearsay rule based upon psychological unavailability . . . ." Practice Book § 35a-23 (a).

of serious emotional or mental harm or some other recognized legal basis.

The respondent father argues that the phrases "reliable and trustworthy" and "reasonably necessary" as used in § 46b-129 (g) are nearly identical to the requirements found in the residual hearsay exception as discussed in *In re Tayler F.* (Internal quotation marks omitted.) Relying on General Statutes § 1-1 (a),[22] he argues that those phrases have " 'acquired a peculiar and appropriate meaning in the law' " identical to the meanings given to the requirements of the residual hearsay exception as set forth in *In re Tayler F.* Therefore, he argues, the phrases should " 'be construed and understood accordingly.' " He further argues that the statute's legislative history supports his assertion that the legislature intended essentially to graft the residual hearsay rule into the child protection statute. The petitioner responds that the legislative history of the enactment of § 46b-129 (g) supports the contrary conclusion, namely, that this statutory exception to the hearsay rule was intended to be less stringent in its application than the residual hearsay exception.

In support of their disparate interpretations, both parties focus on testimony given at the March 20, 1998 public hearing on the proposed bill by then Judge, now Justice, Christine Keller, who, at the time of her testimony, was the Chief Administrative Judge for the Superior Court for Juvenile Matters. Neither party, however, brings to our attention the important fact that the bill that was the subject of Justice Keller's testimony at the public hearing did not include the language that is now in dispute, which was subsequently added by way of

[22] General Statutes § 1-1 (a) provides: "In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly."

amendment. We conclude, on the basis of our review of the legislative history, including how and when the disputed language was added to the legislation, that a proper interpretation of the statute cuts closer to the respondent father's interpretation, although we are not persuaded that the legislature expressed any intent to adopt the strict unavailability requirement of the residual hearsay exception. At this point, a discussion of the legislative history as well as some additional background context is required.

C

We begin by noting that the changes that the legislature enacted in 1998 with respect to ex parte orders of temporary custody were a direct response to changes to federal law as well as a pending lawsuit that had been brought by a respondent mother in a child protection action, both on behalf of herself and on behalf of "a class of persons consisting of all parents in the state whose children have been or may be seized by the [department], and who have been or may be denied their statutory and constitutional right to challenge the state's temporary custody in a timely evidentiary hearing." *Pamela B.* v. *Ment*, 244 Conn. 296, 299, 709 A.2d 1089 (1998); see id., 307 (appeal considering, inter alia, justiciability of underlying action); see also 41 H.R. Proc., Pt. 12, 1998 Sess., p. 4165, remarks of Representative Christel Truglia. The action was brought against Judge Aaron Ment, in his capacity as chief court administrator, and Linda D'Amario Rossi, who, at the time, was the Commissioner of Children and Families, and sought both declaratory and injunctive relief. *Pamela B.* v. *Ment*, supra, 299. According to the plaintiff in *Pamela B.*, courts in this state routinely would order a continuance of the hearing that was required within ten days following the granting of an ex parte order of temporary custody and consolidate that hearing with the adjudication of the merits of the contemporaneously

filed neglect petition, which meant the ex parte order could remain in effect for many months without any opportunity for the respondent parent to challenge it. See *Pamela B.* v. *Ment*, Docket No. CV-95-0556127-S, 1997 WL 88212, *1 (Conn. Super. February 13, 1997), rev'd, 244 Conn. 296, 709 A.2d 1089 (1998). The plaintiff claimed that this practice violated her due process rights under our federal constitution as well as under article first, § 10, of the state constitution, in light of the significant rights at stake in such proceedings. Id. The plaintiff alleged that the delay in providing a contested hearing was the result of "an increase in the number of [order of temporary custody] applications, unreasonably crowded juvenile dockets, insufficient staffing of the juvenile courts and inadequate allocation of judicial resources . . . ." Id.[23]

With that background in mind, we turn next to a discussion of the language of this statutory hearsay exception, both as originally proposed and as eventually enacted. The language of the bill as first proposed, and on which Justice Keller and others testified, was as

[23] As noted by our Supreme Court in its decision in *Pamela B.* v. *Ment*, supra, 244 Conn. 311 n.11, the Judicial Branch had commissioned an independent study that concluded that " '[t]he increase in emergency orders requested and the time to receive a ten-day emergency hearing has reached a critical point in Connecticut. State of Connecticut Court Improvement Project Report (Edmund S. Muskie Institute, University of Southern Maine, 1996) p. 38.' " The study found " 'widespread evidence that the [ten] day hearing requirement is an issue of great difficulty in the courts due to crowded court calendars.' " Id., p. 39. It found " 'a widespread practice of convening the initial [ten] day hearing within the statutory guidelines, introducing the parties into the record to formally initiate the hearing, and then continuing the hearing at a later date. The range of time for the completion of [ten] day hearings spanned from [ten] days to six months. This is a disturbing instance of compliance with the "letter" rather than the "spirit" of the law regarding temporary custody hearings.' " Id. The study recommended "that the state 'develop a strategy and devote resources to schedule and hear [ex parte orders of temporary custody] within a reasonable time of filing.' Id. at 66." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 7, 1998 Sess., p. 2188, written testimony of Paul Chill.

follows: "At a contested hearing on the order for temporary custody or order to show cause *credible hearsay evidence regarding statements of the child or youth may be offered by the parties and admitted at the discretion of the court.* The petitioner may submit a signed affidavit executed by a mandated reporter without the need for the mandated reporter to appear and testify unless called by a respondent, provided the affidavits are submitted to all parties appearing at the preliminary hearing. The affidavits, while not conclusive, shall constitute prima facie evidence of the facts alleged to support the maintenance of an order of temporary custody pending a trial on the merits of the petition or petitions." (Emphasis added.) Substitute House Bill No. 5745, 1998 Sess.

Thus, as originally drafted, the proposed bill gave the court extremely broad discretion to admit any hearsay statement that it deemed credible, which we construe as a far more permissive standard than what appears in the final bill enacted by the legislature. The amended language—which added the "reliable and trustworthy" and "reasonably necessary" requirements—first appeared in a House amendment that was adopted on May 4, 1998, without any discussion or explanation for the changes made to the original bill. Substitute House Bill No. 5745, 1998 Sess., as amended.

At the public hearing on the original bill, Justice Keller testified that the Judicial Branch was fully supportive of the proposed legislation, which would require courts to hold a contested hearing within ten days if requested by a parent at the initial hearing on an ex parte order of temporary custody. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 6, 1998 Sess., pp. 1877–78, testimony of Judge Christine Keller. She testified: "[W]e can do that, but . . . *we see a need to try to shorten the length of these hearings* because the immediacy of this hearing is to determine whether or

not, pending the outcome of the neglect case, the child should remain in the custody of [the department] and, for that reason, we are proposing that you allow us to submit as prima facie evidence, subject to the parent's right to call the witness or call the person and cross-examine them, affidavits of mandated reporters, and also allow us to submit credible hearsay. We examined other states' procedures in these cases to see if they do it better or why are they doing it faster and there's really two basic reasons why they do it faster in other states.

"One, is that they allow documents, affidavits, hearsay statements of the children that are trustworthy and other credible hearsay into evidence at these hearings, and two, they have a lower standard. It's probable cause in many other states. In our state, by judicial fiat, [a]ppellate court rulings, it's fair preponderance of the evidence, which is a higher standard." (Emphasis added.) Id., p. 1877.

One representative, Robert Farr, noting written testimony that opposed the new hearsay exception contained in the proposed legislation, asked Justice Keller to discuss whether this type of hearsay exception was found in the child protection statutes of other states. Id., p. 1881. The relevant colloquy was as follows:

"[State Representative] Farr: Let me just ask you, just for the record, we've got some testimony, written testimony from Paul Chill from the [University of Connecticut School of Law] and criticizing some parts of this. One of the issues is, of course, the hearsay question and am I correct in understanding your testimony, J[ustice] Keller, that this [is] common language in other states?

"[Justice] Keller: Yes. As a matter of fact, the one state that we actually had a meeting here on a few months ago, Rhode Island. They have a rule of evidence that

allows—a statement that a child that the judge deems would be someone the child trusts would be admissible.

"I want to point out too that, under our present civil law, in other kinds of civil cases and our cases are civil cases and the standard of proof in [an] order of temporary custody hearing is the same as it is in every other civil case, fair preponderance of the evidence. We allow reports of physicians, nurses, doctors, psychologists to be admitted into evidence without the need for that person to come and testify. We allow that in the trial on the final merits of the case and the only cautionary reservation, and we've got that proposed, is that we're requiring that, if [the department] wishes to rely on an affidavit of a mandated report, it has to have that affidavit ready to provide to counsel for the parents at the preliminary hearing, that's the hearing held within the first ten days, and then that parent would have the right to request that the mandated reporter come to testify and utilize subpoenas if need be.

"Now, most of our parents are indigent. They cannot afford subpoenas, but in the juvenile court the procedure which is authorized by Practice Book rule is that the lawyers representing the indigent parents would request that the clerk issue summons or subpoenas. And we only need to do that [eighteen] hours before the scheduled contested hearing.

"[State Representative] Farr: Let me ask you this. The language that was proposed—I don't have it right in front of me—as I recall it, you said includes other credible hearsay evidence, which goes beyond the reports for the mandated reporters.

"[Justice] Keller: Right.

"[State Representative] Farr: What would that include?

"[Justice] Keller: Well, it's kind of similar to what we now have, which is sort of a catchall exception to the hearsay rule anyway, where the trustworthiness of the statement makes it so inherently reliable that the court has been allowed to get it in, even though arguably it might always be considered hearsay.

"Statements that a child might make to another parent, someone to whom the child trusts, as in the case in Rhode Island. Also, some statements, not in affidavit form, might come in anyway under other rules that are routinely adopted and accepted.

"For example, a police report could come in under a business records exception without the need for the actual author of that report to testify. Many [department] records would be considered business records. We have a procedure already in the juvenile court where social studies, which is the required study that a worker must have prepared for the courts of its investigation and conclusions for the court's assistance in every neglect or uncared for case. That is allowed in, as long as the worker is there, prepared to testify, or prepared to be subjected to cross-examination.

"So, we already have a number of exceptions which—also, hospital records would be another example. If we had a seriously abused child or a child who['s] born severely addicted to toxic substances and we're using that as evidence, even without an affidavit or without testimony, those hospital records come in as business records under the exception carved out by [General Statutes §] 4-104. I don't think we're broadening expansively the use of evidence that isn't already used in many of our temporary custody hearings." Id., pp. 1881–83.

Attorney Sharon Wicks Dornfeld also provided a written statement to the committee that supported the original bill's proposal with respect to the admission of hearsay statements of children subject to ex parte

orders of temporary custody, noting in relevant part: "As a practical matter, it is often nearly impossible to balance the child's welfare with the rules of evidence. On the one hand, the child's statements are often the best—even only—evidence of the need for protection. On the other, the experience of testifying against a parent is often itself damaging to a child, and bringing him into the courtroom must be a last resort. The proposed language is a reasonable accommodation for this problem." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 7, 1998 Sess., p. 2143, statement of Attorney Sharon Wicks Dornfeld. Judge Ment also provided a written statement to the committee consistent with Justice Keller's testimony that "[a]llowing credible hearsay at the hearing on the order for temporary custody is essential for cases to be resolved as quickly as possible . . . ." Id., p. 2146, statement of Judge Aaron Ment.

The committee also received written testimony and statements offered in opposition to the bill. The Legal Assistance Resource Center of Connecticut, Inc., recommended amending the original bill's proposed hearsay exception, providing via a statement in relevant part: "The bill should . . . be amended in the following ways . . . Hearsay evidence at the [order of temporary custody] hearing should not be permitted. A live witness is needed, not only for cross-examination but also so that the court can make an independent determination of the need for an [order of temporary custody]." Id., p. 2172. Furthermore, Professor Paul Chill of the University of Connecticut School of Law, who represented the plaintiffs in the *Pamela B.* case and whose testimony was referenced by Representative Farr, provided the following relevant written testimony in opposition to the bill: "[H.B.] No. [5745] would further gut due process protections for parents and children by permitting affidavits by mandated reporters to be admitted into evidence in lieu of live testimony. . . . Many affidavits

one sees in juvenile court proceedings are replete with hearsay, supposition, bald, subjective opinion and bias, and it is often impossible to tell, although one may suspect it, just how little education and experience some mandated reporters have in child protection. This is where large mistakes are made and compounded. It would be folly to permit as momentous a decision as whether a child will remain in foster care for several months to be based on such documents." Id., p. 2190, statement of Paul Chill.

As noted, following the public hearing, the proposed bill was amended in the House of Representatives on May 4, 1998, without any explanation or further discussion on the record. The amendment added the "reliable and trustworthy" and "reasonably necessary" requirements, the language that ultimately was enacted and is now found in § 46b-129 (g). It is unclear from the legislative history itself whether the changes were made in response to the opposition to the original bill, but it is undeniable that this added language placed additional guardrails on the court's discretion to admit at a contested hearing hearsay statements it deems "credible."

We glean the following conclusions from this legislative history. First, it is relatively clear from the amendment to the original bill that the legislature was uncomfortable with the breadth of the exception to the hearsay rule that was contained in the original bill. The addition of the "reliable and trustworthy" and "reasonably necessary" language evinces an intent to narrow, at least to some extent, the exception contained in the prior version of the bill.

Second, we are not persuaded by the respondent father's contention that the drafters of the amendment sought to codify the residual hearsay exception as it existed at common law. After all, the residual hearsay exception already was applicable in child protection

proceedings, as indicated by Justice Keller in her testimony, and applied to all hearsay, not just to the hearsay statements of children made to mandated reporters, statements that the bill expressly sought to distinguish. In other words, the statutory exception arguably would be superfluous because the common-law residual exception to the hearsay rule was already applicable to hearings on orders of temporary custody. "We are mindful that, [i]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous." (Internal quotation marks omitted.) *In re Jusstice W.*, supra, 308 Conn. 664; see id. (refusing to adopt interpretation of statutory provision that would render other provision in statute superfluous).

Instead, we view the bill, as enacted, as representing a compromise between advocates of the position that credible hearsay statements should be generally admissible without additional safeguards and advocates of the position that such hearsay statements should be admitted only if the statements meet the stringent admissibility requirements of the common-law residual exception to the hearsay rule, including a showing of the "unavailability" of the declarant as a witness.

This interpretation is buttressed by consideration of the underlying goals and concerns that motivated the legislation. Those goals included ensuring that parents were provided with an opportunity for a prompt hearing in light of the significant rights at stake, while also protecting the best interests of children, including their interest to be free from physical abuse and neglect. An additional goal was to make contested hearings more efficient, given the limited resources of both time and personnel, thereby increasing the court's ability to hold more contested hearings within the desired and shortened ten day time frame. One of the ways in which hearings could be expedited and made more efficient

would be by streamlining the presentation of evidence and reducing the number of witness needed to be called. Considering the legislation with those goals in mind, we construe the addition of the "reasonably necessary" language not as requiring unavailability as a prerequisite to the admission of hearsay statements made by children to a mandated reporter but as requiring the court, before admitting such a hearsay statement under § 46b-129 (g), to consider a number of factors in light of the specific circumstances of the case before it. Those factors would include, but are not necessarily limited to: (1) the age of the child involved; (2) the materiality of the offered hearsay statement; (3) the likelihood of prejudice to the respondent parent due to the inability to cross-examine the child regarding the hearsay statement;[24] (4) any difficulties in obtaining the in-person testimony of the child; and (5) consideration of whether in-court testimony could result in emotional or mental harm to the child.[25] Considering these factors will require trial courts to weigh the state's interest in conducting hearings on orders of temporary custody in a

[24] We recognize that the second and third factors raise competing considerations. If the hearsay is particularly material to the custody determination, there is more reason to find its admission to be reasonably necessary. At the same time, the more material the information, the greater the potential prejudice is to the respondent parent. The trial court must weigh these competing interests under the specific circumstances of the case before it. For example, a child's hearsay statement that a respondent parent physically assaulted the child would be very material to a custody determination but there may be little prejudice to the respondent parent from a lack of cross-examination if the statement is corroborated by other evidence, including physical evidence of an injury. By contrast, an uncorroborated statement that the respondent parent inappropriately touched the child may be unduly prejudicial without the opportunity to cross-examine the child.

