IN RE KATIA V.*
(AC 45026)

Moll, Clark and Vertefeuille, Js.

Syllabus

The respondent mother appealed to this court from the judgment of the trial court terminating her parental rights with respect to her minor child, who had been in foster care since birth. The trial court made the statutory (§ 17a-112 (j) (1)) findings that the Department of Children and Families had made reasonable efforts to reunify the mother with the child and that the mother was unable or unwilling to benefit from those efforts. The mother claimed that the department and the trial court violated her rights under the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.) in determining that the department had made reasonable efforts at reunification, and that the court erred in denying her motions to bifurcate the adjudicatory and dispositional phases of the termination proceedings and to sequester the child's foster parents during trial. *Held*:

1. The respondent mother's challenge to the trial court's finding that the department had made reasonable efforts to reunify her with the child, which was based on her claim that the department and the court had violated her rights under the ADA, was moot; the mother failed to challenge the court's finding that she was unable or unwilling to benefit from the department's reunification efforts, and, because either finding is an independent basis to terminate parental rights, a review of her

* 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.

challenge to the finding that the department had made reasonable efforts to reunify her with the minor child could not have afforded her any practical relief.

2. The trial court did not abuse its discretion by denying the respondent mother's motion to bifurcate the proceedings: it was reasonable for the court to conclude that a unified trial was appropriate because two separate hearings would have undermined the court's interest in judicial economy, as well as the child's interest in the efficient resolution of the proceedings; moreover, there was nothing in the record to indicate that the court improperly considered dispositional evidence in the adjudicatory phase of the trial.

3. The trial court acted within its discretion in denying the respondent mother's motion to sequester the child's foster parents, the mother having failed to provide any basis for such a finding; the motion was neither specific nor supported by evidence, and it failed to establish a likelihood that the foster parents would testify falsely if they were not sequestered.

Argued May 16—officially released August 17, 2022**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Fairfield, Juvenile Matters at Bridgeport, and transferred to the judicial district of Litchfield, Juvenile Matters at Torrington; thereafter, the court, *Aaron, J.*, denied the respondent mother's motion to bifurcate the trial; subsequently, the case was tried to the court, *Hon. Barbara M. Quinn*, judge trial referee; thereafter, the court denied the respondent mother's motion to sequester certain witnesses; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

Lisa M. Vincent, with whom was *Ani A. Desilets*, for the appellant (respondent mother).

** August 17, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Carolyn Signorelli, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Evan O'Roark* and *Jammie Middleton*, assistant attorneys general, for the appellee (petitioner).

Mark S. Weber, for the minor child.

Opinion

VERTEFEUILLE, J. The respondent mother, Karen V., appeals from the judgment of the trial court terminating her parental rights with respect to her minor daughter, Katia V. (Katia). On appeal, the respondent claims that (1) the Department of Children and Families (department) and the court violated her rights under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq. (2018), (2) the court erred by denying her motion to bifurcate the adjudicatory and dispositional portions of the termination proceedings, and (3) the court erred by denying her motion to sequester certain witnesses.[1] We affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of the respondent's appeal. The respondent has four children. Katia is the youngest of the respondent's children, and she was born shortly after her three siblings had entered the custody of the petitioner, the Commissioner of Children and Families.

In 2014, after the respondent gave birth to twins—Katia's middle siblings—she hired a nanny to care for

[1] The respondent also claims that the court erred in failing to sequester counsel for the foster parents, but this claim is not adequately addressed in the respondent's briefs and we deem it abandoned. See *C. B.* v. *S. B.*, 211 Conn. App. 628, 630, 273 A.3d 271 (2022) ("Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.)).

her three children while she was at work. The respondent "did no careful background check of [the] nanny, who had no prior education or experience with young children or in providing day care. Although [the respondent] had surveillance video cameras in her home, she only occasionally spot-checked [the] nanny's performance. . . . After [the] nanny had been in the house for about a year, in March, 2015, [the respondent's oldest child] presented at the end of one school day with a bad burn on her hands, which required medical care. Subsequent to securing treatment, [the respondent] decided to watch a whole block of time on the videotapes she had . . . [and] [s]he discovered to her horror that [the] nanny was physically abusing [her oldest child] throughout the day."

At this time, the department became involved with the family. "As [the department's] investigation continued, it came to light that [the respondent's oldest child] had earlier complained to [the respondent] about the nanny and her physical abuse. [The child] had visible bruises from time to time. Nonetheless, [the respondent] had not acted on [the] child's complaints but dismissed them. [The department] was very concerned about [the respondent's] ability to properly care for her children . . . [and] noted then that [she] was unable to openly admit or recognize the impact of these events on [her oldest child]. . . . Despite apparently understanding that the abuse had been severe, [the respondent] did not comply with the therapeutic case goals for [her oldest child's] treatment, which included her own participation and involvement in [the child's] treatment." After this incident, the department paid for day care services for the respondent's three children. The department also referred the respondent's oldest child to individual counseling and the twins, at that time one year old, to Birth to Three services.

In September, 2015, the day care provider for the respondent's three children "reported [to the department] that [the respondent] cursed at the day care staff and also used vulgar language toward [her oldest child]." In July, 2016, the day care provider reported to the department that "the children attended day care disheveled, dirty and with a foul odor. Their play with each other was [also] seen to be violent, when they would be pulling each other's hair." In approximately September, 2016, another report was made to the department, this time "regarding physical neglect of [the respondent's oldest child]. [The child] was found in the woods behind [the respondent's] condominium by neighborhood children who told a nearby adult. [The child] was returned home by the police, and the department was informed. [The child] reported [that] she had left the home to go to the woods because [the respondent] had been upset and screaming in the house. [The child] had been gone some time, and no one came to look for her. [The department] came to learn that this was not the first time [the child], who was then just over five years old, had gone to the woods alone. [The child] apparently had at least been tacitly permitted to go to the woods behind the condo without adult supervision previously."

In 2016, the department removed the respondent's three oldest children from her care "due to physical neglect and placed them together in foster care. [The department found that the respondent] suffered from unaddressed mental health needs. Those unaddressed needs made her unable to be a competent and safe caretaker for her young children, [the department] alleged.

"Katia . . . was born over a month later. Due to ongoing concerns about [the respondent's] caretaking ability, [the department] removed [Katia] from the hospital at the time of her birth on the ground of predictive

neglect and placed her in a nonrelative foster home apart from the [respondent's] three oldest children." Katia was removed from the care of the respondent pursuant to a court order of temporary custody and was adjudicated neglected.

"At the time Katia came into [foster] care, specific steps were ordered by the court for [the respondent's] rehabilitation. . . . There were two main areas of concern: first, [the respondent's] mental health, [specifically] her debilitating depression, and, second, her resulting inability to be present in the moment for her children to attend to their needs. The specific steps required [the respondent] to take part in counseling and make progress toward the identified treatment goals." (Footnote omitted.) The respondent was also "evaluated multiple times throughout the course of these lengthy proceedings."

In 2016, the respondent completed an eight week parenting course. The first evaluation of the respondent was also completed in 2016, when none of her children was in her care. This evaluation stated that the respondent "was generally good with her children, was a good person and smart." It further stated that, although "[the respondent] wanted to do everything for her children . . . her depression interfered with her ability to parent."

"[The respondent] began her mental health services with a therapist in October, 2016, with whom she remained in treatment until April, 2017. [The respondent] then objected to the fact that [the therapist] reported her general progress to the [department], as he was required to do to demonstrate her compliance with services and her specific steps. [The respondent's] therapist testified to the treatment he provided. He believe[d] [that] he and [the respondent] had made some progress during the time of their sessions. When

questioned about [whether] or not [the respondent's] depression resulted from her trauma in seeing her children abused by their first nanny and [the department's] involvement in her life, his answer was unequivocal. Such adult situational difficulties could not have caused her deep-seated depression, in his opinion. Only unaddressed childhood trauma could have such a negative impact on her functioning. Addressing it adequately, he believed, would take considerable work, which [the respondent] had not yet begun. As time went on, the evidence reveals, [the respondent] was never able to address the underlying causes of her depression, which she remained unwilling to disclose." (Footnote omitted.)

In March, 2017, the respondent completed a "parenting services" program. Upon the respondent's completion of the program, "there was no recommendation for [the respondent] to reunify with her children."

The respondent received treatment from a second therapist from April, 2017, until December, 2017. This therapist "continued the work of [the respondent's] previous therapist in helping [her] to better understand her own childhood experiences and how they connected to her parenting. In addition, one of the therapeutic goals was to help [the respondent] better regulate her emotions, develop awareness of them and employ coping skills for events that proved difficult for her to navigate. [The respondent] also ultimately ended these services, as she felt that the second therapist was too focused on children."

The second and third evaluations of the respondent took place on July 11 and 26, 2017, while she was under the care of her second therapist. The second evaluation stated that "[the respondent] was intelligent, had good common sense and reasoning, was resourceful, and open to new experiences. It was likely that she had a

history of emotional trauma, considering her parents' divorce, her estranged relationship with her brother and her parents' inability to demonstrate affection." The second evaluation concluded that "all of this could have negatively contributed to [the respondent's] problems with emotional attachments." The third evaluation was conducted by court order for the purpose of gaining "a better understanding of [the respondent's] mental health and possible treatment needs." In this evaluation, it was noted that the respondent has been diagnosed with "[u]nspecified [t]rauma" and "[s]tressor [r]elated [d]isorder." The report further noted that the respondent "has a dissociated quality about her that is likely due to her unknown trauma. She also [has] [a]voidant [personality] disorder, which . . . resulted in [the respondent's] having difficulty accepting responsibility for her role in the children's being removed [from her care]." (Internal quotation marks omitted.)

The fourth evaluation of the respondent took place in March, 2018. In this evaluation, it was noted that "[the respondent's] affect was incongruent with what she was saying, such as praising her children but not smiling or having the appropriate tone of voice. Overall, [the respondent] struggled in processing the emotional needs of her children when they were all together. She had difficulty in keeping them integrated and engaged." This evaluation concluded that the respondent "needed to receive individual therapy with a focus on exploring how she perceived her role as a parent and her own abilities to effectively parent her children. She needed to demonstrate her ability to nurture, structure engagement and meet challenges with all of her children in therapeutic and in natural settings. She needed to be able to identify and resolve barriers to demonstrating the above domains and interactions."

In June, 2018, "Katia and [the respondent] began to work on Katia's attachment to [the respondent] through

[a] provider [who assisted] in that work and help[ed] [the respondent] in reading Katia's nonverbal cues. During the summer of 2018, [the respondent's oldest child's] commitment to [the department] was revoked and [one] year of protective supervision was ordered for this child, as she returned home. It was around [this] time that [the department] heard from the provider assisting Katia and [the respondent] that there were concerns about supervision during visits and [the respondent's] poor mental health. In August, 2018, the unsupervised visitation [that the respondent] had with her three younger children was suspended [because the respondent] had left Katia unattended. That unsupervised visitation began again in November of 2018. . . .

"When [the department] filed a permanency plan seeking termination of [the respondent's parental] rights [as] to Katia, further contested litigation ensued with an agreement reached in court [on] May 30, 2019. . . . A crucial provision [of the agreement] was that, over the next six months, a reunification service provider would work diligently with [the department] and [the respondent] to facilitate the reunification of [the respondent's twins] and Katia with [the respondent]. . . . Although the plan was for the twins to be returned to [the respondent] before the start of school that year, they were returned shortly thereafter as problems continued to surface. In November, 2019, [the] commitment [of the twins] to [the department] was revoked with protective supervision ordered. In the meantime, although there had been unsupervised and overnight visitation with Katia, the lack of an attachment between [the respondent] and [Katia] continued to be troublesome to the reunification and visitation supervisors." (Footnote omitted.)

In late 2019, "a higher level of services for the family was recommended. It was to include family therapy for [the respondent] and her twins, as they had been out

of [the respondent's] home for three years upon their return. [The respondent] categorically rejected those services and sought her own family therapy, although [the department] was never able to learn about [it because the respondent] would not sign releases for the information. New services were [also] provided for Katia's and [the respondent's] reunification . . . [but the respondent was] convinced that [the department] deliberately sabotaged her reunification with Katia at this juncture and did not comply with the May court agreement. . . . [The department] determined that Katia and [the respondent] were not ready for reunification . . . [because there was a] lack of attachment between [them that represented] a significant barrier to reunification. [The department] believed that proceeding without additional attachment work between [the respondent] and [Katia] would result in reunification failure and further frustration for [the respondent]. [The department] recommended an additional readiness assessment and, after that had been performed, for the reunification work to begin if that was the recommendation. Four sessions were scheduled for that purpose. . . . [The respondent, however] refus[ed] to cooperate with [the] continued . . . efforts [of the department]. . . .