[25] We caution that, in considering this factor, courts need not require proof of the degree of serious psychological harm that was required in *In re Tayler F.* It is equally important, however, to be mindful of the court's warning in *In re Tayler F.* that "[r]arely will it be in a child's best interest to testify"; *In re Tayler F.*, supra, 296 Conn. 547; and, therefore, courts must be equally cautious not to so loosely apply this factor such that proof of any possible discomfort that may accompany a child's in-court testimony renders the admission of the child's hearsay statements "reasonably necessary . . . ."

timely and efficient manner, protecting the procedural rights of the respondent parents to challenge the evidence presented by the petitioner, and ensuring that the children who are the subject of the proceeding are protected from unnecessary psychological harm. It bears emphasizing though that the proponent of the hearsay evidence has the burden of tipping the balance in favor of admissibility by establishing that, in light of these factors, the hearsay evidence is reasonably necessary. For example, if an older child is readily available to testify, all else being equal, there would be little reason to conclude that the introduction of the child's hearsay statements was reasonably necessary. The calculus could change though if the proponent of the hearsay evidence presented evidence that, due to the child's relationship with the respondent parent, testifying would be particularly harmful to the child. Ultimately, trial courts must use their sound discretion in deciding whether to employ the statutory exception, and we will reverse such determinations only for an abuse of that discretion.

Having construed what "reasonably necessary" means for the purposes of § 46b-129 (g)'s hearsay exception, we now turn to the evidence identified by the respondent father that he asserts the court improperly admitted into evidence at the contested hearing.

D

The first and broadest category of inadmissible hearsay identified by the respondent father involves the testimony of Zesmery and Borders, each of whom was permitted by the court to recount various out-of-court statements made to them by the children over the hearsay objections of the respondent father's counsel. In so doing, the court never directly addressed the dispute between the parties regarding the meaning of "reasonably necessary" as used in § 46b-129 (g); it simply concluded that the statements were reliable and trustwor-

thy and that their admission was reasonably necessary. Nevertheless, we may presume that, in ruling in favor of the petitioner and allowing the testimonial hearsay statements into evidence, the court accepted the rationale offered by the petitioner's counsel, which did not include any reasoned consideration regarding the availability of the children to appear and testify. The court made no finding that the children would have suffered psychological harm from testifying or that there was any other reasonable basis for the petitioner not to have presented the in-court testimony of the children. Although the petitioner's counsel argued that testifying likely would be difficult and potentially harmful to the children, the court was not free to accept that representation without some supporting evidence, given that the respondent father contested it. See *In re Tayler F.*, supra, 296 Conn. 546–47. Specifically, the respondent father's counsel argued to the court that these were not young children but teenagers and, thus, they could easily have been brought to court to testify and that his inability to cross-examine them was particularly prejudicial.

In light of our conclusion that the petitioner has the burden to establish a reasonable basis for why it was not possible to have the children testify at the contested hearing in order to establish that the admission of their hearsay statements were "reasonably necessary," we agree with the respondent father that the court abused its discretion in failing to sustain his counsel's objections to the admission of the hearsay statements in the present case. In arguing in favor of the admissibility of the children's hearsay statements, the petitioner's counsel focused on the reliability of the hearsay statements rather than on whether it was reasonably necessary that they be admitted as hearsay. In short, the petitioner's counsel seemed to believe that it was sufficient to establish that the children's statements were

made to a mandatory reporter and had some independent indicia of reliability. The respondent father's counsel, however, argued that because the children were older, they should have been summoned to testify at the hearing. Other than a bald assertion that the children would suffer harm if required to testify in person, the petitioner's counsel offered nothing to support a finding of emotional or mental harm, nor did the court make such a finding. The petitioner's counsel offered no other reasonable basis that would justify the decision not to call the children to testify, other than that their statements were reliable. Moreover, in this case, the allegations of physical and sexual abuse all involved the respondent mother or her boyfriends. The evidence before the court was that the respondent mother remained in Puerto Rico and had been defaulted in the proceeding, so there was little chance of the children being confronted by her at the hearing. The court offered no analysis supporting its conclusion that the admission of the hearsay statements was "reasonably necessary." Having thoroughly reviewed the record and arguments of the parties, we conclude that the court's decision to overrule the hearsay objections of the respondent father's counsel, under the circumstances of the present case, was error.

E

In addition to the court's erroneous admission of the children's various hearsay statements through the testimony of Borders and Zesmery, the respondent father also challenges the admission of the petitioner's exhibits on hearsay grounds. Exhibits B and E each contained hearsay statements that the court determined were admissible under § 46b-129 (g). Exhibit B contained the screenshots of the three Snapchat messages between the children and Zesmery. Exhibit E was a copy of a text message from Zesmery to Borders that memorialized a conversation that Zesmery had with

Alyson. For the same reasons that the hearsay statements of the children offered through the testimony of Zesmery and Borders were improperly admitted by the court pursuant to § 46b-129 (g), exhibits B and E should not have been admitted as full exhibits.

With respect to the admission of exhibits C and D, the photographs that Zesmery received from the children of an injury to Alizabeth's ear and a broken door that were offered by the petitioner as corroborating evidence of the alleged physical abuse of the children by the respondent mother, the respondent father argues that they were improperly admitted into evidence by the court through Zesmery because she did not have personal knowledge necessary to authenticate the photographs. According to the respondent father, in attempting to authenticate what was depicted in the photographs, Zesmery relied entirely on what she was told by the children and not her own knowledge. We agree that the photographs improperly were authenticated through the use of hearsay and, thus, the court should have denied the admission of exhibits C and D.

Pursuant to the Connecticut Code of Evidence, "[t]he requirement of authentication as a condition precedent to admissibility is satisfied by *evidence* sufficient to support a finding that the offered evidence is what its proponent claims it to be." (Emphasis added.) Conn. Code Evid. § 9-1 (a). The Connecticut Code of Evidence, including its bar against the admissibility of hearsay statements not covered by an exception, applies equally to evidence offered for the purposes of authentication. See Conn. Code Evid. § 1-3 (b), commentary (b) ("Code applies in making determinations required by [§] 1-3 (b)," and evidence offered for purposes of authentication is "example of an instance in which the relevance of evidence to the case depends upon the existence of another fact or other facts" to which § 1-3 (b) of Connecticut Code of Evidence applies). Although the

code does not apply to "[p]roceedings involving questions of fact preliminary to admissibility of evidence pursuant to [§] 1-3 of the Code"; Conn. Code Evid. § 1-1 (d) (2); evidence relating to the authentication of proffered evidence must itself be in admissible form because it is ultimately for the trier of fact to determine whether the evidence is what it purports to be. See *State* v. *Porfil*, 191 Conn. App. 494, 519–21, 215 A.3d 161 (2019), appeal dismissed, 338 Conn. 792, 259 A.3d 1127 (2021). Because we have determined that the children's hearsay statements constituted inadmissible evidence, these statements were equally inadmissible for the purpose of authenticating exhibits C and D. Accordingly, those exhibits were improperly admitted.

F

Finally, we turn to the court's admission of exhibit A, Borders' affidavit filed in support of the neglect petitions and motions for orders of temporary custody. Borders' affidavit was admitted by the court under the "affidavit provision" of the hearsay exception in § 46b-129 (g). The respondent father's counsel objected to the admission of the affidavit. Although he acknowledged that affidavits by mandated reporters such as Borders generally would be admissible pursuant to the statute, he argued that the affidavit was inadmissible in the present case because Borders already had provided direct testimony consistent with the contents of her affidavit and because it contained hearsay statements of the children and, thus, amounted to impermissible hearsay within hearsay. The court overruled the objection on the ground that the statute did not expressly limit the admissibility of affidavits to cases in which the affiant did not testify, and because the court already had ruled that the children's hearsay statements were themselves admissible under § 46b-129 (g). We agree that the affidavit was improperly admitted in full

because it contained inadmissible hearsay statements of the children.

Section 8-7 of the Connecticut Code of Evidence provides that "[h]earsay within hearsay is admissible only if each part of the combined statements is independently admissible under a hearsay exception." An affidavit is an out-of-court statement and, thus, generally is inadmissible to prove the truth of the matter asserted therein unless it falls within a hearsay exception. See, e.g., *Burritt Mutual Savings Bank of New Britain* v. *Tucker*, 183 Conn. 369, 375, 439 A.2d 396 (1981). For purposes of our analysis in the present case, we assume, without deciding, that Borders' affidavit was admissible under § 46b-129 (g), despite her presence and testimony at the hearing. Nevertheless, for the same reasons that Borders' testimony regarding the children's hearsay statements were inadmissible, like statements of the children remained inadmissible to the extent that they were repeated in the affidavit.

In sum, we agree with the respondent father that the court abused its discretion by admitting various hearsay statements of the children, in their many forms, because the petitioner failed to meet her burden under the statute of demonstrating that the admission of those statements was "reasonably necessary" as we have construed that term in the context of a contested hearing on a motion for an order of temporary custody. Although we must also address whether the evidentiary errors were harmful, we turn to that question after reviewing the alternative basis on which the court admitted some of the same hearsay statements.

II

The respondent father next claims that the court improperly admitted those hearsay statements made by Alizabeth to Borders during the forensic interview on the alternative ground that they fell under the medical

treatment exception to the hearsay rule. The respondent father argues in particular that the petitioner failed to demonstrate that Alizabeth understood at the time that she made the statements that the forensic interview, at least in part, was for a medical purpose. The petitioner contends that we should reject this claim because the respondent father failed to raise it before the trial court and, even if he did, the argument fails on its merits because there was evidence presented from which the court reasonably could have inferred that Alizabeth understood that the interview had a medical purpose. We agree with the respondent father. The following additional facts are relevant to our resolution of this claim.

As stated previously in part I of this opinion, during her direct testimony, Borders was asked about a conversation that she had with the children on the day they were removed from the respondent parents' home and during their transport to their placement. Borders testified that, during that conversation, she had "introduced them to the forensic interview process," but she provided no details about what she had told them or whether her discussion of the "process" included any discussion of the *purpose* for a forensic interview. Borders later testified that she eventually conducted a forensic interview of Alizabeth on June 1, 2021. Borders was asked about and testified to her understanding of the purpose for a forensic interview, which she stated was "done in conjunction with law enforcement," and was "to interview [the] children in a controlled environment, neutral environment and gather information so that we can ensure [their] physical, emotional, mental safety and well-being." When asked why the other children had not participated in the forensic interview, Borders testified that Alizabeth had told her that "because she was the oldest, if somebody was gonna be blamed

for coming forward she wanted it to be her so that her sisters couldn't be blamed."

The forensic interview was conducted at the Child Advocacy Center in Danielson. In attendance and observing the interview from outside of the interview room were an advocate from the Sexual Assault Crisis Center of Eastern Connecticut, another forensic interviewer, the director of the Child Advocacy Center, and three members of law enforcement. Nothing in the record suggests that any medical professional took part in the interview or examined or treated Alizabeth either before or after the interview.

Borders testified that, during the interview, Alizabeth repeated the accusations that the children initially had made regarding physical and sexual abuse and also provided new information. When asked by the petitioner's counsel what new information Alizabeth had provided, the respondent father's counsel renewed his earlier hearsay objection, arguing with respect to the statutory hearsay exception that there was even less indicia of trustworthiness and reliability with respect to the statements that Alizabeth made during the forensic interview because those statements, unlike the earlier statements to Zesmery and Borders, were not made spontaneously or in confidence. Rather, he argued, the statements made during the forensic interview were made in response to questioning in ongoing litigation and with law enforcement present.

The petitioner's counsel responded to the objection of the respondent father's counsel first by reiterating that the statements that Alizabeth made to Borders during the interview were fully admissible under § 46b-129 (g) because Borders was a mandated reporter. The petitioner's counsel also argued in the alternative, however, that courts routinely found hearsay statements

made by sexual assault victims during forensic interviews to be admissible under the medical treatment exception to the hearsay rule.

With respect to whether the medical treatment exception provided an alternative basis for the admission through Borders of Alizabeth's statements made during the forensic interview, the respondent father's counsel first argued that he believed that the exception is limited to hearsay statements offered through expert testimony by a medical professional. After the petitioner's counsel disputed that argument as unfounded and after it was squarely rejected by the court, the respondent father's counsel made the additional argument that he had not "heard any evidence at all that there's been, you know, any medical treatment undertaken or planned to be undertaken on the basis of [the forensic] interview." The court overruled the hearsay objection of the respondent father's counsel.

Borders then testified that Alizabeth had told her during the interview that the children had made the respondent father aware in April, 2021, of the respondent mother's infidelity and the physical and sexual abuse they had suffered at the hands of the respondent mother but that the respondent father's response to the disclosure was focused on the respondent mother's infidelity, not the abuse allegations. Borders never was asked by the petitioner and never testified that she had explained to Alizabeth that one of the purposes of the forensic interview was to address any potential medical issues arising from any alleged abuse. No other evidence was presented suggesting that Alizabeth understood that her participation in the forensic interview was pertinent to a medical diagnosis or treatment.

A

Section 8-3 (5) of the Connecticut Code of Evidence contains an exception to the hearsay rule for "[a] statement made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past

or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment." In discussing this exception, this court has explained that, "[r]egardless of whether the statements were made to a physician, they must all have been made in furtherance of medical treatment. . . . In fact, the medical treatment exception is not limited to physicians and has been extended to include social workers, as long as the social worker is found to have been acting within the chain of medical care. . . . Although [t]he medical treatment exception to the hearsay rule requires that the statements be both pertinent to treatment and *motivated by a desire for treatment* . . . in cases involving juveniles, our cases have permitted this requirement to be satisfied inferentially." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Juan V.*, 109 Conn. App. 431, 446–47, 951 A.2d 651, cert. denied, 289 Conn. 931, 958 A.2d 161 (2008). Accordingly, "[t]he rationale underlying the medical treatment exception to the hearsay rule is that the patient's desire to recover his [or her] health . . . will restrain him [or her] from giving inaccurate statements to a physician [or other professional] employed to advise or treat him [or her]. . . . The term medical encompasses psychological as well as somatic illnesses and conditions." (Citation omitted; internal quotation marks omitted.) *State* v. *Freddy T.*, 200 Conn. App. 577, 591, 241 A.3d 173 (2020).

As this court explained in *Freddy T.*, however, "[t]he statements of a declarant may be admissible under the medical treatment exception [only] if made in circumstances from which it reasonably may be inferred that *the declarant understands that the interview has a medical purpose*. Statements of others, including the interviewers, may be relevant to show the circumstances. . . . [Thus] the focus of the medical treatment

exception is *the declarant's* understanding of the purpose of the interview . . . . Accordingly, the inquiry must be restricted to the circumstances that could be perceived by the declarant, as opposed to the motivations and intentions of the interviewer that were not apparent to the declarant. . . . This focus accords with the rationale for the medical diagnosis and treatment exception that patients are motivated to speak truthfully to their medical care providers when their own well-being is at stake." (Citations omitted; emphasis altered; internal quotation marks omitted.) Id., 592–93. In other words, under our case law applying the medical treatment exception, the proponent must show not only that the forensic interview in fact had some medical purpose but that the declarant understood this to be the case.

In *Freddy T.*, we agreed with the defendant that portions of a video recording of a forensic interview containing statements by the victim, a five year old child, should not have been admitted into evidence under the medical treatment exception. Id., 585, 590, 593. The defendant had argued that the real purpose of the interview was to aid the police investigation and not to provide medical treatment for the child because any such treatment had concluded by the time the interview was conducted. Id., 589. We agreed and concluded that the content of the interview provided no basis from which to conclude that the child understood that the interview was for medical treatment purposes. Id., 593. There was no indication in the record that the child in *Freddy T.* had ever been told in advance that she would be meeting with any medical professionals. Id., 594. Although there was evidence that medical referrals were made *after* the interview concluded, this court stated that "[p]ro forma referrals at the end of an interview, even if fulfilled, do not satisfy th[e] requirement" that the declarant understand that there was a medical

purpose for the interview at the time the declarant made the statements the proponent sought to admit under the medical treatment exception. Id., 595 n.16.