"Given [the respondent's refusal], the new program was canceled entirely and another program called Theraplay began. This program was designed to assist [the respondent] in forming an attachment with Katia, learning how to pick up on her cues and respond to those cues. The visitation between [the respondent] and Katia was supervised once a week, and there was a second Saturday visit with two hours for each such visit per week. [The respondent] made it clear that she was not going to accept [the department's] supervising the visits, so another service . . . was located to provide [supervision]." The individuals who supervised these

visits noted the respondent's "ongoing difficulty [in] connect[ing] with [Katia], and Katia's resistance to all of [the respondent's] overtures, which were often in themselves distant, inconsistent and not adequately reciprocal. Katia often rejected [the respondent's] attempts at affection and was unwilling to accept them. She would become rigid when they were offered and turn her head away. She would not respond when [the respondent] told her at the end of visits how much she loved her." It was also noted that "there was not a lot of effort made by [the respondent] to engage Katia directly, and attention and praise did not come naturally to her." It was further noted that the respondent's home was an environment that was difficult to manage and chaotic, and that the respondent "was passive during the visits when all four children were present, and she struggled with being assertive."

A fifth evaluation of the respondent was completed in April, 2020. This evaluation concluded that the respondent "continued to have significant clinical depression . . . which persisted, despite . . . the passage of more than four years after Katia was removed from her care in 2016, [and] all of the treatment and support that she had received." This evaluation also found that the respondent's "lack of energy and engagement impacted her ability to parent adequately and, in particular, to parent a young child such as Katia who required structure and engagement."

The respondent began working with a third therapist, with whom she was still working at the time of trial. The respondent's third therapist testified at trial that the respondent "is provided with certain medications for management of her mood, which he oversees. As a result of recommendations in April, 2020, by . . . the court-appointed psychologist evaluator, he has been providing [the respondent with] cognitive behavioral therapy. The objectives in [the respondent's] treatment

with [her third therapist] continue to include identifying issues and cognitive distortions, learning coping skills to reduce trauma, taking medications and learning to effectively manage the symptoms of anxiety and depression associated with trauma."

In addition to the evaluations of the respondent, an evaluation of Katia was also conducted. This evaluation was completed on October 15, 2020, and concluded that "it seems unlikely that [the respondent] could provide what Katia needs in order to successfully transfer her attachment from the foster home to [the respondent's] home if the court decides to reunify Katia with [the respondent]. [The respondent] would need to be open and accepting to input without defensiveness from and about the foster home as well as other professionals. Significant levels of intervention and guidance would be required to facilitate the possibility of a positive developmental trajectory for Katia. Such openness and acceptance of the opinions of others, including professional service providers, has been lacking in the long years of [the respondent's] involvement with [the department]. . . . [The respondent's] ongoing inability to accept any contrary input about her own preconceived opinions and positions has significantly inhibited her ability to make the positive changes needed for Katia's benefit and possible reunification . . . ."

On December 11, 2020, the petitioner filed a petition for the termination of the respondent's parental rights with respect to Katia pursuant to General Statutes § 17a-112. The petitioner alleged that the statutory grounds for termination were that, pursuant to § 17a-112 (j), Katia had been found in a prior proceeding to have been neglected, abused or uncared for, and that the respondent had failed to achieve the degree of personal rehabilitation that would encourage the belief that, within a reasonable time, considering the age and needs

of Katia, the respondent could assume a responsible position in Katia's life.

On March 4, 2021, the respondent filed a motion to bifurcate the adjudicatory and dispositional portions of the proceedings. The respondent's motion was denied by the court, and a unified trial began on March 7, 2021. On March 29, 2021, the respondent filed a motion to sequester witnesses, wherein she sought to have Katia's foster parents "precluded from being present at court during the consolidated termination of parental rights trial." On April 7, 2021, the court denied the respondent's motion.

After the conclusion of the trial, the court issued a detailed, comprehensive memorandum of decision in which it concluded, based on the factual findings set forth previously in this opinion, that the petitioner had established the alleged grounds for termination. In reaching this conclusion, the court found that (1) the department had made reasonable efforts to reunify the respondent with Katia, and (2) the respondent was unable or unwilling to benefit from reunification efforts. Specifically, the court found that the efforts that the department had made to reunify Katia with the respondent were "extraordinary and continued with modifications and attempts to engage her over many years. They included, in summary, case management services, visitation with Katia, mental health and substance abuse services, counseling to assist her in overcoming her barriers to reunification as well as medication to manage the debilitating symptoms of her clinical depression, which defeated [her] parenting efforts. The details of those services demonstrate the lengths to which [the department] went to secure relevant, timely and targeted services for [the respondent]." (Footnote omitted.) The court further found that the respondent was unwilling or unable to benefit from reunification services despite the efforts of the department because

the respondent "was never able to address adequately either her mental health needs or develop the necessary parenting skills to appropriately parent Katia." Additionally, the court determined that it was in the best interests of Katia to terminate the parental rights of the respondent because the respondent, "despite more than four years of services and parenting training, had been unable to form an attachment to her and cannot provide her with the care, structure and nurturing that she requires to be able to thrive and prosper."

The respondent appealed to this court. Additional facts and procedural history will be set forth as necessary.

I

The respondent first claims that the department and the court violated her rights under the ADA. Specifically, the respondent challenges the court's finding that the department had made reasonable efforts to reunify her with Katia pursuant to § 17a-112 (j) (1) on the ground that her rights under the ADA were violated because (1) the court "illegally devalued her use of a highly trained service animal to address symptoms of her lifelong depression," (2) the court issued a decision that "illegally required [her] to 'disclose' and 'address' some unidentified, underlying cause of her mental health disability as a prerequisite to reunification," (3) the court "allowed the [department] to introduce [its] social study as proof of mental health unfitness and relied upon it," (4) the department "never provided any actual opportunity [for her] to reunify with [Katia]," (5) the department "failed to accommodate the unique needs of the [respondent] or [Katia] in the structure, frequency, and duration of visitation," and (6) the court "failed to fairly consider [her] evidence of the foregoing." In response, the petitioner argues, inter alia, that the respondent's first claim is moot and not justiciable

because she "fail[ed] to challenge the second, independent basis for satisfying § 17a-112 (j) (1), namely, the fact that she was unable or unwilling to benefit from reunification efforts," and that failure alone is sufficient to warrant the termination of the respondent's parental rights. We agree with the petitioner.

We begin by setting forth the applicable standard of review and relevant legal principles. "The question of mootness implicates the subject matter jurisdiction of this court and thus may be raised at any time . . . . Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction . . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. . . . A case is considered moot if [the] court cannot grant the appellant any practical relief through its disposition of the merits . . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way. . . . Our review of the question of mootness is plenary." (Citations omitted; internal quotation marks omitted.) *Wozniak* v. *Colchester*, 193 Conn. App. 842, 853, 220 A.3d 132, cert. denied, 334 Conn. 906, 220 A.3d 37 (2019).

"[A]s part of a termination of parental rights proceeding, § 17a-112 (j) (1) requires the department to prove by clear and convincing evidence that it has made reasonable efforts to locate the parent and reunify the child with the parent, unless the court finds . . . that the parent is unable or unwilling to benefit from reunification efforts . . . . Because the two clauses are separated by the word unless, [§ 17a-112 (j) (1)] plainly is written in the conjunctive. Accordingly, the department must prove either that it has made reasonable efforts to reunify or, alternatively, that [the respondent] is unwilling or unable to benefit from reunification efforts.

Section 17a-112 (j) clearly provides that the department is not required to prove both circumstances. Rather, either showing is sufficient to satisfy this statutory element. . . .

"Accordingly . . . when . . . the trial court finds that the department has proven both statutory elements—the department made reasonable reunification efforts and the respondent was unable to benefit from them—the respondent's failure to challenge both findings on appeal renders the appeal moot because either one constitutes an independent, alternative basis for affirming the trial court's judgment." (Citation omitted; footnote omitted; internal quotation marks omitted.) *In re Elijah C.*, 326 Conn. 480, 493–94, 165 A.3d 1149 (2017).

In the present case, the court concluded in its memorandum of decision that (1) the department had made reasonable efforts to reunify the respondent with Katia, and (2) the respondent was unable or unwilling to benefit from reunification efforts. On appeal, however, the respondent has challenged only the finding of the trial court that the department had made reasonable efforts to reunify her with Katia. The respondent, therefore, has failed to challenge the second, independent basis for satisfying § 17a-112 (j) (1)—that she was unable or unwilling to benefit from reunification efforts. This fact is determinative in the disposition of this appeal. Therefore, because the respondent in the present case has failed to challenge the finding of the court that she was unable or unwilling to benefit from reunification efforts, we conclude that her claim is moot.

II

The respondent next claims that the court erred by denying her motion to bifurcate the proceedings because it "conflat[ed] the statutory grounds of failure to rehabilitate and no ongoing parent-child bond

. . . .” In response, the petitioner argues that the court did not abuse its discretion because “there were sound reasons for the court to hear the evidence on the dispositional and adjudicatory phases together instead of bifurcating them.” We agree with the petitioner.

On March 4, 2021, the respondent filed a motion to bifurcate, claiming that “[t]here is an unusual and significant risk of prejudice to the [respondent] if the adjudicatory and dispositional portions of the trial are not bifurcated.” The respondent’s motion was denied by the court, and a unified trial began on March 7, 2021. The respondent claims on appeal that “[t]he denial of [her] motion to bifurcate constituted an abuse of discretion which [prevented her] from obtaining a fair trial . . . .” Specifically, the respondent argues that the court “improperly considered dispositional issues in the adjudicatory phase.” We disagree.

We begin with the applicable legal principles and standard of review. “A hearing on a petition to terminate parental rights consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the trial court determines whether one of the statutory grounds for termination of parental rights exists by clear and convincing evidence. If the trial court determines that a statutory ground for termination exists, it proceeds to the dispositional phase. In the dispositional phase, the trial court determines whether termination is in the best interests of the child. . . . A petition to terminate parental rights consists of two phases. . . . It is not necessary, however, that the two phases be the subject of separate hearings. One unified trial . . . is permissible. . . .

“Our standard of review of a court’s decision to bifurcate a termination of parental rights hearing is well settled. The decision whether to bifurcate a termination

of parental rights proceeding lies solely within the discretion of the trial court. . . . In reviewing claims that the trial court abused its discretion the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness; the ultimate issue is whether the court could reasonably conclude as it did . . . .'' (Citations omitted; internal quotation marks omitted.) *In re Deana E.*, 61 Conn. App. 197, 204–205, 763 A.2d 45 (2000), cert. denied, 255 Conn. 941, 768 A.2d 949 (2001); see also Practice Book § 35a-7 (b).

In the present case, in light of our review of the record, we conclude that there is no basis to support a finding that the court abused its discretion by denying the respondent's motion to bifurcate and conducting a unified hearing. It was reasonable for the court to conclude that a unified trial was appropriate because two separate hearings would have undermined the court's interest in judicial economy, as well as Katia's interest in the efficient resolution of these proceedings. Moreover, there is nothing in the record to indicate that the court improperly considered dispositional evidence in the adjudicatory phase. Therefore, we conclude that the court did not abuse its discretion by denying the motion to bifurcate.

III

The respondent's final claim is that the court erred by denying her motion to sequester certain witnesses during the trial. We disagree.

Prior to trial, the respondent filed a motion to sequester, wherein she sought to have Katia's foster parents ''precluded from being present at court during the consolidated termination of parental rights trial . . . .'' In the motion, the respondent stated that she intended to call the foster parents as witnesses and argued that ''it would be prejudicial to her case to have [them]

participate in [the] trial." Specifically, the respondent argued that the presence of the foster parents at the trial would be prejudicial because (1) "she [did] not consent to their receipt of any confidential information about her own physical, mental or emotional health or well-being," and (2) they may receive "information to which they are not already privy." On April 7, 2021, the court denied the respondent's motion.