B

We first briefly address whether the respondent father's claim on appeal was properly raised before the trial court so as to preserve it for review. Although the petitioner argues that the claim is not preserved, we disagree.

"[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted. . . .

"These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . Assigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush. . . .

"[T]he sina qua non of preservation is fair notice to the trial court. . . . An appellate court's determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated [in the trial court] with sufficient clarity to place the trial court on reasonable notice of that very same claim." (Citations omitted; internal quotation marks omitted.) *State*

v. *Sease*, 147 Conn. App. 805, 813–14, 83 A.3d 1206, cert. denied, 311 Conn. 932, 87 A.3d 581 (2014).

We conclude that part and parcel of the objection by the respondent father's counsel to the admission of Alizabeth's forensic interview statements to Borders was that there was no evidence that any medical treatment or planned medical intervention occurred as a result of the forensic interview. He argued at one point that the statements made during the forensic interview were made in response to questioning in ongoing litigation and with law enforcement present, suggesting by implication that there was no basis on which to conclude that Alizabeth's statements were made for the purpose of obtaining medical treatment. We conclude that the arguments of the respondent father's counsel were sufficient to put the trial court on notice to consider whether all necessary requirements of admission under the medical treatment exception had been satisfied, which included whether the petitioner had met its burden of demonstrating that Alizabeth understood her statements to have been made in furtherance of medical treatment so as to fall within the exception.

C

We now turn to the merits of the respondent father's claim that, like in *Freddy T.*, the trial court was not presented with any evidence from which it reasonably could have inferred that Alizabeth understood the forensic interview to have a medical purpose. To the contrary, the record suggests that Alizabeth and her sisters understood the interview to be for investigatory purposes. This is borne out by the fact that the children elected to have only Alizabeth risk providing additional information to Borders during the forensic interview, thereby limiting the risk of angering the respondent parents if they were implicated in wrongdoing. In other words, it appears clear that Alizabeth understood the

purpose of the forensic interview to be to further the investigation against the respondent parents. Borders did testify that she previously had walked the children through the "forensic interview process . . . ." There was additional testimony from which to conclude that Borders herself understood that there was a potential medical treatment component of the interview. The record is entirely silent, however, as to whether Alizabeth understood this to be the case. No medical examination or interview with a medical professional occurred in conjunction with the forensic interview conducted by Borders from which such an understanding might have been inferred. Accordingly, to the extent that the court overruled objections to Borders' testimony about what Alizabeth had told her during the forensic interview under the alternative theory that the statements fell under the medical treatment exception to the hearsay rule, we conclude that it did so in error.

III

Although we have determined that the court improperly admitted a number of hearsay statements and permitted the authentication of exhibits through the use of inadmissible hearsay, that determination is not itself fully dispositive of the respondent father's claims on appeal. He also must demonstrate that these evidentiary errors were harmful. *In re Tayler F.*, supra, 111 Conn. App. 36. The respondent father asserts that the erroneous evidentiary rulings were, in total, harmful because no other admissible evidence supports the court's conclusion that the petitioner met her burden with respect to sustaining the orders of temporary custody and, accordingly, the court's finding to the contrary is clearly erroneous. The petitioner counters that any errors in admitting the evidence were harmless because the court could have sustained the ex parte orders of temporary custody on the basis of other evidence that was admitted at the hearing. We agree with the respondent father.

As we have previously stated, "[p]ursuant to . . . § 46b-129 (b), the court may issue an order ex parte vesting in some suitable agency or person the child's or youth's temporary care and custody if it appears, on the basis of the petition and supporting affidavits, that there is reasonable cause to believe that (1) the child or youth is suffering from serious physical illness or serious physical injury or is in immediate physical danger from the child's or youth's surroundings, and (2) that as a result of said conditions, the child's or youth's safety is endangered and immediate removal from such surroundings is necessary to ensure the child's or youth's safety . . . .

"At a subsequent hearing on an order of temporary custody, the proper standard of proof . . . is the normal civil standard of a fair preponderance of the evidence. . . . We note that [a]ppellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; internal quotation marks omitted.) *In re Kelsey M.*, supra, 120 Conn. App. 542–43.

In order to demonstrate that he was harmed by the court's evidentiary errors, the respondent father must show that it is likely that the outcome of the contested hearing would have been different. See *Prentice* v. *Dalco Electric, Inc.*, 280 Conn. 336, 358, 907 A.2d 1204 (2006) (holding that standard in civil case for determining whether evidentiary ruling was harmful is whether

"ruling [likely] would [have] affect[ed] the result" and citing *Swenson* v. *Sawoska*, 215 Conn. 148, 153, 575 A.2d 206 (1990), as having rejected standard "that would have required treating as harmless error any evidentiary ruling, regardless of its effect upon verdict, so long as evidence not implicated by ruling was sufficient as matter of law to sustain verdict" (internal quotation marks omitted)), cert. denied, 549 U.S. 1266, 127 S. Ct. 1494, 167 L. Ed. 2d 230 (2007). In evaluating the potential effect of the court's evidentiary errors, we remain mindful that it is axiomatic that a prerequisite to a court's entry of a temporary order vesting custody of a child in one other than the child's parents is a finding that the child is *presently* suffering from a serious physical illness or serious physical injury or is in *immediate* physical danger. See *In re J.R.*, supra, 161 Conn. App. 573.

In arguing in her brief that the court's decision to sustain the orders of temporary custody was not clearly erroneous, the petitioner either relies on evidence that we have determined was inadmissible or evidence that fails to demonstrate any immediate need for the removal of the children. Outside of the inadmissible evidence, there is nothing in the record from which the court reasonably could have found that the children presently were in danger of a serious physical injury or illness, or that they were in any immediate physical danger from their surroundings. Even with the hearsay evidence, the petitioner's case was not particularly strong with respect to any immediate need to remove the children from their home. All the evidence of abuse implicated the respondent mother, and the evidence before the court demonstrated that she remained in Puerto Rico. Although there was testimony that the respondent father intended to have the respondent mother return to the residence, there was no evidence that her return was imminent. In our view, without the

improperly admitted hearsay testimony and exhibits, it is likely that the outcome of the hearing would have been different. Accordingly, the evidentiary errors were harmful and a new hearing on whether to sustain the orders of temporary custody is warranted.[26]

The judgments are reversed and the case is remanded for a new contested hearing on the ex parte orders of temporary custody.

In this opinion the other judges concurred.

[26] The respondent father argues on appeal that, even if some or all of the challenged evidence pertaining to the claims of past physical and sexual abuse by the respondent mother properly was admitted and credited by the court, "there is still no proof that, at the time of the removal, the children were in immediate (as opposed to at some time in the past or hypothetically in the future) danger or that it was necessary (as opposed to preferable or even desirable) to remove them." (Emphasis omitted.) See *In re J.R.*, supra, 161 Conn. App. 573 ("finding of *immediate* physical danger is a prerequisite to the court's entry of a temporary order vesting custody of a child in one other than the child's parents" (emphasis added; internal quotation marks omitted)). The respondent father asks us to vacate the ex parte orders of temporary custody and order the children to be returned to his custody.

Although we acknowledge that vacating an ex parte order of temporary custody on concluding that insufficient evidence was presented at a contested hearing to sustain such an order is an appropriate appellate remedy, in evaluating a claim of evidentiary insufficiency, we consider the totality of the evidence that was before the trier of fact, including any evidence claimed to have been improperly admitted by the court. See, e.g., *State* v. *Chemlen*, 165 Conn. App. 791, 818, 140 A.3d 347 ("[A]ppellate review of the sufficiency of the evidence . . . properly includes hearsay evidence *even if such evidence was admitted despite a purportedly valid objection*. Claims of evidentiary insufficiency in criminal cases are always addressed independently of claims of evidentiary error." (Emphasis added; internal quotation marks omitted.)), cert. denied, 322 Conn. 908, 140 A.3d 977 (2016).

Here, because there was evidence admitted at the contested hearing to support the court's findings that the allegations of physical abuse of the children by the respondent mother and of sexual abuse of the children by the respondent mother's boyfriends were serious, that the respondent father intended to have the respondent mother return to the family residence, and that the possibility of the respondent mother's presence or imminent return was not foreclosed by anything in the record, we agree with the petitioner that the respondent father cannot prevail on appeal on a theory of evidentiary insufficiency. The proper remedy in the present case is a new hearing.

TYISHA S. WALLACE *v.* CARING SOLUTIONS, LLC (AC 43975)

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

Syllabus

The plaintiff, a certified nursing assistant, sought to recover damages from the defendant for an alleged violation of the Connecticut Fair Employment Practices Act (CFEPA) (§ 46a-60), for failing to hire the plaintiff, who is hard of hearing, on the basis of her disability. During the hiring interview with S, the owner and administrator of the defendant, the plaintiff asked S to speak up, as she had trouble hearing her. S subsequently asked how the plaintiff would be able to hear her clients and the plaintiff responded that she had no problem communicating with her nonverbal autistic son. The interview continued with no further questions regarding the plaintiff's disability but, instead, focused on the plaintiff's sporadic work history. After the interview, S received a fax containing employment discrimination information from the plaintiff's mother, which S interpreted as a potential threat of litigation. Thereafter, the defendant did not hire the plaintiff. Subsequently, the plaintiff filed her discrimination action with the trial court, which determined that the plaintiff had not proven that the reason she was not hired by the defendant was because of her hearing disability, and that the reasons given by the defendant for not hiring the plaintiff, the gaps in her employment history, her reliability, and the fax sent by her mother, were not due to intentional discrimination. On appeal to this court, the plaintiff claimed, inter alia, that the trial court applied the incorrect legal standard for determining the defendant's liability under CFEPA. *Held*:

1. The plaintiff could not prevail on her claim that the trial court erred in applying the but-for causation standard in reviewing her disability claim pursuant to CFEPA, as the trial court properly applied the motivating factor test as the causation standard, which required the plaintiff to prove only that the illegal discrimination was a cause of the adverse employment action: although the trial court's decision did not state which causation test it applied, the court's use in its memorandum of decision of the phrase "because of," when it stated that the plaintiff had failed to prove that she was not hired because of her hearing disability, was not inconsistent with the court's application of the motivating factor test, as both our Supreme Court and this court have interpreted the phrase "because of" in CFEPA as incorporating the motivating factor test; moreover, the language of the court's memorandum of decision was completely consistent with its application of the motivating factor test, as the court's findings made clear that it concluded that the plaintiff had failed to prove that her hearing disability played any role in the defendant's decision not to hire her and, therefore, was not a

motivating factor, the record having supported the court's conclusion in crediting S's testimony that she decided not to hire the plaintiff because she had concerns about the plaintiff's work history and felt threatened by the fax from the plaintiff's mother.

2. Contrary to the plaintiff's claim, statements in the defendant's pretrial brief alleging that the plaintiff was not hired because of concerns that her hearing impairment could endanger her clients were not judicial admissions: although it is possible that, in certain circumstances, an attorney's unequivocal representations of facts on behalf of his client could constitute a judicial admission, the defendant made no clear, deliberate and unequivocal or voluntary and knowing concessions of fact, and, instead, set forth the arguments it intended to make based on the evidence it expected to be admitted at trial and explicitly referred to those statements as arguments, and those statements constituted, at most, evidentiary admissions that the trial court was free to accept or disregard; moreover, the plaintiff could not prevail on her claim that the court's findings were clearly erroneous in that the court failed to give sufficient weight to the different explanations offered by the defendant for not hiring the plaintiff, as the record sufficiently supported the trial court's finding that the plaintiff had failed to prove that she was not hired because of her disability and the trial court was free to weigh the evidence, consider the parties' credibility, and decide the facts based on all the information, and not just the particular statements on which the plaintiff focused and, accordingly, regardless of the different statements that the defendant made in its pretrial brief, the trial court's finding that the plaintiff failed to prove her discrimination claim was not clearly erroneous.

Argued February 2—officially released July 5, 2022

Procedural History

Action to recover damages for alleged employment discrimination, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Honorable A. Susan Peck*, judge trial referee; judgment rendered for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

James V. Sabatini, with whom, on the brief, was *Zachary T. Gain*, for the appellant (plaintiff).

George C. Schober, for the appellee (defendant).

Opinion

BRIGHT, C. J. The plaintiff, Tyisha S. Wallace, appeals from the judgment of the trial court rendered after

a trial to the court in favor of the defendant, Caring Solutions, LLC. On appeal, the plaintiff claims that the court erred when it rendered judgment for the defendant because the court (1) applied the wrong causation standard to the plaintiff's discrimination claim and (2) failed to find that certain statements in the defendant's pretrial brief were binding judicial admissions and ignored other statements made by the defendant that conflicted with its purported, nondiscriminatory reason for not hiring the plaintiff. We affirm the judgment of the trial court.

The following facts, as found by the court, and procedural history are relevant to our disposition of this appeal. The plaintiff has been hard of hearing since birth and a licensed certified nursing assistant since 2002. "She hears at a level of 40 percent in her left ear and 20 percent in her right ear. . . . She is able to hear with hearing aids and can [also] read lips . . . . She can work as a [certified nursing assistant] provided she wears hearing aids." The defendant provides at-home health care to elderly and disabled individuals "who wish to remain in their homes and need help caring for themselves."

On July 25, 2015, the plaintiff applied for a certified nursing assistant position with the defendant by submitting a preemployment screening form. "At the time of her employment application with the defendant, the plaintiff had sporadic work experience in home health care. . . . When she first became a [certified nursing assistant] in 2002, she worked mainly for nursing pool agencies in nursing homes, including Maximum Healthcare and MGM Healthcare, but these were not listed on either her application or her questionnaire. . . . Her first job as a [certified nursing assistant] was at Avery Heights in April, 2002. . . . In May, 2006, for a period of time, she worked at Kettlebrook. . . . She was fired from Kettlebrook for missing too many days of work.

. . . From January to March, 2012, she worked for Comfort Keepers as a [certified nursing assistant]. . . . From December, 2014 to July, 2015, she worked as a [certified nursing assistant] or home health aide at Interim Health Care, a home health care agency, but ultimately was not able to work the number of hours she had hoped." (Footnote omitted.)

After submitting the prescreening form, the plaintiff received a phone call from Carol Censki, the defendant's human resources administrator, who asked the plaintiff to come in for an initial interview. On July 28, 2015, Censki interviewed the plaintiff and gave her a preemployment exam, which the plaintiff passed. Censki then had the plaintiff complete a formal application for a position with the defendant as either a full-time or part-time caregiver.

On July 30, 2015, the plaintiff returned to the defendant's office for a second interview, this time with Censki and Sandra Sergeant, the owner and administrator of the defendant. "Sergeant is a registered nurse who has worked in hospitals, nursing homes and home health care. . . . She started the defendant home health care company in 2000 with ten employees. . . . She now employs approximately eighty-five people. . . . The defendant provides home health aides for elderly and disabled clients. . . . It is a requirement of the job of a home health aide to be able to hear the clients he/she is serving. . . . Sergeant has interviewed thousands of potential employees. . . . Reliability is an essential qualification for a home health aide. . . . Sergeant evaluates the reliability of potential employees based on their work history. . . . The defendant has hired individuals as home health aides with disabilities and has made reasonable accommodations in the past. . . . The defendant hires and trains some [home] health aides directly out of school and also sometimes hires experienced home health aides for a probationary period."

During the interview, Sergeant questioned the plaintiff about her certified nursing assistant license, her work experience, and several gaps in her employment history. Approximately twenty to twenty-five minutes into the interview, the plaintiff asked Sergeant to speak up and then informed Sergeant and Censki that she was hard of hearing. Sergeant responded by asking the plaintiff how she would hear her clients. The plaintiff replied that "she had a nonverbal autistic child with whom she had no trouble communicating." Sergeant found this explanation plausible. The interview continued for another ten minutes, during which time Sergeant mostly focused on the plaintiff's work history because it was sporadic.

After the interview, Sergeant went to her office to get a business card to give to the plaintiff. While the plaintiff and Censki waited for Sergeant to return, the plaintiff told Censki that she had a really hard time hearing Sergeant. When Sergeant returned, she gave the plaintiff her business card and told the plaintiff to call her. The plaintiff, however, never called Sergeant as requested.

"Following the interview, the plaintiff's feelings were hurt and her self-esteem damaged. . . . She was upset, started crying, and called her mother, Mitzi Treadwell-Green, who is also a registered nurse. . . . Treadwell-Green was 'appalled' and indignant to learn that Sergeant had asked the plaintiff if she was going to hear the clients. . . . She asked the plaintiff for Sergeant's contact information and told the plaintiff that she was going to fax Sergeant some information about discrimination." Thereafter, Treadwell-Green "faxed Sergeant a document in the form of a notice issued by the Connecticut Department of Labor" concerning "[d]iscrimination laws regarding disabilities." Sergeant was shocked to receive the fax and believed it was "some sort of implied threat." The defendant did not hire the plaintiff. Then, on July 13, 2017, the plaintiff filed a

one count complaint alleging that the defendant had violated the Connecticut Fair Employment Practices Act (CFEPA), General Statutes § 46a-60,[1] because the defendant had "failed to hire the plaintiff on the basis of her hearing impairment" and, thus, had "intentionally discriminated against the plaintiff." On August 15, 2018, the defendant filed an answer and special defenses to the plaintiff's complaint. The defendant denied the plaintiff's allegations of discrimination and, as a special defense, pleaded that "[t]he defendant had legitimate nondiscriminatory reasons for not hiring the plaintiff."

A two day trial to the court was held on June 6 and 7, 2019. At trial, Sergeant testified that she initially had concerns about hiring the plaintiff because of her limited work history and the significant gaps in that work history. Although the plaintiff had been a licensed certified nursing assistant since 2002, she had "sporadic work experience in home health care." Given her work history, Sergeant was not confident that the plaintiff would be a reliable employee. Sergeant also testified that receiving the fax further compounded her concerns about hiring the plaintiff. Sergeant also testified that she had hired and accommodated employees with disabilities in the past. According to Sergeant, it was due to her concerns about the plaintiff's reliability and the fax that she received from Treadwell-Green, and not because of the plaintiff's hearing impairment, that she decided not to hire the plaintiff. The court found Sergeant's testimony as to her reasons for not hiring the plaintiff to be credible and persuasive.

The court found that the plaintiff had proven "by a preponderance of the evidence that she is disabled

[1] The plaintiff initially filed a complaint against the defendant with the Commission on Human Rights and Opportunities (commission). Pursuant to General Statutes § 46a-100, the plaintiff obtained a release of jurisdiction from the commission before she filed the complaint at issue in the present case.

within the meaning of CFEPA" and had "established that she is able to perform the essential functions of the job as a home health aide or [certified nursing assistant] with reasonable accommodation in the form of hearings aids." The court also found, however, that the plaintiff "has not proven . . . that the reason she was not hired by the defendant was because of her hearing disability, or that the defendant was unwilling to accept her as an employee with hearing aids as a reasonable accommodation. Rather, the court finds that the reasons given by the defendant for not hiring the plaintiff . . . were not due to intentional discrimination because of the plaintiff's disability." Accordingly, the court rendered judgment for the defendant. The plaintiff appealed.

I

The plaintiff first claims that the court applied the incorrect legal standard for determining the defendant's liability when it concluded that the plaintiff's disability was not the "but-for" cause of the defendant's failure to hire her instead of considering whether her disability was a "motivating factor" in the defendant's hiring decision. The difference between the two tests is significant. Under the but-for test, the plaintiff must establish that the illegal discrimination was *the* cause of the adverse employment action. Under the motivating factor test, the plaintiff must prove only that the illegal discrimination was *a* cause of the adverse employment action. Specifically, the plaintiff argues that CFEPA, properly interpreted, does not require a plaintiff to prove but-for causation. The plaintiff further claims that under the motivating factor test, the court would have been required to render judgment for her because the evidence established that her hearing disability was a cause of the defendant's decision not to hire her. The defendant argues that, pursuant to the United States Supreme Court's decision in *Gross* v. *FBL Financial Services, Inc.*, 557 U.S. 167, 173–78, 129 S. Ct. 2343, 174

L. Ed. 2d 119 (2009), which determined that the but-for test, not the motivating factor test, was appropriate for claims under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 et seq., and, which the United States Court of Appeals for the Second Circuit has since applied to claims arising under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 et seq., the plaintiff must establish but-for causation under the similarly worded CFEPA. Alternatively, the defendant argues that, even if the motivating factor test is applied, it is clear from the court's findings that the plaintiff's disability played no role in the defendant's decision not to hire her. We agree with the plaintiff that the correct causation standard under CFEPA is the motivating factor test. We disagree, however, with the plaintiff's claim that the court failed to apply the motivating factor test in resolving the underlying action.

A

We begin by addressing whether the proper causation standard under CFEPA is the but-for or motivating factor test. Resolving this issue requires us to interpret the provisions of CFEPA to determine the appropriate burden of proof a plaintiff must meet to prove that an employer's adverse employment action was caused by discriminatory conduct. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual

evidence of the meaning of the statute shall not be considered. . . . Because issues of statutory construction raise questions of law, they are subject to plenary review on appeal." (Internal quotation marks omitted.) *Robinson* v. *Tindill*, 208 Conn. App. 255, 264, 264 A.2d 1063, cert. denied, 340 Conn. 917, 265 A.3d 926 (2021).

General Statutes § 46a-60 (b) provides in relevant part: "It shall be a discriminatory practice in violation of this section . . . [f]or an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ . . . any individual . . . because of the individual's race, color, religious creed, age, sex, gender identity or expression, marital status, national origin, ancestry, present or past history of mental disability, intellectual disability, learning disability, physical disability, including, but not limited to, blindness or status as a veteran. . . ." The question we must decide is whether the "because of" language in the statute requires a plaintiff to establish but-for causation, as the defendant contends, or merely that discrimination based on one or more of the enumerated statutory characteristics was a motivating factor in the decision not to hire. Although neither our Supreme Court nor this court has addressed this precise issue, a number of Superior Court and United States District Court decisions have. There is a split of authority among those courts. Compare *Weisenbach* v. *LQ Management*, United States District Court, Docket No. 3:13-CV-01663 (MPS) (D. Conn. September 25, 2015) (motivating factor standard applies to CFEPA claims), and *Wagner* v. *Board of Trustees*, Superior Court, judicial district of Hartford, Docket No. CV-08-5023775-S (January 30, 2012) (same), with *Fasoli* v. *Stamford*, 64 F. Supp. 3d 285, 313 (D. Conn. 2014) (but-for standard applies to CFEPA claims), and *Marasco* v. *Connecticut Regional Vocational-Technical School System*, Superior Court,

judicial district of Waterbury, Docket No. CV-09-5014324-S (October 15, 2012) (54 Conn. L. Rptr. 812) (same), rev'd in part on other grounds, 153 Conn. App. 146, 100 A.3d 930 (2014), cert. denied, 316 Conn. 901, 111 A.3d 469 (2015). To put those decisions and our analysis in the proper context, some history is helpful.

In *Levy* v. *Commission on Human Rights & Opportunities*, 236 Conn. 96, 104–109, 671 A.2d 349 (1996), a case in which the plaintiff asserted a CFEPA claim based on alleged discrimination due to a hearing disability, our Supreme Court discussed the two models used at that time by courts to allocate the burden of proof, and, accordingly, to establish the proper causation standard, in a disparate treatment case under CFEPA: the mixed-motive model and the pretextual model. The mixed-motive model originated in the United States Supreme Court's decision in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 246, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (plurality opinion), wherein a plurality of the court applied the model to a sex discrimination claim under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e et seq. "A mixed-motive case exists when an employment decision is motivated by both legitimate and illegitimate reasons. . . . In such instances, a plaintiff must demonstrate that the employer's decision was motivated by one or more prohibited statutory factors. Whether through direct evidence or circumstantial evidence, a plaintiff must submit enough evidence that, if believed, could reasonably allow a [fact finder] to conclude that the adverse employment consequences resulted because of an impermissible factor. . . .

"The critical inquiry [in a mixed-motive case] is whether [a] discriminatory motive was a factor in the [employment] decision at the moment it was made. . . . Under this model, the plaintiff's prima facie case requires that the plaintiff prove by a preponderance of the evidence

that he or she is within a protected class and that an impermissible factor played a motivating or substantial role in the employment decision. . . .

"Once the plaintiff has established his prima facie case, the burden of production and persuasion shifts to the defendant. [T]he defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken [the impermissible factor] into account." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Levy* v. *Commission on Human Rights & Opportunities*, supra, 236 Conn. 105–106.

In contrast, under the pretextual model, also called the *McDonnell Douglas-Burdine*[2] model, a plaintiff may establish discrimination by inference rather than direct evidence. "Often, a plaintiff cannot prove directly the reasons that motivated an employment decision. Nevertheless, a plaintiff may establish a prima facie case of discrimination through inference by presenting facts [that are] sufficient to remove the most likely bona fide reasons for an employment action . . . . From a showing that an employment decision was not made for legitimate reasons, a fact finder may infer that the decision was made for illegitimate reasons. It is in these instances that the *McDonnell Douglas-Burdine* model of analysis must be employed. . . .

"The plaintiff's burden of establishing a prima facie case is not onerous under this model. . . . The plaintiff need prove only four elements by a preponderance of the evidence: (1) that he or she belongs to a protected class; (2) that he or she applied and was qualified for the position in question; (3) that despite his or her

[2] See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 252–56, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2 668 (1973).

qualifications, the individual was rejected; and (4) that after the individual was rejected, the position remained open. . . . Once a plaintiff has established a prima facie case of discrimination, a presumption of discrimination is created.

"Under the *McDonnell Douglas-Burdine* model, the burden of persuasion remains with the plaintiff. . . . Once the plaintiff establishes a prima facie case, however, the burden of production shifts to the defendant to rebut the presumption of discrimination by articulating (not proving) some legitimate, nondiscriminatory reason for the plaintiff's rejection. . . . Because the plaintiff's initial prima facie case does not require proof of discriminatory intent, the *McDonnell Douglas-Burdine* model does not shift the burden of persuasion to the defendant. Therefore, [t]he defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. . . . Once the defendant offers a legitimate, nondiscriminatory reason, the plaintiff then has an opportunity to prove by a preponderance of the evidence that the proffered reason is pretextual. . . .

"The *McDonnell Douglas-Burdine* analysis keeps the doors of the courts open for persons who are unable initially to establish a discriminatory motive. If a plaintiff, however, establishes a *Price Waterhouse* prima facie case, thereby proving that an impermissible reason motivated a defendant's employment decision, then the *McDonnell Douglas-Burdine* model does not apply, and the plaintiff should receive the benefit of the defendant bearing the burden of persuasion." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 107–109.

In *Levy*, the hearing officer found that the plaintiff was transferred from his position as an out of the area

remote driver "*because of* his hearing disability." (Emphasis in original.) Id., 109. Our Supreme Court held that "[t]his . . . finding, standing alone, is direct evidence of an impermissible motive for transferring the plaintiff. . . . Because we conclude that the plaintiff had produced evidence that [the employer] *was motivated*, *at least in part*, by his disability in deciding to transfer him, we hold that the hearing officer should have used the mixed-motive model of analysis." (Emphasis added; footnote omitted.) Id., 109–10.

Although the court in *Levy* did not discuss the but-for test as a possible alternative to the motivating factor test, its analysis is important to our conclusion. The court clearly applied the motivating factor test to a claim of disability discrimination under CFEPA. Id., 109. Furthermore, it did so explicitly, relying on the hearing officer's finding that the plaintiff was transferred "because of" his hearing disability. Id., 109–10. Thus, the court concluded that the phrase "because of," the precise statutory words at issue in the present case, is consistent with the application of the motivating factor test. Id. Since *Levy*, both our Supreme Court and this court repeatedly have held that the applicable causation standard under CFEPA is the motivating factor test. See, e.g., *Board of Education* v. *Commission on Human Rights & Opportunities*, 266 Conn. 492, 505, 832 A.2d 660 (2003) ("[w]hen a [complainant] alleges disparate treatment, liability depends on whether the protected trait . . . actually motivated the employer's decision" (footnote omitted; internal quotation marks omitted)); *Phadnis* v. *Great Expression Dental Centers of Connecticut, P.C.*, 170 Conn. App. 79, 90–91, 153 A.3d 687 (2017) ("the plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the motivating factors" (internal

quotation marks omitted)). Based on this precedent, it would appear that the motivating factor test is clearly the causation standard that applies to claims of disability discrimination that are brought pursuant to CFEPA.

Nevertheless, the defendant argues that our Supreme Court's analysis in *Levy* is outdated and should be abandoned because it relied on the plurality opinion in *Price Waterhouse* v. *Hopkins*, supra, 490 U.S. 228, which the United States Supreme Court disavowed in *Gross* v. *FBL Financial Services, Inc.*, supra, 557 U.S. 167, and its progeny, as to all discrimination claims except those based on an employee's race, color, religion, sex, or national origin. In *Gross*, the United States Supreme Court considered whether the causation standard under the ADEA was the but-for test or the motivating factor test and determined that the applicable causation standard was the but-for test. See *Gross* v. *FBL Financial Services, Inc.*, supra, 557 U.S. 176–78. The court reached this conclusion by comparing the statutory language of Title VII, which specifically states that the motivating factor test applies to claims brought pursuant to Title VII for discrimination based on race, color, religion, sex, or national origin, to that of the ADEA, which is silent as to the motivating factor test. Id., 176–78. The court then determined that, because "[u]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor"; id., 174; and because the plain language of the ADEA instead uses the phrase " 'because of,' " which means " 'by reason of' " and " 'on account of,' " that "the ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was *the* 'reason' that the employer decided to act." (Emphasis added.) Id., 176. Therefore, on the basis of the ADEA's use of the phrase because of, the court held that "a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by

a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action." Id., 180.

Relying on the court's analysis in *Gross*, the United States Court of Appeals for the Second Circuit recently held that the but-for test also applied to a disability discrimination claim brought pursuant to Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. § 794 (a) through (d). See *Natofsky* v. *New York*, 921 F.3d 337, 347–50 (2d Cir. 2019), cert. denied, U.S. , 140 S. Ct. 2668, 206 L. Ed. 2d 822 (2020). In reaching this conclusion, the Second Circuit first held that, "when a plaintiff alleges an employment discrimination claim under the Rehabilitation Act, the causation standard that applies is the same one that would govern a complaint alleging employment discrimination under the ADA." Id., 345. The Second Circuit then agreed with the defendant that the but-for test applied to claims asserted under the ADA because the United States Supreme Court's decisions in *Gross* and *University of Texas Southwestern Center* v. *Nassar*, 570 U.S. 338, 133 S. Ct. 2517, 186 L. Ed. 2d 503 (2013), effectively overruled cases that had applied the motivating factor test to such claims. *Natofsky* v. *New York*, supra, 347. The Second Circuit then explained at length how the United States Supreme Court's jurisprudence had evolved on this issue. Id., 347–49.

"The mixed-motive test originates from Title VII, which prohibits employment discrimination because of an individual's race, color, religion, sex, or national origin. . . . In 1989, the Supreme Court in *Price Waterhouse* . . . read the prohibition against acting because of a discriminatory motive to mean that an employer cannot take any illegal criterion into account. . . . Thus, a defendant would be liable under Title VII if a plaintiff could demonstrate that discrimination was a

motivating factor in the defendant's adverse employment action. . . . A defendant, however, could avoid all liability if it could prove it would have taken the same action regardless of any impermissible consideration. . . .

"In 1991, Congress amended Title VII and determined that an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice. . . . Congress disagreed that an employer could avoid all liability by proving it would still have taken the same adverse action in the absence of discriminatory motivation. Instead, where an employer could demonstrate that it would have taken the adverse action even in the absence of discriminatory motivation, Congress denied the plaintiff damages and limited the plaintiff's remedies to declaratory relief, injunctive relief . . . and attorney's fees and costs. . . . Even though *Price Waterhouse* and the subsequent 1991 Congressional amendments dealt only with Title VII, the majority of circuit courts, including [the Second Circuit], held that the mixed-motive burden-shifting framework applied equally to other anti-discrimination statutes that employed the because of causation language, including, prior to 2008, the ADA. . . .