We next set forth the applicable standard of review and relevant legal principles. "[T]ermination of parental rights cases are juvenile proceedings . . . that constitute a civil inquiry. . . . In a civil proceeding, a court has the discretion to sequester any witness, including a party, if (1) seasonably requested, (2) specific and supported by sound reasons, and (3) false corroboration would probably result." (Citations omitted; internal quotation marks omitted.) *In re Christopher A.*, 22 Conn. App. 656, 663, 578 A.2d 1092 (1990); see also *State* v. *Pikul*, 150 Conn. 195, 201, 187 A.2d 442 (1962). "Sequestration of witnesses . . . is not demandable as a right, but rests in the discretion of the trial court. . . . The court's action is subject to review and reversal for abuse of discretion. . . . In reviewing whether there was an abuse of discretion, every reasonable presumption in favor of the trial court's ruling must be made." (Citation omitted; internal quotation marks omitted.) *Cirinna* v. *Kosciuszkiewicz*, 139 Conn. App. 813, 825, 57 A.3d 837 (2012).

In the present case, the respondent argues that the court abused its discretion by denying her motion to sequester Katia's foster parents because she had established, at the time the motion was heard, that there was a reasonable probability that they would (1) "falsely corroborate what some other witnesses testified to," and (2) testify falsely based on "all of the protected health and private information about [her] . . . ." The respondent, however, did not provide any support or

evidence for her motion beyond these bald claims. As previously set forth, the court *may* sequester a witness if the request is specific and supported by sound evidence and it is likely that false corroboration will result. See *In re Christopher A.*, supra, 22 Conn. App. 663. In light of our review of the record, we find that there is no basis for concluding that the court abused its discretion by denying the respondent's motion to sequester because the respondent failed to provide any basis for such a finding. The respondent's motion was neither specific nor supported by evidence. It failed to establish a likelihood that the foster parents would testify falsely if they were not sequestered. Therefore, we conclude that the court acted within its discretion in denying the respondent's motion to sequester.

The judgment is affirmed.

In this opinion the other judges concurred.

DEUTSCHE BANK AG *v.* CAROLINE VIK ET AL.
(AC 44586)

Elgo, Clark and Lavine, Js.

Syllabus

The plaintiff bank sought to recover damages for alleged tortious interference with business expectancy and violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.), for the defendants' actions in connection with the plaintiff's attempt to collect amounts owed to it by S Co., which the plaintiff alleged was a shell company controlled by the defendant A. The plaintiff sought to enforce a judgment it previously obtained against S Co. in a different jurisdiction and alleged that the defendants deliberately interfered with a court-ordered sale of certain assets to satisfy that judgment by fabricating a document purporting to grant the defendant C the right of first refusal to acquire the asset, shares in a software company. The trial court denied the defendants' motion to dismiss the plaintiff's complaint, in which they claimed that the court lacked subject matter jurisdiction because the plaintiff's allegations arose out of communications made and actions taken in past judicial proceedings and were thus barred by the litigation privilege. On the defendants' appeal to this court, *held*:

1. The trial court erred in denying the defendants' motion to dismiss the plaintiff's claim for tortious interference with business expectancy, as the claim was predicated on communications made during and relevant to prior judicial or quasi-judicial proceedings: multiple paragraphs of the plaintiff's complaint included allegations concerning the defendants' participation in or commencement of legal actions or appeals, and the fact that the plaintiff characterized the defendants' alleged legal actions as conduct that was meritless, frivolous or an abuse of the legal system did not bring the conduct within the limited exception to the litigation privilege, as the cause of action of tortious interference does not challenge the purpose of the underlying litigation procedure; moreover, the plaintiff could have pursued other remedies to address the defendants' claimed abuses, including an abuse of process or vexatious litigation claim, but chose not to do so.
2. The trial court erred in denying the defendants' motion to dismiss the plaintiff's claim asserting a violation of CUTPA; the plaintiff's claim, premised largely on the defendants' alleged communications and conduct in prior judicial proceedings, including the alleged introduction of false and/or fabricated evidence and the alleged filing of false and/or frivolous actions and appeals, closely resembled CUTPA claims that courts in Connecticut consistently have held are barred by the litigation privilege.
3. Although the plaintiff's complaint included allegations unrelated to communications in the course of judicial proceedings, the litigation privilege barred those claims, as the complaint was permeated with allegations pertaining to the defendants' communications and participation in prior judicial proceedings, which were both central to the plaintiff's claims and inextricably intertwined with the allegations of extrajudicial conduct.

Argued February 14—officially released August 23, 2022

Procedural History

Action to recover damages for, inter alia, violation of the Connecticut Unfair Trade Practices Act, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Edward T. Krumeich II*, judge trial referee, denied the defendants' motion to dismiss, and the defendants appealed to this court. *Reversed*; *judgment directed.*

Monte E. Frank, with whom was *Johanna S. Katz*, for the appellants (defendants).

Thomas D. Goldberg, with whom were *John W. Cerreta* and *Jennifer M. Palmer*, and, on the brief, *Michael*

Schoeneberger, *David G. Januszewski*, and *Sheila C. Ramesh*, pro hoc vice, for the appellee (plaintiff).

Opinion

CLARK, J. The defendants, Alexander Vik (Alexander) and Caroline Vik (Caroline), appeal from the judgment of the trial court denying their motion to dismiss, in which they asserted that the claims brought by the plaintiff, Deutsche Bank AG, were barred by the litigation privilege. On appeal, the defendants claim that the court improperly concluded that the litigation privilege does not bar the plaintiff's claims of tortious interference with business expectancy and violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. We agree and, accordingly, reverse the judgment of the trial court.

For purposes of this appeal, we take the facts as alleged in the complaint as true and construe them in a manner most favorable to the pleader. See *Tyler* v. *Tatoian*, 164 Conn. App. 82, 84, 137 A.3d 801, cert. denied, 321 Conn. 908, 135 A.3d 710 (2016). The plaintiff's complaint is comprised of 173 paragraphs of allegations relating to its long running attempt to collect on amounts owed to it by nonparty Sebastian Holdings, Inc. (SHI). The plaintiff alleges that SHI is a shell company, which until 2015, was solely owned and controlled by Alexander. Despite transferring his shares in SHI and resigning from its board of directors, Alexander continues to dominate and control SHI today. Since 2008, when SHI first became indebted to the plaintiff, Alexander, with other entities and individuals acting on his behalf, allegedly has employed various tactics to obstruct the plaintiff's collection efforts. These include, inter alia, concealing assets, fabricating documents, and undertaking fraudulent transfers. The plaintiff alleges that, in 2013, the Commercial Court, Queen's Bench Division of the High Court of Justice of England and

Wales (English court) rendered a judgment ordering SHI to pay amounts due to the plaintiff (English judgment) and finding that Alexander had fabricated evidence and lied under oath. With interest, the plaintiff alleges that the amount of the English judgment now exceeds $300 million.

At all times, SHI has claimed that it lacks sufficient assets to satisfy the English judgment. The plaintiff alleges that, since 2013, it has vigorously sought to enforce the English judgment by undertaking a global enforcement effort, including the filing of actions in Connecticut, New York, Delaware, Pennsylvania, the United Kingdom, and Norway. Certain of these enforcement actions sought judgments declaring Alexander personally liable for the English judgment as SHI's alter ego. The complaints in those actions also detail Alexander's long history of shuffling and concealing assets from the plaintiff.

The plaintiff alleges that, in 2008, SHI found itself facing hundreds of millions of dollars in losses arising from, among other things, risky trading on margin in the foreign exchange market. As a result of these losses, SHI faced margin calls from its prime broker, the plaintiff. Knowing that SHI faced large losses, the plaintiff alleges that, in October, 2008, Alexander caused SHI to transfer approximately $1 billion worth of assets out of SHI. As a result of the October, 2008 transfers, the plaintiff alleges that Alexander falsely claimed that SHI had insufficient assets, leaving the plaintiff with an unpaid debt of more than $235 million. The present action concerns one such asset: shares in a Norwegian software company, Confirmit AS (Confirmit). To that end, the plaintiff alleges that, in 2008, Alexander wrongfully caused SHI to transfer the shares in Confirmit to his personal account in order to keep those shares beyond the plaintiff's reach.

The plaintiff further alleges that the English court found that the shares of Confirmit were one portion of the approximately $1 billion of assets that Alexander drained from SHI to avoid paying the plaintiff the amount it is owed. The plaintiff claims that, in 2015, Alexander again purported to transfer those same shares, this time to his father, Erik Martin Vik (Erik), while the shares were the subject of litigation with the plaintiff. The plaintiff alleges that it sought an execution lien on the Confirmit shares in 2016. Following a lengthy legal battle, which included a full trial and appeals to the Norwegian Supreme Court, the plaintiff alleges that the Oslo Court of Probate, Bankruptcy, and Enforcement (Oslo enforcement court) invalidated both the 2008 and 2015 transfers of Confirmit shares. As a result, the shares reverted to SHI and were thus subject to enforcement. In April, 2016, the plaintiff filed a petition with the Oslo enforcement court to execute a lien on the Confirmit shares, which was ultimately granted by the court. On March 8, 2017, the plaintiff filed a petition seeking a forced sale of the Confirmit shares. Following a two year postponement due to the pendency of appeals regarding the execution lien, the plaintiff submitted a request to continue the enforcement process of the Confirmit shares on May 27, 2019. The plaintiff alleges that, on June 12, 2019, the enforcement officer issued a decision to commence the sale, and, on July 8, 2019, named nonparty ABG Sundal Collier ASA (ABG) as the sales assistant for the forced sale. Rather than allow the sale of Confirmit shares to proceed, the plaintiff alleges that the defendants and related parties engaged in a series of maneuvers designed to inject doubt and uncertainty into the sales process. The plaintiff alleges that these tactics included manufacturing false evidence, submitting a bad faith bid by Alexander to acquire Confirmit, and, importantly for present purposes, commencing frivolous legal actions and appeals.

The plaintiff alleges that, among the most egregious of these tactics, is the defendants' fabrication of a document purporting to grant Alexander's daughter, Caroline, a right of first refusal to acquire the Confirmit shares (ROFR). The plaintiff alleges that, upon information and belief, the ROFR was forged and backdated to enable the defendants to interfere with the court-ordered sale of Confirmit. With this allegedly false document in hand, the plaintiff alleges that Caroline proceeded to commence litigation in the United States District Court for the District of Connecticut against ABG seeking to enjoin the Confirmit sale midway through the bidding process. The District Court granted an ex parte temporary restraining order (TRO), and subsequently, with the consent of the parties, kept the TRO in place until December 6, 2019, pending a decision on Caroline's application for a preliminary injunction. The plaintiff alleges that, "[d]uring the proceedings in the District Court, [Alexander] submitted two affidavits in support of [Caroline's] application for an injunction. Those affidavits describe how [Alexander] personally attempted to participate in the Confirmit sales process and state that he had contacted ABG so that he could be considered a potential buyer in the process." After the District Court denied her application for a preliminary injunction on December 4, 2019, the plaintiff alleges that Caroline voluntarily dismissed her "frivolous action." The plaintiff alleges that two days later, on December 6, 2019, Caroline filed a separate but substantially similar petition for a preliminary injunction with the Oslo enforcement court, asking the court to stop any sale of the Confirmit shares that did not respect the ROFR agreement.

In support of its tortious interference with business expectancy claim, the plaintiff incorporates by reference the aforementioned allegations and further

alleges, inter alia, that the defendants brought "frivolous," "meritless," or "baseless" legal claims or appeals in an effort to undermine or reverse the sale of Confirmit sales. The plaintiff further alleges that the English judgment formed a business relationship between the plaintiff and SHI insofar as the English court determined that SHI owed the plaintiff $235,646,355. The plaintiff alleges that it has sought to realize this business expectation by enforcing the English judgment in various jurisdictions, including in Connecticut. The plaintiff alleges that Caroline's lawsuits in Connecticut federal court and Norway were "timed specifically to interfere with the forced sale of the Confirmit shares and the business expectations of [the plaintiff]. . . . The execution and attempted enforcement of [Caroline's] sham ROFR on which she based her requests for an injunction was for the sole purpose of interfering with the forced sale of Confirmit, and had no proper purpose or justification." Among other allegations, the plaintiff alleges that "[Alexander] is the decision maker behind other nonparties' actions relating to Confirmit. This includes the continuous stream of meritless legal action that [Erik] . . . on behalf of SHI . . . ha[s] filed in Norway." The plaintiff alleges that "[the] interference with the business of Confirmit, whether through manipulating the board of directors or prolonging the enforcement lien with adverse effects, is cumulative, and the ongoing legal battles are similarly detrimental." The plaintiff alleges that, as a result of the defendants' intentional interference with the plaintiff's business relationships and expectations, the market value of the Confirmit shares dropped from $150 million to $65 million.