"In 2009, the Supreme Court in *Gross* addressed whether Title VII's motivating factor standard applied outside of the Title VII context to claims brought under the [ADEA] which prohibits employers from discriminat[ing] against any individual . . . because of such individual's age. . . . The [c]ourt held that it did not because [u]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. . . . Furthermore, the [c]ourt found that Congress must have

omitted the language intentionally because, at the time it added §§ 2000e-2 (m) and 2000e-5 (g) (2) (B) to Title VII, Congress . . . contemporaneously amended the ADEA in several ways. . . . Examining the text of the ADEA, the [c]ourt concluded that the words because of mean that age was the reason that the employer decided to act. . . . Thus, the [c]ourt held that a plaintiff must prove that age was the but-for cause of the employer's adverse decision—not just a motivating factor. . . .

"In *Nassar*, the Supreme Court revisited the principle defined in *Gross*: that the text of an anti-discrimination statute must expressly provide for a motivating factor test before that test can be applied. The [c]ourt held that even though Title VII permits mixed-motive causation for claims based on the personal characteristics of race, color, religion, sex, or national origin (i.e., status-based discrimination), it does not permit mixed-motive causation for retaliation-based claims. . . . The [c]ourt based its holding on the text and structure of Title VII. . . . It noted that § 2000e-2 (m), which contains the mixed-motive causation provision, mentions just the . . . status-based [factors]; and . . . omits the final two, which deal with retaliation. . . . It also noted that Congress inserted [the mixed-motive test] within the section of the statute that deals only with [the status-based factors], not the section that deals with retaliation claims or one of the sections that apply to all claims of unlawful employment practices. . . . Because, according to the [c]ourt, Title VII has a detailed structure, the [c]ourt could conclude that Congress knew how to word the mixed-motive provision to encompass the anti-retaliation section and intentionally chose not to do so. . . . As a result, Title VII retaliation must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e-2 (m). . . .

"*Gross* and *Nassar* dictate our decision here. The ADA does not include a set of provisions like Title VII's § 2000e-2 (m) (permitting a plaintiff to prove employment discrimination by showing that discrimination was a motivating factor in the adverse decision) and § 2000e-5 (g) (2) (B) (limiting the remedies available to plaintiffs who can show that discrimination was a motivating factor but not a but-for cause of the adverse decision). There is no express instruction from Congress in the ADA that the motivating factor test applies. Moreover, when Congress added § 2000e-2 (m) to Title VII, it contemporaneously amended the ADA but did not amend it to include a motivating factor test. . . . We, therefore, join the conclusion reached by the Fourth, Sixth, and Seventh Circuits that the ADA requires a plaintiff alleging a claim of employment discrimination to prove that discrimination was the but-for cause of any adverse employment action." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Natofsky* v. *New York*, supra, 921 F.3d 347–48.

Relying on the Second Circuit's analysis in *Natofsky*, the defendant argues that we should apply the but-for test to claims brought under CFEPA because CFEPA includes the same "because of" language that federal courts have equated with but-for causation and the statute contains no explicit reference to the motivating factor test. In making this argument, the defendant notes that we regularly look to federal employment discrimination cases when applying CFEPA; see *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 415, 944 A.2d 925 (2008); and further notes that a number of courts have held that Connecticut courts construe disability discrimination claims under CFEPA similarly to how discrimination claims are construed under the ADA. See, e.g., *Hopkins* v. *New England Health Care Employees Welfare Fund*, 985 F. Supp. 2d 240, 255 (D. Conn. 2013) ("[d]iscriminatory claims brought under CFEPA

. . . are construed similarly to ADA claims, with Connecticut courts reviewing federal precedent concerning employment discrimination and retaliation for guidance in enforcing the CFEPA"); see also *Young* v. *Precision Metal Products, Inc.*, 599 F. Supp. 2d 216, 228 (D. Conn. 2009).

As noted previously in this opinion, since the United States Supreme Court's decision in *Gross*, a number of decisions from our Superior Court and the United States District Court for the District of Connecticut have addressed whether the proper test for a claim under CFEPA is the but-for or motivating factor test. In *Vale* v. *New Haven*, 197 F. Supp. 3d 389, 397–400 (D. Conn. 2016), Judge Charles S. Haight, Jr., catalogued those decisions at that time and the rationale for each side of the argument. More recently, in *Soares* v. *Altice Technical Services US, LLC*, United States District Court, Docket No. 3:19-cv-1975 (JBA) (D. Conn. August 6, 2021), Judge Janet Bond Arterton noted: "The Connecticut Supreme Court has not yet decided the issue, but application of the *Gross* rule appears disfavored in Connecticut trial courts." Until now, this court also has not had the opportunity to resolve the issue. The present case gives us that opportunity and, for the reasons that follow, we conclude that, regardless of the United States Supreme Court's decision in *Gross* and the Second Circuit's decision in *Natofsky*, the motivating factor test remains the applicable causation standard under CFEPA.

First, the Connecticut Supreme Court is the ultimate authority on interpreting Connecticut statutes, including CFEPA. See *Johnson* v. *Manson*, 196 Conn. 309, 319, 493 A.2d 846 (1985) ("Connecticut is the final arbiter of its own laws"), cert. denied, 474 U.S. 1063, 106 S. Ct. 813, 88 L. Ed. 2d 787 (1986). Although Connecticut's appellate courts often look to federal precedent regarding employment discrimination for guidance in enforcing our own antidiscrimination laws, we are not bound

by that precedent. See *Curry* v. *Allan S. Goodman, Inc.*, supra, 286 Conn. 415; *Vollemans* v. *Wallingford*, 103 Conn. App. 188, 199, 928 A.2d 586 (2007), aff'd, 289 Conn. 57, 956 A.2d 579 (2008). Moreover, as noted previously, our appellate courts always have applied the motivating factor test to discrimination claims under CFEPA; see, e.g., *Board of Education* v. *Commission on Human Rights & Opportunities*, supra, 266 Conn. 505; *Levy* v. *Commission on Human Rights & Opportunities*, supra, 236 Conn. 109–10; and have continued to do so even after the United States Supreme Court's decisions in *Gross* and *Nassar*. See *Commission on Human Rights & Opportunities ex rel. Arnold* v. *Forvil*, 302 Conn. 263, 278, 25 A.3d 632 (2011) (applying motivating factor test two years after decision in *Gross* in case involving claim of housing discrimination);[3] *Phadnis* v. *Great Expression Dental Centers of Connecticut, P.C.*, supra, 170 Conn. App. 90–91 (applying motivating factor test to pregnancy discrimination claim in 2017 after decision in *Nassar*).

Second, the interpretive rationale that is the underpinning for *Gross*, simply does not apply to CFEPA. The United States Supreme Court's conclusion that the but-for test applies to ADEA claims was based on the fact that Title VII makes explicit reference to the motivating factor test and the ADEA does not. Thus, the Supreme Court concluded that Congress must have intended that the motivating factor test not apply to age discrimination claims under the ADEA and was instead limited to claims under Title VII based on race, color, religion, sex, or national origin. The Second Circuit reached the same conclusion in *Natofsky* as to disability claims under the ADA and the Rehabilitation

[3] The claim in *Forvil* was brought under General Statutes § 46a-64, which prohibits discrimination in public housing accommodation "because of" the same traits that are identified in § 46a-60.

Act for the same reason. Neither of those acts makes any reference to the motivating factor test.

Connecticut's statutory scheme is much different. Unlike at the federal level, where employment discrimination law divides prohibited employment practices among various statutes,[4] the traits protected at the federal level by Title VII, the ADA, and the ADEA are all protected by a single statute in Connecticut, § 46a-60. Thus, although at the federal level, there is a rationale to utilize different causation standards depending on the language of the act involved, the same cannot be said for CFEPA. There is no basis for us to conclude that our legislature intended one causation standard for claims based on race, color, religion, sex, or national origin and a more stringent standard for disability based claims.

Furthermore, although our legislature has amended CFEPA several times since its initial adoption in 1949, it never has sought to alter the causation standard applied by our Supreme Court and this court to discrimination claims brought under the act. CFEPA has always provided that it is a violation of the act for any employer to refuse to hire any individual "because of" any of the listed traits. The legislature has never saw fit to define the phrase "because of." Significantly, it never amended CFEPA to provide a clearer definition of "because of" after our Supreme Court equated it with the motivating factor test in *Levy*. Nor did it provide a different definition of "because of" after the United States Supreme Court equated it with the but-for test in *Gross*. The legislature is presumed to be aware of the decisions of our courts and those of the United States Supreme

[4] More specifically, Title VII prohibits discrimination on the basis of race, color, religion, sex, and national origin; see 42 U.S.C. § 2000e et seq. (2018); the ADEA prohibits discrimination on the basis of age; see 29 U.S.C. § 621 et seq. (2018); and the ADA prohibits discrimination on the basis of physical disability. See 42 U.S.C. § 12101 (2018).

Court. See *Angelsea Productions, Inc.* v. *Commission on Human Rights & Opportunities*, 236 Conn. 681, 693, 674 A.2d 1300 (1996). Had the legislature concluded that our Supreme Court incorrectly interpreted CFEPA as incorporating the motivating factor test, it could have amended the act, before or after *Gross*, to make clear that for a plaintiff to prevail under CFEPA he or she must show that the alleged discrimination was the but-for cause of the adverse employment action. The fact that the legislature has chosen not to do so, despite the many times it has amended CFEPA, including on several occasions since the United States Supreme Court decided *Gross*, confirms for us that it intended the motivating factor test, as set forth in *Levy*, to be the proper causation standard. This conclusion is further buttressed by the fact that our legislature has chosen not to follow the legislative approach taken by Congress of adopting different statutes to address different types of employment discrimination with varying causation burdens. Our legislature's decision to include multiple types of unlawful employment discrimination within a single statutory provision, without setting out distinctive standards for the different types, leads to the logical conclusion that it intended that the same standard of proof be applied to all the types of discrimination set forth in CFEPA.

Accordingly, we are persuaded that the motivating factor test, and not the but-for test, remains the applicable causation standard for claims of discrimination under CFEPA, regardless of the federal precedent established in *Gross* and its progeny.

B

Having concluded that the proper causation standard is the motivating factor test, we turn to the plaintiff's claim that the court failed to apply that test to her CFEPA claim. As stated earlier, the court found that

the plaintiff had not proven "that the reason she was not hired by the defendant was *because of* her hearing disability . . . ." (Emphasis added.) The plaintiff argues on appeal that the court's use of the phrase "because of" indicates that the court incorrectly reviewed the plaintiff's disability discrimination claim according to the but-for causation standard. We disagree.

Whether the court applied the correct legal standard to the parties' claims is a question of law subject to our plenary review. *United Public Service Employees Union, Cops Local 062* v. *Hamden*, 209 Conn. App. 116, 123, 267 A.3d 239 (2021).

Nowhere in the court's memorandum of decision did it state which causation test it was applying. Instead, the court merely stated that the plaintiff could not prevail because she had failed to prove that she was not hired *because of* her hearing disability. As previously discussed, although federal precedent has recently associated the phrase "because of" with the but-for test, the phrase is not inconsistent with a court's application of the motivating factor test.[5] In fact, both our Supreme Court and this court have interpreted the "because of" language of CFEPA as incorporating the motivating factor test.

Moreover, the language of the court's memorandum of decision is completely consistent with its application of the motivating factor test. The court found that the plaintiff "has not proven . . . that the reason she was not hired by the defendant was because of her hearing disability, or that the defendant was unwilling to accept her as an employee with hearing aids as a reasonable

[5] We also note that the court in this case, *Honorable A. Susan Peck*, judge trial referee, has held in other cases that the proper causation standard under the act is the motivating factor test, even in light of the conflicting decision in *Gross*. See, e.g., *Wagner* v. *Board of Trustees*, supra, Superior Court, Docket No. CV-08-5023775-S.

accommodation. Rather, the court finds that the reasons given by the defendant for not hiring the plaintiff . . . were not due to intentional discrimination because of the plaintiff's disability." The court's findings make clear that it concluded that the plaintiff had failed to prove that her hearing disability played *any* role in the defendant's decision not to hire her and, therefore, was not a motivating factor. This conclusion is further supported by the fact that the court credited Sergeant's testimony that she decided not to hire the plaintiff because she had concerns about the plaintiff's work history and felt threatened by the fax from Treadwell-Green, and that her decision had nothing to do with the plaintiff's hearing disability. Accordingly, we conclude that the court applied the correct causation standard to the plaintiff's discrimination claim.

II

The plaintiff's second claim on appeal, although not entirely clear, appears to be twofold. First, the plaintiff claims that the court erred when it refused to find that certain statements in the defendant's pretrial brief were binding judicial admissions. Moreover, the plaintiff further contends that had the court properly considered those statements to be judicial admissions, it would have concluded that the defendant's purported reason for not hiring the plaintiff was pretextual and that the real reason she was not hired was because of her hearing disability. Second, the plaintiff claims that because the defendant gave so many different reasons for why it did not hire the plaintiff, the court's finding that the plaintiff had failed to prove that the defendant failed to hire her because of her hearing disability is clearly erroneous. We are not persuaded by either claim.

The following additional procedural history is relevant to these claims. Over the course of the litigation, the defendant gave several explanations for why it did

not hire the plaintiff. In Sergeant's affidavit in support of the defendant's motion for summary judgment, she attested that the plaintiff "was not hired due to large gaps in her employment history and her evasive answers regarding that employment history," as well as because of the fax that Treadwell-Green sent following the plaintiff's interview. Similarly, in response to an interrogatory submitted by the plaintiff asking the defendant to "[s]et forth in full detail the reason or reasons for not hiring the plaintiff," the defendant stated: "Plaintiff was not hired due to her lack of work history and experience. Plaintiff could not or would not provide an explanation for her lack of work history. Within thirty minutes of leaving the interview, Defendant received, via facsimile, a document with the subject line 'Interviewing Skills' and 'Discrimination Laws Regarding Disabilities From Employers Receiving Federal Funding.' Defendant viewed this facsimile as a threat of litigation from Plaintiff."

In the defendant's pretrial brief, however, the defendant stated that it did not hire the plaintiff because: "Based upon the defendant's interview with the plaintiff, during which the plaintiff was wearing her hearing aids, the defendant believed that the plaintiff would be unable to hear her clients and as such, the defendant believed that the plaintiff could not perform the essential functions of the job." The defendant further stated that "the defendant will show that it needs to protect its clients, and has acted in good faith upon that belief. It is essential that a home health aide be able to hear clients in their homes. An inability to hear a client would place that client at risk and in danger if she needed help. This is a legitimate nondiscriminatory reason for the decision not to hire the plaintiff."

At trial, the plaintiff implored the court to find that the statements in the defendant's pretrial brief concerning the reasons for why the plaintiff was not hired were

binding judicial admissions that the plaintiff's hearing disability was a motivating factor in the defendant's decision not to hire her. The court refused to do so, stating: "The plaintiff's argument that the court should consider a statement in the defendant's pre-trial brief as a judicial admission is without merit. The role of the trial judge in a trial to the court is to decide the facts of the case by a preponderance of the admissible evidence presented in court, not by the arguments of counsel before any evidence is presented." The plaintiff also argued that the court should reject the explanation Sergeant offered at trial in light of the defendant's varying explanations pretrial for its failure to hire the plaintiff. The court clearly rejected this argument because it found Sergeant's trial testimony to be credible and persuasive. We address each claim in turn.

A

We first consider the plaintiff's claim that the statements in the defendant's pretrial brief alleging that the plaintiff was not hired because of concerns that her hearing impairment could endanger her clients were judicial admissions. "Judicial admissions are voluntary and knowing concessions of fact by a party or a party's attorney occurring during judicial proceedings. . . . They excuse the other party from the necessity of presenting evidence on the fact admitted and are conclusive on the party making them. . . . The statement relied on as a binding admission [however] must be clear, deliberate and unequivocal. . . . The distinction between judicial admissions and mere evidentiary admissions is a significant one that should not be blurred by imprecise usage. . . . While both types are admissible, their legal effect is markedly different; judicial admissions are conclusive on the trier of fact, whereas evidentiary admissions are only evidence to be accepted or rejected by the trier. . . .