In support of its CUTPA claim, the plaintiff incorporates all of its allegations in support of its tortious interference claim and, additionally, alleges that SHI's persistent refusal to pay the English judgment has forced the plaintiff to pursue multiple actions across

various jurisdictions to enforce it. The plaintiff alleges that the defendants engaged in unfair methods of competition and unfair and deceptive acts to interfere with the sale of the Confirmit shares by filing for injunctions in both Connecticut and Norway on the false premise that Caroline genuinely sought to exercise her purported ROFR. The plaintiff further alleges that Alexander attempted to use the bidding process for the Confirmit shares to gather confidential information about the sales process and had no intention of following through on a legitimate bid. It alleges that "[Alexander] and his associates have targeted Confirmit, interfering with its business through the intentional prolonging of the enforcement lien and uncertainty of the company's ownership as well as through their continued and obstructionist litigation." The plaintiff alleges that the defendants' "conduct . . . constitutes a reckless indifference to and/or an intentional and wanton violation of [the plaintiff's] rights."

On October 22, 2020, in response to the plaintiff's complaint in the present case, the defendants filed a motion to dismiss the action on the basis of the litigation privilege. The defendants argued, inter alia, that the court lacked subject matter jurisdiction because the plaintiff's allegations arise out of communications made and actions taken in past judicial proceedings and are thus barred by the litigation privilege. On December 18, 2020, the plaintiff filed its opposition to the defendants' motion, arguing that there is no colorable basis for the court to dismiss the complaint in its entirety and that the motion should be denied.

On March 11, 2021, the court issued its memorandum of decision denying the defendants' motion to dismiss. It concluded, inter alia, "[t]hat part of the alleged misconduct included filing sham lawsuits and meritless appeals does not immunize [the] defendants' alleged conduct because the claims themselves are decidedly

different than a defamation claim. The claims do not concern how the cases were litigated, or the words used in communications by litigants or advocates, but that the sham cases themselves were commenced and maintained as part of a multifaceted scheme to avoid enforcement of the judgment. These claims are not akin to a defamation or fraud claim that focuses on communication of false information in the prosecution or defense of a lawsuit, but rather they allege improper use of the judicial system for purposes not intended to further the course of justice but rather to pervert the course of justice." In short, the court stated that the "underlying purpose of absolute immunity does not apply just as equally to the claims alleged as it does to the tort of defamation; the claims alleged are not more like defamation than vexatious litigation, but rather share more with vexatious litigation, malicious prosecution and abuse of process as a perversion of justice in support of objectives largely based on conduct outside the courtroom designed to achieve aims not consistent or achievable with lawful judicial remedies." This appeal followed.

The defendants argue that the trial court erroneously concluded that the litigation privilege does not bar the plaintiff's tortious interference and CUTPA claims. They contend that the court (1) misapplied binding authority that makes clear that the plaintiff's claims are subject to the protection of the litigation privilege, (2) erroneously determined that the plaintiff's allegations fell within the abuse of process exception to the privilege, despite the plaintiff not pleading an abuse of process claim, and (3) failed to recognize that the public policy behind the litigation privilege applies with equal force to the allegations in the plaintiff's complaint, regardless of the plaintiff's allegations that the past

litigations were "meritless." For the reasons that we discuss herein, we agree with the defendants.[1]

We first set forth our standard of review. We review the trial court's ultimate legal conclusion and its resulting denial of dismissal de novo. See *Rioux* v. *Barry*, 283 Conn. 338, 343, 927 A.2d 304 (2007). In conducting this review, "we take the facts to be those alleged in the complaint, construing them in a manner most favorable to the pleader." *Beecher* v. *Mohegan Tribe of Indians of Connecticut*, 282 Conn. 130, 132, 918 A.2d 880 (2007). We are mindful that the doctrine of absolute immunity, also referred to as the litigation privilege, "implicates the court's subject matter jurisdiction"; *Dorfman* v. *Smith*, 342 Conn. 582, 594, 271 A.3d 53 (2022); and that "every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Tyler* v. *Tatoian*, supra, 164 Conn. App. 87.

Turning to the merits of the appeal, we begin with a general overview of the litigation privilege. "Connecticut has long recognized the litigation privilege." *Simms* v. *Seaman*, 308 Conn. 523, 536, 69 A.3d 880 (2013). In recent years, our Supreme Court has detailed the history of that privilege; see, e.g., id., 531–45; and has applied it in a number of contexts. See, e.g., *Dorfman*

[1] The plaintiff claims that this court should dismiss the appeal for want of jurisdiction because the defendants have not offered any basis for dismissing the action as a whole. They contend that the defendants' arguments "refer to only 7 of the complaint's 173 paragraphs." We are not persuaded. The defendants' motion to dismiss clearly pertains to the entire complaint, as they requested that the court "[dismiss] the case in its entirety or strik[e] the offending allegations." The crux of the defendants' argument is that the plaintiff's complaint improperly centers around prior litigation and they are thus absolutely immune from suit. The defendants have set forth a colorable claim of absolute immunity. See *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 787, 865 A.2d 1163 (2005) (like colorable claim of sovereign immunity, to protect against threat of suit, colorable claim of absolute immunity based on participation in judicial and quasi-judicial proceedings gives rise to immediately appealable final judgment). As a result, there are no grounds for dismissing the defendants' appeal.

v. *Smith*, supra, 342 Conn. 585; *Scholz* v. *Epstein*, 341 Conn. 1, 3, 266 A.3d 127 (2021); *MacDermid, Inc.* v. *Leonetti*, 310 Conn. 616, 617, 79 A.3d 60 (2013); *Rioux* v. *Barry*, supra, 283 Conn. 340; *Hopkins* v. *O'Connor*, 282 Conn. 821, 823, 925 A.2d 1030 (2007). The litigation privilege was first recognized in response to the need to bar persons accused of crimes from suing their accusers for defamation. See *Bruno* v. *Travelers Cos.*, 172 Conn. App. 717, 725, 161 A.3d 630 (2017). It has since been applied to other causes of action, including claims brought pursuant to CUTPA and claims of intentional interference with contractual or beneficial relations. See, e.g., *Dorfman* v. *Smith*, supra, 585 (litigation privilege applicable to plaintiff's claims for breach of implied covenant of good faith, negligent infliction of emotional distress, and violation of CUTPA premised on business practice of filing false discovery responses); *Rioux* v. *Barry*, supra, 350 ("absolute immunity does bar the plaintiff's claim of intentional interference with contractual or beneficial relations").