"In contrast with a judicial admission, which prohibits any further dispute of a party's factual allegation . . . [a]n evidential admission is subject to explanation by the party making it so that the trier may properly evaluate it. . . . Thus, an evidential admission, while relevant as proof of the matter stated . . . [is] not conclusive. . . . The trier of fact is free to give as much weight to [an evidential] admission as, in the trier's judgment, it merits, and need not believe the arguments made regarding the statement by one side or the other." (Internal quotation marks omitted.) *Bowen* v. *Serksnas*, 121 Conn. App. 503, 518 n.12, 997 A.2d 573 (2010); see also *Northeast Builders Supply & Home Centers, LLC* v. *RMM Consulting, LLC*, 202 Conn. App. 315, 338, 245 A.3d 804 ("[f]actual allegations contained *in pleadings upon which the cause is tried* are considered judicial admissions and hence irrefutable as long as they remain in the case" (emphasis in original; internal quotation marks omitted)), cert. denied, 336 Conn. 933, 248 A.3d 709 (2021).

Our standard of review of a trial court's failure to recognize a statement as a judicial admission depends on the issue before the court. Whether a statement in a pleading amounts to a judicial admission involves the interpretation of the pleading, which presents a question of law as to which our review is plenary. Id., 339. Where, however, the claimed judicial admission is a statement made outside of the pleadings, for example a representation by a party's attorney to the court, context surrounding the statement may be important. In such circumstances, "[a] court's determination of whether a particular statement made by a party in litigation is a judicial admission involves a factual determination." *National Amusements, Inc.* v. *East Windsor*, 84 Conn. App. 473, 482, 854 A.2d 58 (2004). In the present case, the alleged judicial admissions were set forth in the defendant's pretrial brief. Although the brief was

not a pleading, it could be argued that any unequivocal concession contained therein is more akin to a concession in a pleading than it is to an oral representation made by counsel and, therefore, should be subject to plenary review. Having said that, argumentative statements in a pretrial brief, like the ones at issue in this case, are part of the advocacy process that should be considered in the context of other positions and representations the party or its counsel has made to the court. Which standard of review we apply here is unimportant because even under a plenary review it is clear that the statements at issue do not qualify as judicial admissions.

Statements made in a party's pleadings are unquestionably judicial admissions. *Northeast Builders Supply & Home Centers, LLC* v. *RMM Consulting, LLC*, supra, 202 Conn. App. 338. For example, if in its answer a defendant admits an allegation pleaded by the plaintiff in its complaint, the defendant is deemed to have admitted the allegation and the plaintiff need not present any evidence to prove the allegation at trial. In the present case, there is no claim that the defendant made such an admission in its answer. As previously noted, the statements in the present case on which the plaintiff relies were made in the defendant's pretrial brief, not in a pleading. Nevertheless, the plaintiff argues that statements made by the defendant's counsel to the court outside of the pleadings can constitute judicial admissions. We agree that it is possible that in certain circumstances an attorney's unequivocal representations of facts on behalf of his client can constitute a judicial admission. See *National Amusements, Inc.* v. *East Windsor*, supra, 84 Conn. App. 483 (court considered but rejected claim that counsel's concession was judicial admission because of context in which concession was made); *Macy* v. *Lucas*, 72 Conn. App. 142, 153, 804 A.2d 971 (court considered whether statements in closing

were judicial admission as to plaintiff's injuries and concluded that "[n]o reasonable view of the defendants' closing argument favors the plaintiff's claim that the defendants made a judicial admission through their statements"), cert. denied, 262 Conn. 905, 810 A.2d 272 (2002). For example, where a defendant's counsel in a pretrial brief or in an opening statement unequivocally concedes that the defendant is liable for the plaintiff's injuries and the only issue in dispute is damages, it is appropriate for the court to treat such a concession as a judicial admission.

In the present case, the defendant made no such "clear, deliberate and unequivocal" or "voluntary and knowing concessions of fact." *Bowen* v. *Serksnas*, supra, 121 Conn. App. 518 n.12. Instead, the defendant set forth the arguments it intended to make based on the evidence it expected to be admitted at trial. Indeed, the defendant prefaced the statements made in its pretrial brief on which the plaintiff relies by explicitly referring to them as arguments, stating that the "[d]efendant will *argue* that it believed that the plaintiff was not qualified to perform the essential functions of the job [and] that the defendant had legitimate business reasons for its failure to hire the plaintiff . . . ." (Emphasis added.) Previewing arguments that a party anticipates making is not the same as clearly and unequivocally stating a fact. The defendant here did the former, not the latter, in its pretrial brief. See *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, P.C.*, 167 Conn. App. 691, 709, 145 A.3d 292 (statements in party's brief were not judicial admissions), cert. denied, 323 Conn. 930, 150 A.3d 231 (2016).

For these reasons, we conclude that the statements the defendant made in its pretrial brief were argumentative in nature and thus constituted, at most, evidentiary admissions that the court was free to accept or disregard. See *Bowen* v. *Serksnas*, supra, 121 Conn. App.

518 n.12 (evidentiary admissions represent question for trier of fact and are not conclusive).

B

We next consider the plaintiff's argument that the court failed to give sufficient weight to the different explanations offered by the defendant for not hiring the plaintiff when it concluded that she failed to prove that her disability was a motivating factor for the decision not to hire her. Essentially, the plaintiff argues that the court's finding that the plaintiff failed to prove that she was not hired because of her hearing disability was clearly erroneous. "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *Commissioner of Transportation* v. *Lagosz*, 189 Conn. App. 828, 841, 209 A.3d 709, cert. denied, 333 Conn. 912, 215 A.3d 1210 (2019).

The plaintiff is correct that the defendant's reasons for why it did not hire her were different over the course of the proceedings. Because of the varying explanations propounded by the defendant, however, it was up to the court to weigh the evidence, to consider the credibility of the parties, and to decide the facts of the case based on all of that information, not just the particular statements on which the plaintiff focuses. See, e.g., *State* v. *Thompson*, 307 Conn. 567, 575, 57 A.3d 323 (2012) ("the weighing of the evidence is the province of the trial court"); *State* v. *Trine*, 236 Conn. 216, 227, 673 A.2d 1098 (1996) ("[t]he determination of a witness' credibility is the special function of the trial court" (internal quotation marks omitted)). The court here did

that and concluded that the plaintiff had failed to prove that "the reason she was not hired . . . was because of her hearing disability." This conclusion was based in large part on the evidence that the defendant presented at trial, including Sergeant's testimony, which the court explicitly credited, that she did not hire the plaintiff because of the gaps in her employment history, apprehensions over whether she would be a reliable employee, and concerns raised by the fax that Treadwell-Green sent after the plaintiff's interview.

Given this testimony, there was evidence in the record to support the court's finding that the plaintiff had failed to prove that she was not hired because of her disability. Thus, regardless of the different statements that the defendant made in its pretrial brief, we cannot say that the court's finding that the plaintiff failed to prove her discrimination claim was clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES EX REL. JULISSA CORTES *v.* MARGARET VALENTIN (AC 43887)

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

Syllabus

The intervening plaintiff C filed a complaint with the plaintiff Commission on Human Rights and Opportunities alleging discrimination in housing against the defendant. The commission filed a complaint in the trial court, claiming that the defendant had engaged in a prohibited discriminatory housing practice pursuant to statute (§ 46a-64c (a) (1) and (3)) by denying C an opportunity to rent or view a rental property and making discriminatory statements about C's ability to rent the property on the basis of a lawful source of income, a voucher pursuant to section 8 of the National Housing Act (42 U.S.C. § 1437f). The defendant, who had

told C that the property was not "section 8 ready," also claimed that C's credit score, which C had reported as "fair," did not meet her requirements. The court rendered judgment in favor of the commission and C, and the defendant appealed to this court. *Held*:

1. The defendant could not prevail on her claim that there was insufficient evidence in the record to support the trial court's conclusion that the defendant violated subdivisions (1) and (3) of § 46a-64c (a):

   a. There was sufficient evidence to support the trial court's conclusion that the defendant had engaged in a prohibited discriminatory housing practice pursuant to § 46a-64c (a) (1): testimony by a previous tenant that he did not provide the defendant with his credit score prior to viewing the property supported the court's finding that the defendant did not have a legitimate, nondiscriminatory reason for failing to show C the rental property; moreover, this court declined to review the defendant's unpreserved challenge to documentary evidence from individuals who had posed as prospective tenants to determine whether her actions toward C were legally actionable and testimony related to those prospective tenants, as she did not make any objections to that evidence or testimony during the trial, and this court declined to assess the weight of the documentary evidence, which was the sole province of the trial court; furthermore, the court determined that the defendant's proffered reason of refusing to allow C to view the rental property because of her credit score was questionable and that, even if the defendant had a legitimate credit score policy, she had applied it in a discriminatory fashion to C, as there was evidence that she did not ask prior tenants without section 8 vouchers for their credit scores prior to showing them the property or accepting rental applications from them.

   b. The trial court's factual finding that the defendant's statement that the rental property "was not section 8 ready" conveyed to an ordinary listener an intent to discriminate against prospective tenants with section 8 vouchers in violation of § 46a-64c (a) (3) was not clearly erroneous; the statement was facially discriminatory, thus, the court was not required to examine the surrounding context or the defendant's intent to determine whether the statement indicated any impermissible inference, and the court considered evidence in the record that the defendant gave applications to, held open houses for and agreed to rent the property to individuals who did not receive section 8 vouchers as well as testimony that it was discriminatory to show a property only to tenants without section 8 vouchers or to decline to rent to section 8 recipients by using coded language.

2. The trial court did not abuse its discretion in awarding C compensatory damages for emotional distress; the court considered C's testimony regarding her emotional pain and suffering, including that the property C eventually rented was inferior and dissimilar to the defendant's rental property and that C's son was required by the location of the new property to attend school in a district in which he experienced bullying.

3. The trial court did not abuse its discretion in denying the defendant's application for a writ of audita querela and denying her motion for reargument and reconsideration of that decision:

a. The trial court did not abuse its discretion in declining to hold a hearing on the defendant's application, the defendant having failed to make the showing necessary of a new matter raisable for the first time after judgment; the issues raised in the application, including whether the defendant had asked a previous tenant for his credit score prior to showing him the rental property, whether C's son experienced bullying at school, whether the defendant had informed C's boyfriend that the rental property was not section 8 ready and the extent of C's physical symptoms of emotional distress, reasonably could have been and were raised and litigated during the trial.

b. The defendant could not prevail on her claim that the trial court abused its discretion in denying her motion for reargument and reconsideration, as she failed to establish that the court overlooked a controlling principle of law, misapprehended relevant facts or otherwise abused its discretion in denying her application for a writ of audita querela.

Argued February 28—officially released July 5, 2022

Procedural History

Action to recover damages for alleged housing discrimination, and for other relief, brought to the Superior Court in the judicial district of Hartford, Housing Session, where the court, *Shah*, *J.*, granted the motion to intervene filed by Julissa Cortes; thereafter, the matter was tried to the court, *Shah*, *J.*; judgment for the plaintiffs, from which the defendant appealed to this court; thereafter, the court, *Shah*, *J.*, denied the defendant's application for a writ of audita querela, and the defendant filed an amended appeal. *Affirmed.*

Margaret Valentin, self-represented, the appellant (defendant).

Pamela A. Heller, with whom were *Jeffrey Gentes*, and, on the brief, *Cullen W. Guilmartin* and *Nicholas M. Varney*, for the appellee (intervening plaintiff).

Margaret J. Nurse-Goodison, human rights attorney, for the appellee (plaintiff).

Opinion

DiPENTIMA, J. The defendant, Margaret Valentin,[1] appeals from the judgment of the trial court, rendered after a trial to the court, in favor of the plaintiff, the Commission on Human Rights and Opportunities (commission), and the intervening plaintiff, Julissa Cortes, in this action alleging housing discrimination in violation of General Statutes § 46a-64c (a). The defendant claims that (1) there was insufficient evidence to support the court's conclusion that she had violated § 46a-64c (a) by engaging in discriminatory housing practices, (2) the court abused its discretion in awarding Cortes compensatory damages for emotional distress and (3) the court (a) improperly failed to conduct an evidentiary hearing prior to denying her application for a writ of audita querela and (b) abused its discretion in denying her motion for reargument and reconsideration of that application. We affirm the judgment of the trial court.

The following facts, as found by the trial court or as otherwise undisputed in the record, and procedural history are relevant. In July, 2016, Cortes' landlord informed her that the property in which she then resided in East Hartford was being sold. In that same month, Cortes sent the defendant a message via the website Zillow to schedule a viewing of the defendant's rental property in East Hartford and inquired whether she would accept a voucher pursuant to section 8 of the National Housing Act (section 8), 42 U.S.C. § 1437f. After receiving no response, Cortes called the defendant to schedule a viewing and indicated that she intended to use a section 8 voucher. The defendant responded that the rental property "was not section 8 ready." Cortes had Victor Irizarry, the father of her three children, call the defendant regarding the rental property. The

[1] The defendant is self-represented in the present appeal. She was represented by counsel during trial and was self-represented during the posttrial proceedings.

defendant told Irizarry that the rental property "wasn't section 8 ready," and that she "just didn't want to deal with the paperwork."

Cortes' section 8 worker referred her to the Connecticut Fair Housing Center (center). Maria Cuerda, a fair housing specialist with the center, called the defendant regarding her refusal to allow Cortes to view the rental property. The defendant informed Cuerda that the rental property would not qualify for section 8, that she had the right to rent to whomever she wanted and that she was not interested in getting the rental property approved for prospective tenants with section 8 vouchers. Cuerda informed the defendant that it constituted a discriminatory housing practice to refuse to rent to prospective tenants on the basis of their intent to use a section 8 voucher. Cortes texted the defendant to request a viewing of the rental property. The defendant responded that, before she could schedule a viewing, she needed additional information, including Cortes' credit score. Cortes replied that she had a "fair" credit score. The defendant told Cortes that her "[c]redit doesn't meet my requirements," and did not provide Cortes with an opportunity to view the rental property. On October 1, 2016, Cortes moved into a different rental property in East Hartford. The defendant rented her East Hartford property to another prospective tenant, Charles Stewart, who did not receive section 8 federal housing assistance and who moved into the rental property on October 1, 2016.

The commission brought an action on behalf of Cortes claiming that the defendant had violated subdivisions (1) and (3) of § 46a-64c (a) by discriminating against Cortes by denying her an opportunity to rent or view the rental property and by making discriminatory statements regarding Cortes' ability to rent the property on the basis of a lawful source of income, her section

8 voucher.[2] Pursuant to Practice Book § 9-18, Cortes filed a motion to intervene as a plaintiff, and the motion was granted by the court.

Following trial, the court issued a memorandum of decision on January 30, 2020, in which it determined that the defendant had violated § 46a-64c (a) (1) and (3), awarded Cortes $7500 in noneconomic damages for emotional distress and ordered the defendant to pay a $5000 civil penalty to the commission. Specifically, as to § 46a-64c (a) (1), the court concluded that the defendant's failure to allow Cortes to rent or view the rental property was on account of Cortes' status as a recipient of a section 8 voucher and therefore constituted a discriminatory housing practice. The court found that the defendant's proffered legitimate reason for not showing Cortes the rental property—that Cortes had not satisfied her credit score criteria—was "unavailing." The court determined that the defendant's reasoning that she would not rent to anyone with a credit score of less than 700 was belied by the fact that the defendant did not know Cortes' actual credit score, but rather only knew that Cortes had described her credit score as being "fair." The court further reasoned that the defendant's "denial of Ms. Cortes is further undercut by her testimony that it was 'irrelevant' to her whether Ms. Cortes had the ability to pay, even if her section 8 voucher covered 100 percent of the rent, because she assumed Ms. Cortes' credit was not up to her 'criteria.' . . . Even if [the defendant] had a legitimate credit score policy, she applied it in a discriminatory fashion to . . . Cortes because [the defendant] never asked

[2] General Statutes § 46a-63 (3) defines " '[l]awful source of income' " as "income derived from Social Security, supplemental security income, housing assistance, child support, alimony or public or state-administered general assistance." See *Lopez* v. *William Raveis Real Estate, Inc.*, 343 Conn. 31, 38 n.5, 272 A.3d 150 (2022) ("[t]he lawful sources of income protected from discrimination by § 46a-64c include section 8 rental subsidies as a form of housing assistance" (internal quotation marks omitted)).

her three prior tenants for their credit score prior to showing or accepting an application from them to rent the home."

The court also concluded that the defendant's statements to Cortes that the rental property "was not section 8 ready" conveyed to an ordinary listener a preference for tenants who did not receive section 8 vouchers in violation of § 46a-64c (a) (3). The court determined that the defendant's proffered reason for having made those statements—that no one could rent the property because the furnace needed repair—was "transparent." The court found that, during the same time period in which the defendant claimed the furnace needed repairs, she gave applications to, held open houses for and agreed to rent the property to prospective tenants who did not receive section 8 vouchers, and the defendant and Stewart both testified at trial that all repairs were completed prior to the move in date of October 1, 2016, that was proposed by Cortes. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that there was insufficient evidence to support the court's conclusion that she had violated subdivisions (1) and (3) of § 46a-64c (a) by engaging in discriminatory housing practices. In furtherance of her argument, she contends that some of the court's subordinate factual findings were clearly erroneous. We are not persuaded.

Section 46a-64c (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section: (1) . . . to refuse to negotiate for the . . . rental of, or otherwise make unavailable or deny, a dwelling to any person because of . . . lawful source of income . . . . (3) To make . . . or cause to be made . . . any . . . statement . . . with respect to the . . . rental of

a dwelling that indicates any preference, limitation, or discrimination based on . . . lawful source of income . . . or an intention to make any such preference, limitation or discrimination. . . .''

We first set forth the standard of review. ''[W]here the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . We also must determine whether those facts correctly found are, as a matter of law, sufficient to support the judgment. . . . Although we give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses . . . we will not uphold a factual determination if we are left with the definite and firm conviction that a mistake has been made.'' (Citations omitted; internal quotation marks omitted.) *Briggs* v. *McWeeny*, 260 Conn. 296, 322, 796 A.2d 516 (2002).

The law applicable to this claim is well established. The court stated that there was direct evidence of discrimination and employed the mixed-motive disparate treatment theory. ''Used in this general sense, disparate treatment simply refers to those cases where certain individuals are treated differently than others. . . . The principal inquiry of a disparate treatment case is whether the plaintiff was subjected to different treatment because of his or her protected status. Under the analysis of the disparate treatment theory of liability, there are two general methods to allocate the burdens of proof: (1) the mixed-motive/*Price Waterhouse* model;[3]

[3] ''This analytical framework has on occasion been referred to as the direct evidence theory of discrimination. The designation of this analysis as direct evidence is misleading. . . . [U]nder the *Price Waterhouse* model, a plaintiff may utilize *both* direct evidence and circumstantial evidence to prove that an employment decision was made because of or motivated by

Price Waterhouse v. *Hopkins*, 490 U.S. 228, 246, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989); and (2) the pretext/*McDonnell Douglas–Burdine* model. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 252–56, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)." (Citation omitted; footnote in original; footnote omitted; internal quotation marks omitted.) *Levy* v. *Commission on Human Rights & Opportunities*, 236 Conn. 96, 104–105, 671 A.2d 349 (1996). "Under *Price Waterhouse*, a plaintiff alleging discrimination must show as part of her prima facie case that she is a member of a protected class and that an impermissible factor motivated the defendant in making the adverse decision. . . . Once the plaintiff has made this showing, the burden then shifts to the defendant to show, by a preponderance of the evidence, that it would have made the same decision even in the absence of the impermissible factor. . . . [I]t is not sufficient for the defendant to show that a legitimate, nondiscriminatory reason would have justified the decision. . . . A defendant may prevail in a mixed motives case only if it can show that it actually was motivated, at the time that the decision was made, by a legitimate reason and that its legitimate reason, standing alone, would have induced it to make the same decision." (Citations omitted; internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Sullivan*, 285 Conn. 208, 228–29, 939 A.2d 541 (2008).

A

The defendant claims that the court's conclusion that she had engaged in a prohibited discriminatory housing practice pursuant to § 46a-64c (a) (1) "lacks the proper

impermissible factors." (Internal quotation marks omitted.) *Levy* v. *Commission on Human Rights & Opportunities*, 236 Conn. 96, 104–105 n.16, 671 A.2d 349 (1996).

and reliable evidentiary support." Specifically, she argues that the court's (1) subordinate factual findings were clearly erroneous, (2) reliance on certain documentary evidence was "impermissible" and (3) ultimate conclusion regarding § 46a-64c (a) (1) was not supported by sufficient evidence. We are not persuaded.

1

The defendant contends that the court's finding that she had not asked her prior tenants for their credit scores before showing them the rental property was clearly erroneous.[4] She argues that the trial testimony of Caleb Vonberg, a prior tenant, indicates that she had discussed credit scores with her prior tenants before showing them the rental property and specifically highlights Vonberg's testimony that he and his wife had signed a form authorizing the defendant to obtain their credit scores. We reject this contention. First of all, the court was not required to credit the testimony of any witness. See *Wall Systems, Inc.* v. *Pompa*, 324 Conn. 718, 741, 154 A.3d 989 (2017) (it is exclusive province of trier of fact to make determinations of credibility, crediting some, all or none of any given witness' testimony). Additionally, even had the court found Vonberg credible with respect to having authorized the defendant to obtain his credit score, this testimony at most reasonably reveals that Vonberg *at some undefined point* provided the defendant with his credit score. Notably, Vonberg further testified that he did not provide the defendant with his credit score prior to viewing

[4] To place this finding in context, the court found unavailing the defendant's proffered legitimate reason, regarding credit scores, for denying Cortes the ability to rent or view the rental property. The court determined that, even if the defendant had such a policy regarding credit scores, she applied it in a discriminatory fashion because the defendant had not inquired as to the credit scores of her three prior tenants, who were not recipients of section 8 vouchers, "prior to showing or accepting an application from them to rent the home."

the property. This testimony supports the court's finding that the Vonbergs were permitted to view the property without providing a credit score, which underlies the court's finding that the defendant did not have a legitimate nondiscriminatory reason for failing to show Cortes the rental property.

2

The defendant's next argument concerns "Rental Test Assignment Forms" (forms), which were admitted as full exhibits at trial. As we interpret her arguments, the defendant raises an unpreserved evidentiary challenge to the admissibility of the forms, which we do not review. She also challenges the reliability of the forms, which argument we reject.

By way of background, the court found that, in an effort to determine if the defendant's refusal to show or rent to Cortes was legally actionable, the center used four individuals called "testers" to pose as prospective tenants and to ask the defendant about the rental property. The center provided each of the four testers with a form. Those forms contained a section labeled "key test information" that each tester was to provide to the defendant, including whether the tester was a recipient of a section 8 housing voucher. The forms contained a narrative description written by the tester detailing the tester's interaction with the defendant regarding the rental property. The testers did not testify at trial, and Erin Kemple, the executive director of the East Hartford Housing Authority, authenticated the forms during her trial testimony. By way of her deposition transcript, which was admitted as a full exhibit at trial, Cuerda explained the testing process as well as the results obtained by the four testers. The court found that the defendant had provided the three testers who posed as prospective tenants without section 8 vouchers with an application, details regarding the application and/or a

viewing of the property. The court also found that the defendant initially told the tester purporting to be a prospective tenant with a section 8 voucher that her $18,000 yearly income was sufficient, but, after that tester informed the defendant of her intent to use a section 8 voucher, the defendant informed that tester that the rental property was not ready, did not provide her with an application and did not offer to allow her to view the rental property.

The defendant argues that the court's reliance on the forms was "tainted and erroneous under the circumstances" and that, because "case law frowns upon credibility assessments based on the cold printed record," it was improper for the court to rely on the forms and the trial testimony of Kemple and the deposition testimony of Cuerda regarding the forms. As best we can discern, the defendant is challenging the admissibility of the forms. We decline to review this unpreserved evidentiary claim regarding the admissibility of the forms and related testimony because the defendant did not make any objections at trial in this regard. See *State* v. *Golding*, 213 Conn. 233, 241, 567 A.2d 823 (1989) ("once identified, unpreserved evidentiary claims . . . will be summarily dismissed"). We note that, although the defendant highlights case law that cautions appellate tribunals that the finder of fact is the best judge of credibility and that it is inappropriate to assess credibility from the cold printed record; see, e.g., *Shelton* v. *Statewide Grievance Committee*, 277 Conn. 99, 111, 890 A.2d 104 (2006); such case law does not prevent a trial court from considering documentary evidence admitted without objection at trial.

The defendant also argues that "there does not appear to be any checks and balances to ensure that the testers are in compliance with the testing guidelines" and points to alleged inaccuracies in the testing forms, including that one tester indicated in one location on

the form that a change in the rental amount was attributable to snow removal while stating in a different location on the form that the defendant had not provided a reason for the change in the rental amount. The defendant, who did not call the testers to testify at trial, cannot prevail on her argument challenging the reliability of the forms. The alleged inaccuracies go to the weight of the forms, and we decline the defendant's attempt to relitigate the case by asking this court to assess the weight of the documentary evidence at issue, which task is within the sole province of the trial court. "The weight given the evidence before it is within the sole province of the trial court." *Dubicki* v. *Dubicki*, 186 Conn. 709, 713, 443 A.2d 1268 (1982).

3

The defendant's argument that there was insufficient evidence to support the court's ultimate conclusion that she engaged in a discriminatory practice in violation of § 46a-64c (a) (1) by refusing to rent or show the property to Cortes because she received section 8 rental assistance is also unavailing. It is undisputed that the defendant did not show Cortes the rental property, and the defendant admitted in her trial testimony that she had informed Cortes that the property "was not section 8 ready." The court did not credit the defendant's proffered reason that she did not allow her to view the rental property because of Cortes' credit score. Cortes testified that, when she inquired about the rental property, the defendant stated that before she could schedule a viewing, she required certain information, including the defendant's credit score. Cortes testified that, when she informed the defendant that her credit score was "fair," the defendant responded that she had guidelines for all renters and that Cortes' credit score did not satisfy those requirements. The defendant testified that she did not rent or show the rental property to Cortes because Cortes' credit score failed to satisfy her

requirements, despite not knowing Cortes' credit score, but only that Cortes had described her credit score as "fair." The defendant was asked on cross-examination: "You never asked for the value of the section 8 voucher, so you could not have considered the value of a voucher, when considering whether or not she should afford to pay the rent, would you agree with me on that?" The defendant responded, "If her credit didn't meet my criteria at that point in time, it was irrelevant for me to even ask her all those other questions." The court did not credit the defendant's explanation that Cortes' credit score did not satisfy her criteria. The court determined that the defendant's explanation that she refused to rent to Cortes on the basis of her credit score was "questionable" because the defendant lacked "any information" with which to make a proper determination regarding Cortes' credit score. The court further determined that, even if the defendant had a legitimate credit score policy, she applied it in a discriminatory fashion to Cortes, as she did not ask her three prior tenants, who did not have section 8 vouchers, for their credit scores prior to showing them the rental property or accepting rental application from them. On the basis of the evidence presented at trial, and the court's discrediting of the defendant's credit score explanation, we conclude that there was sufficient evidential support for the court's determination that the defendant engaged in a discriminatory practice in violation of § 46a-64c (a) (1).

B

The defendant also argues that there was insufficient evidence to support the court's conclusion that the defendant made discriminatory statements in violation of § 46a-64c (3). Specifically, she refers to the court's conclusion that her statement to Cortes that the rental property "was not section 8 ready" indicated a preference for tenants without section 8 vouchers. We are not persuaded.

We begin with the relevant legal principles for determining whether a statement is discriminatory under § 46a-64c (a) (3). In assessing whether a landlord's statement conveys a discriminatory preference, an ordinary listener standard is used. See *Soules* v. *U.S. Dept. of Housing & Urban Development*, 967 F.2d 817, 824 (2d Cir. 1992); see also *Lopez* v. *William Raveis Real Estate, Inc.*, 343 Conn. 31, 47–48, 272 A.3d 150 (2022).

The defendant contends that the court "simply did not have the entire context of the conversation when the discriminatory statement was made to determine the intent behind the statement in order to properly assess how that statement in its actual context would affect an ordinary listener. . . . [T]here was not sufficient evidence established by the plaintiff . . . that reflects the full context of the conversation between the defendant and Cortes as to when the arguably discriminatory statement was made."[5] She contends that her statements that the rental property was "not section 8 ready" did not convey an intent to discriminate against prospective tenants on the basis of a lawful source of income, but rather that the statement was nondiscriminatory and indicated that the rental property needed repairs in order to pass a section 8 inspection.

The court determined that the defendant's statements that the rental property "was not section 8 ready," in

[5] The defendant also argues that, "[t]o the extent that the court is relying on testimony of Cortes it is inconclusive as to what context the statement was made to either Cortes or her children's father. The children's father was not in court to testify. The court was not in the position to assess his credibility over that of the defendant's." Notwithstanding that the court was not required to consider the context of the statements, the defendant could have called Irizarry to testify at trial. Additionally, the court made no assessment as to Irizarry's credibility. Rather, the court credited the testimony of Cortes that the defendant informed Irizarry that the rental property was not section 8 ready and that she did not want to deal with the paperwork. The defendant's testimony that she did not recall speaking with Irizarry did not persuade the court that she had not spoken with him. The defendant did not object to the admission of Cortes' testimony. It is within the sole province

conjunction with testimony from the defendant's own expert, Christine Paisley, regarding the discriminatory nature of such statements "objectively conveys a preference for nonsection 8 renters." We construe the court's determinations in this regard to mean that the defendant's statements were facially discriminatory, which is supported by the record.

In *Lopez* v. *William Raveis Real Estate, Inc.*, supra, 343 Conn. 40–48, our Supreme Court considered the standard for determining whether a statement made in connection with the sale or rental of a dwelling violates § 46a-64c (a) (3). The court concluded that the trial court properly applied the ordinary listener standard when determining whether certain statements made by the defendant's authorized representative in the course of renting an apartment owned by another were discriminatory. Id., 48. The court disagreed with the plaintiff that the court improperly considered the context of the statements and concluded that, because the trial court had determined that the statements of the defendant's authorized representative were not facially discriminatory, it was not improper for the trial court to consider the context of the statements in determining whether they stated a preference with respect to lawful source of income, in violation of § 46a-64c (a) (3). Id. In determining when it was necessary for a trial court to consider the context in which allegedly discriminatory statements are made, the court held that, "when a notice, statement, or advertisement that allegedly violates § 46a-64c (a) (3) is plainly discriminatory on its face, courts need not examine the surrounding context or the speaker's intent to determine whether the statement indicates any impermissible preference, limitation, or discrimination to the ordinary listener. When, however, such a notice, statement, or advertisement is

of the court to make credibility determinations. See *Briggs* v. *McWeeny*, supra, 260 Conn. 322.

not facially discriminatory, courts may consider the context and intent of the speaker to aid in determining the way an ordinary listener would have interpreted it. . . . [T]he ordinary listener inquiry is one of fact." (Footnotes omitted; internal quotation marks omitted.) Id., 47–49. The court determined that, because the trial court had concluded that the statements of the authorized agent were not facially discriminatory, it was not improper for the trial court to consider the context of the statements in determining whether they stated a preference with respect to lawful source of income in violation of § 46a-64c (a) (3). Id., 48.

In the present case, as a result of the facially discriminatory nature of the defendant's statements that the rental property "was not section 8 ready," according to *Lopez*, the trial court "need not examine the surrounding context or the speaker's intent to determine whether the statement indicates any impermissible preference." Id., 47–48. If the defendant believed that the evidence presented at trial failed to convey the entire context of her statements, then she could have presented additional evidence at trial in furtherance of her argument that her statements were not discriminatory, facially or otherwise. She did not do so. Although the court was not required to, it nonetheless examined the context of the defendant's statements and discredited her view of the evidence—that her statements meant that the furnace needed repairs— in light of the evidence presented at trial, including that the defendant gave applications to, held open houses for, and agreed to rent the property to individuals who did not receive section 8 vouchers during the same time frame.

The court's ultimate factual finding, that the defendant's statements that the rental property was "not section 8 ready" conveyed to an ordinary listener an intent to discriminate against prospective tenants with section 8 vouchers in violation of § 46a-64c (a) (3), was not

clearly erroneous. See *Lopez* v. *William Raveis Real Estate, Inc.*, supra, 343 Conn. 49 (ordinary listener inquiry is one of fact). As noted by the trial court, the defendant's expert witness, Paisley, testified that it would be discriminatory for a landlord to show a property only to individuals without section 8 vouchers and to inform those with section 8 vouchers that the property was "not section 8 ready" while making the necessary repairs. Additionally, Kemple testified that it is discriminatory for a landlord to decline to rent to section 8 recipients by using "code," such as saying that a rental unit is not section 8 ready. In light of the supporting evidence in the record, we reject the defendant's argument.

II

The defendant next claims that the court abused its discretion in awarding Cortes compensatory damages for emotional distress. We are not persuaded.

General Statutes § 46a-86 (c) provides in relevant part: "In addition to any other action taken under this section, upon a finding of a discriminatory practice prohibited by section . . . 46a-64c . . . the presiding officer shall determine the damage suffered by the complainant, which damage shall include, but not be limited to, the expense incurred by the complainant for obtaining alternate housing or space, storage of goods and effects, moving costs and other costs actually incurred by the complainant as a result of such discriminatory practice . . . ." Emotional distress damages may be awarded under § 46a-86 (c). See *Commission on Human Rights & Opportunities* v. *Board of Education*, 270 Conn. 665, 705, 855 A.2d 212 (2004). "The assessment of damages is peculiarly within the province of the trier and the award will be sustained so long as it does not shock the sense of justice. The test is whether

the amount of damages awarded falls within the necessarily uncertain limits of fair and just damages. . . . [W]e cannot disturb the decision of the trial court unless there are considerations of the most persuasive character. . . . The trial judge has a broad legal discretion and his action will not be disturbed unless there is a clear abuse. . . . The evidence offered at trial must be reviewed in the light most favorable to sustaining the verdict." (Internal quotation marks omitted.) *Commission on Human Rights & Opportunities ex rel. Arnold* v. *Forvil*, 302 Conn. 263, 283, 25 A.3d 632 (2011).

In making its assessment regarding emotional distress damages, the court considered the factors set forth in *Commission on Human Rights & Opportunities ex rel. Harrison* v. *Greco*, CHRO No. 7930433 (June 3, 1985) pp. 7–8.[6] "Under the *Harrison* analysis, the most important factor of such damages is the subjective internal emotional reaction of the complainants to the discriminatory experience which they have undergone and whether the reaction was intense, prolonged and understandable. . . . Second, is whether the discrimination occurred in front of other people. . . . For this, the court must consider if the discriminatory act was in public and in view or earshot of other persons which would cause a more intense feeling of humiliation and embarrassment. . . . The third and final factor is the degree of the offensiveness of the discrimination and the impact on the complainant. . . . In other words, was the act egregious and was it done with the intention and effect of producing the maximum pain, embarrassment and humiliation." (Internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Cantillon*, 207 Conn. App. 668, 680, 263 A.3d 887 (quoting *Commission on Human Rights & Opportunities* v. *Sullivan Associates*, Superior Court, judicial district of New Haven, Docket Nos. CV-94-4031061-S

[6] The defendant does not contest the applicability of the *Harrison* factors.

and CV-95-4031060-S (June 6, 2011)), cert. granted, 340 Conn. 909, 264 A.3d 94 (2021).

The court credited the testimony of Cortes regarding her emotional pain and suffering. The court found that the property that Cortes eventually rented was inferior and dissimilar to the defendant's rental property, which "was quiet, had a fenced in backyard, newer appliances, and a preferred school district." The court also found that Cortes felt "great distress" because, due to the location in East Hartford of the unit she eventually rented, her son would attend the same school district where he had experienced bullying. The court found the defendant's actions offensive but found the defendant had not intended to inflict maximum pain, embarrassment or humiliation on Cortes and that Cortes was "able to proceed with her life and find a home for her family." The court concluded that an award of $7500 was warranted given the degree of pain, embarrassment and humiliation inflicted.

The defendant argues that the court abused its discretion in awarding Cortes damages for emotional distress because there was insufficient evidence to support the court's finding that the defendant had caused Cortes' emotional distress.[7] She contends that the court improperly based the award on Cortes' testimony alone, and that, in the absence of supporting testimony or medical evidence, the court was left to speculate as to the cause of Cortes' distress as "life in itself is stressful." She further argues that but for Cortes' former landlord selling the property, Cortes would have continued to reside

[7] The defendant also argues that, because there was insufficient evidence for the court to determine that she had violated § 46a-64c, the court abused its discretion in awarding Cortes damages for emotional distress. We concluded in part I of this opinion that there was sufficient evidence to support the court's conclusion that the defendant had violated § 46a-64c (a) (1) and (3).

within the same East Hartford school district in which her son experienced bullying.

The court's award was supported by sufficient evidence. The court credited Cortes' testimony, a determination that we will not disturb. See, e.g., *Mozell* v. *Commissioner of Correction*, 51 Conn. App. 818, 823, 725 A.2d 971 (1999) ("the judge is the sole arbiter of the credibility of witnesses and the weight to be given to their specific testimony" (internal quotation marks omitted)). Cortes testified that the unit she eventually rented was "a last resort . . . my time was running out with the extension for section 8." When asked on direct examination, "How has this entire process affected you, if at all," Cortes explained that the process "put me under a lot of pressure of trying to hurry up and move. I got very stressed out . . . my hair was falling [out]. You know, just the . . . anxiety of that. I had to keep my son in the same school district, had me really bad, and I was crying a lot." It was within the province of the court to draw the reasonable inference from Cortes' testimony that her emotional state was a result of the defendant's discriminatory housing practices. See *Mozell* v. *Commissioner of Correction*, supra, 823 ("[i]t is the right of the trier of fact to draw reasonable and logical inferences from the facts that it finds to be proved" (internal quotation marks omitted)).

We disagree with the defendant's argument that the court's award was speculative or otherwise improper because the court's finding of emotional distress damages relied solely on the testimony of Cortes. "[I]n garden variety emotional distress claims, the evidence of mental suffering is generally limited to the testimony of the plaintiff." (Internal quotation marks omitted.) *Patino* v. *Birken Mfg. Co.*, 304 Conn. 679, 707, 41 A.3d 1013 (2012). In the absence of considerations of the " 'most persuasive character' "; *Commission on Human Rights & Opportunities ex rel. Arnold* v. *Forvil*,

supra, 302 Conn. 283; we cannot determine that the court abused the exercise of its broad legal discretion in awarding emotional distress damages. Giving every reasonable presumption in favor of the correctness of the court's award, we conclude that the trial court did not abuse its discretion when it awarded Cortes compensatory damages for emotional distress.

III

The defendant's final claim challenges the court's denial of her application for a writ of audita querela. She argues that the court abused its discretion in (a) declining to conduct an evidentiary hearing prior to denying her application for a writ of audita querela and (b) denying her motion for reargument and reconsideration.[8] There was no abuse of discretion.

The following additional facts and procedural history are relevant. During the pendency of the present appeal and nearly eleven months after the court's judgment, the defendant filed in the trial court an application for a writ of audita querela in which she requested that the court vacate its judgment on the ground of newly discovered evidence. The defendant attached to her application an affidavit of Stewart in which he stated in contradiction to his trial testimony that the defendant had inquired as to his credit score *prior* to showing him the rental property. The defendant further argued in her application that Cortes had testified falsely at trial both that her son had experienced bullying at

[8] The defendant filed a separate appeal, Docket No. AC 44445, from the court's denial of her application for a writ of audita querela and from the court's denial of her motion for reargument and reconsideration. The appellate clerk treated that appeal as an amendment to the present appeal, Docket No. AC 43887, and disposed of AC 44445. This court granted the motion of the defendant to file a supplemental brief and appendix in the present appeal, which addressed the defendant's claims regarding the court's denial of her writ of audita querela and denial of her motion for reargument and reconsideration.

school and that the defendant had informed Irizarry that the rental property "was not section 8 ready." She attached to her application an affidavit of Irizarry, in which he stated that he is active in his children's lives as he resides with Cortes and their children, that at no time has his son been bullied at school, that both he and Cortes have bad credit, that he did not observe Cortes experiencing any of the physical symptoms she claimed at trial to have suffered, that Cortes did not express concern about not being able to move into the defendant's rental property and that he did not contact the defendant regarding the rental property. In her application, the defendant contended that the issues raised in the affidavits of Stewart and Irizarry were not known to her until after the court had rendered judgment. The court denied the defendant's application. The defendant then filed a motion for reargument and reconsideration in which she argued that the court had misapprehended the law when it denied her application without first holding an evidentiary hearing. The court denied the motion, reasoning that the defendant "claims there are new facts that need to be presented, but she had every opportunity to present any issues at trial and develop all factual issues prior to trial. The court had a full trial on the merits of the underlying case and made the findings it believed were proved at trial." The court further reasoned that the defendant, through her application for a writ of audita querela, was "attempting to retry the case," and that it had denied the writ "because she failed to meet the standard for the granting of such a rare remedy."

A

The defendant argues that the court erred in failing to hold an evidentiary hearing prior to denying her application for a writ of audita querela. Specifically, she contends that during the pendency of the present appeal she "learned of new information that credibly

refutes Cortes' testimony concerning bullying of her son and statements that she claims [were] told by her son's father" and "learned that one of her witnesses . . . Stewart provided false testimony." She further argues that the court erred in making a substantive decision where material facts were in dispute because, "[w]ithout a hearing, the trial court was not in a position to see the witnesses testify and to be able to fully undertake a proper factual finding as required." We are not persuaded.

We begin with our standard of review and relevant legal principles. "We consistently have held that, unless otherwise required by statute, a rule of practice or a rule of evidence, whether to conduct an evidentiary hearing generally is a matter that rests within the sound discretion of the trial court. . . . Under this standard of review, [w]e must make every reasonable presumption in favor of the trial court's action." (Citation omitted; internal quotation marks omitted.) *DeRose* v. *Jason Robert's, Inc.*, 191 Conn. App. 781, 797, 216 A.3d 699, cert. denied, 333 Conn. 934, 218 A.3d 593 (2019).

"The ancient writ of audita querela has been defined as a writ issued to afford a remedy to a defendant against whom judgment had been rendered, but who had new matter in defense (e.g., a release) arising, or at least raisable for the first time, after judgment. . . . Because the writ impairs the finality of judgments, the common law precluded its use in cases in which the judgment debtor sought to rely on a defense such as payment or a release that he had the opportunity to raise before the entry of judgment against him. . . . No authority has been cited to suggest that the writ of audita querela was ever available to present issues which were presented before the entry of the judgment attacked by the writ. . . . The writ of audita querela provides relief from a judgment at law because of *events occurring subsequently* which should cause discharge

of a judgment debtor." (Emphasis added; internal quotation marks omitted.) *Anthony Julian Railroad Construction Co.* v. *Mary Ellen Drive Associates*, 50 Conn. App. 289, 294, 717 A.2d 294 (1998). "Audita querela is a remedy granted in favor of one against whom execution has issued on a judgment, the enforcement of which would be contrary to justice because of (1) matters arising subsequent to its rendition, or (2) prior existing defenses that were not available to the judgment debtor in the original action, or (3) the judgment creditor's fraudulent conduct or circumstances over which the judgment debtor had no control." *Oakland Heights Mobile Park, Inc.* v. *Simon*, 40 Conn. App. 30, 32, 668 A.2d 737 (1995). "Equitable relief is extraordinary and not available as a matter of right, but rather it is within the discretion of the court." (Internal quotation marks omitted.) *Modzelewski* v. *William Raveis Real Estate, Inc.*, 65 Conn. App. 708, 715, 783 A.2d 1074, cert. denied, 258 Conn. 948, 788 A.2d 96 (2001).

The fact that the defendant may have learned of the existence of the additional evidence following the court's rendering of judgment does not suffice for the allowance of a writ of audita querela. Rather, the controlling consideration is whether the moving party could have *raised at trial* the issues presented in the application for a writ of audita querela. See *Oakland Heights Mobile Park, Inc.* v. *Simon*, supra, 40 Conn. App. 33. All of the issues raised in the defendant's application—including whether the defendant had asked Stewart for his credit score prior to showing him the rental property, whether Cortes' son experienced bullying at school, whether the defendant had informed Irizarry that the rental property was not section 8 ready, and the extent of Cortes' physical symptoms of emotional distress—reasonably could have been raised during trial. Because the issues were not raisable *for the first time postjudgment*, but rather were issues that not only

could have been raised, but were actually raised and litigated at trial, a writ of audita querela is inapplicable. "[A] party is not entitled to relief by audita querela when the party has had a legal opportunity to avail him- or herself of the matters of defense set forth in the complaint, or when the injury of which the party complains is attributable to his or her own neglect." 7A C.J.S. Audita Querela § 3 (2022). Because the remedy of a writ of audita querela was not available, the court did not need to resolve the factual issues raised in the application, which was essentially an attempt by the defendant to retry the case. The defendant has not cited to any statute, evidentiary rule or rule of practice mandating her entitlement to an evidentiary hearing when the evidence cited in the application could have been presented at trial. We conclude that the court did not abuse its discretion in declining to hold a hearing on the defendant's application.[9]

B

The defendant claims that the court abused its discretion in denying her motion for reargument and reconsideration. We disagree.

[9] The defendant also argues that the court violated her right to due process when it made factual findings regarding "material disputed issues without a trial." The defendant's argument is misplaced. A trial occurred during which the defendant was afforded an opportunity to be heard at a meaningful time in a meaningful manner on the issues raised in the plaintiffs' complaint. At trial, the defendant presented evidence, cross-examined the plaintiffs' witnesses, and was afforded a reasonable opportunity to present the evidence she now raises in her application. Due to the nature of a writ of audita querela, an issue that reasonably could have been raised at trial is not permitted to be raised by that writ. As such, a writ of audita querela is not to be used to have a second bite at the apple for issues that the defendant reasonably could have raised at trial. Accordingly, the court did not deprive the defendant of her due process right to a fair trial by denying her an opportunity to relitigate the issues raised during trial. "[A] party should not be able to relitigate a matter which it already has had an opportunity to litigate." (Internal quotation marks omitted.) *Ames* v. *Sears, Roebuck & Co.*, 206 Conn. 16, 22, 536 A.2d 563 (1988).

Our review again is deferential. "[A]s with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did. . . . In addition, where a motion is addressed to the discretion of the court, the burden of proving an abuse of that discretion rests with the appellant. . . . [R]eargument is proper when intended to demonstrate to the court that there is some . . . principle of law which would have a controlling effect, and which has been overlooked . . . . Reargument is also meant for situations where there has been a misapprehension of facts. . . . Reargument may be used to address alleged inconsistencies in the trial court's memorandum of decision as well as claims of law that the [movant] claimed were not addressed by the court. . . . [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple or to present additional cases or briefs which could have been presented at the time of the original argument." (Citations omitted; internal quotation marks omitted.) *Carriage House I-Enfield Assn., Inc.* v. *Johnston*, 160 Conn. App. 226, 236–37, 124 A.3d 952 (2015).

The defendant failed to establish that the court overlooked a controlling principle of law, misapprehended relevant facts or otherwise abused its discretion in denying her application for a writ of audita querela. The defendant's attempt to relitigate the issues raised at trial by introducing evidence postjudgment when she had an opportunity to present such evidence at trial amounts to an attempted impermissible second bite of the apple. Accordingly, we conclude that the defendant has not demonstrated that the court abused its discretion in denying her motion for reargument and reconsideration.

The judgment is affirmed.

In this opinion the other judges concurred.