In its most basic form, the litigation privilege provides that "communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of the controversy." (Internal quotation marks omitted.) *Hopkins* v. *O'Connor*, supra, 282 Conn. 830–31. This includes "statements made in pleadings or other documents prepared in connection with a court proceeding." (Internal quotation marks omitted.) *Scholz* v. *Epstein*, supra, 341 Conn. 28–29.

"[T]he purpose of affording absolute immunity to those who provide information in connection with judicial and quasi-judicial proceedings is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious

statements." (Internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 627. "[T]he possibility of incurring the costs and inconvenience associated with defending a [retaliatory] suit might well deter a citizen with a legitimate grievance from filing a complaint." (Internal quotation marks omitted.) *Craig* v. *Stafford Construction, Inc.*, 271 Conn. 78, 95, 856 A.2d 372 (2004). "Put simply, absolute immunity furthers the public policy of encouraging participation and candor in judicial and quasi-judicial proceedings. This objective would be thwarted if those persons whom the common-law doctrine was intended to protect nevertheless faced the threat of suit. In this regard, the purpose of the absolute immunity afforded participants in judicial and quasi-judicial proceedings is the same as the purpose of the sovereign immunity enjoyed by the state." *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 787, 865 A.2d 1163 (2005). As such, "courts have recognized absolute immunity as a defense in certain retaliatory civil actions in order to remove this disincentive and thus encourage citizens to come forward with complaints or to testify." *Rioux* v. *Barry*, supra, 283 Conn. 344.

The litigation privilege is not without limits, however. Our Supreme Court has held that certain causes of action are not barred by the litigation privilege. See, e.g., *Simms* v. *Seaman*, supra, 308 Conn. 541–43, 546 (discussing claims of vexatious litigation and abuse of process). What generally distinguishes these causes of action from those to which the privilege attaches is that they "prohibit conduct that subverts the underlying purpose of the judicial process. Specifically, these causes of action prevent, or hold an individual liable for . . . the improper use of the judicial process for an illegitimate purpose, namely, to inflict injury upon another individual in the form of unfounded actions." *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 631.

These causes of action are treated differently in part because of "restraints built into [them] by virtue of [their] stringent requirements."[2] *Rioux* v. *Barry*, supra, 283 Conn. 347–48; see also *Scholz* v. *Epstein*, supra, 341 Conn. 21 ("[t]he plaintiff's statutory theft claim . . . is distinguishable from a vexatious litigation claim because the elements of the claim do not provide any safeguards to prevent inappropriate retaliatory litigation"). For example, one element of a vexatious litigation claim is that the suit must have terminated in the plaintiff's favor.[3] See *Scholz* v. *Epstein*, supra, 21.

"Relevant to any determination of whether policy considerations support applying absolute immunity to any particular cause of action, [our Supreme Court] in *Simms* identified the following factors: (1) whether the alleged conduct subverts the underlying purpose of a judicial proceeding, in a similar way to how conduct constituting abuse of process and vexatious litigation does; (2) whether the alleged conduct is similar in essential respects to defamatory statements, inasmuch as a defamation action is barred by the privilege; and (3) whether the alleged conduct may be adequately addressed by other available remedies."[4] Id., 10–11. "In

[2] We note that a lack of built-in restraints by virtue of a cause of action's stringent requirements is not always dispositive of whether the litigation privilege applies to a particular claim. See *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 630–31 (absolute immunity did not bar claim of employer retaliation). Nevertheless, whether a cause of action has built-in safeguards that protect against inappropriate retaliatory litigation remains a factor. See *Scholz* v. *Epstein*, supra, 341 Conn. 21 ("[u]nlike a claim of vexatious litigation, a claim of statutory theft does not provide the same level of protection against the chilling effects of a potential lawsuit" (footnote omitted)).

[3] "Vexatious litigation requires a plaintiff to establish that: (1) the previous lawsuit or action was initiated or procured by the defendant against the plaintiff; (2) the defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice; (3) the defendant acted without probable cause; and (4) the proceeding terminated in the plaintiff's favor." *Rioux* v. *Barry*, supra, 283 Conn. 347.

[4] These factors apply regardless of whether the action is against an attorney, party opponent, or witness. See *Dorfman* v. *Smith*, supra, 342 Conn. 592 n.3.

examining the competing interests and public policies at stake, our Supreme Court has focused on the need to ensure candor from all participants in the judicial process." *Tyler* v. *Tatoian*, supra, 164 Conn. App. 90.

I

With these principles in mind, we begin by addressing the defendants' contention that the court improperly concluded that the litigation privilege did not bar the plaintiff's tortious interference with business expectancy claim against the defendants. The defendants argue, inter alia, that the trial court failed to follow binding Supreme Court precedent that makes clear that the litigation privilege bars such claims. We agree.

As this court has observed: "Our Supreme Court has held that absolute immunity bars claims based on tortious interference with business and contractual relationships when the alleged conduct occurred during the course of a judicial or quasi-judicial proceeding." *Law Offices of Frank N. Peluso, P.C.* v. *Rendahl*, 170 Conn. App. 364, 367, 154 A.3d 584 (2017), citing *Rioux* v. *Barry*, supra, 283 Conn. 351. In undertaking a careful balancing of the competing interests and public policies at stake, our Supreme Court in *Rioux* stated that the elements of a tortious interference claim "simply do not have the same stringency as those that are the hallmark of the elements of a claim for vexatious litigation. For this reason, insofar as the balancing that applies, this tort is more like defamation than vexatious litigation. Therefore, the same balancing test applies to it as applies to defamatory statements: if made in the course of a judicial or quasi-judicial proceeding, they are absolutely immune." *Rioux* v. *Barry*, supra, 351.

In light of our Supreme Court's holding in *Rioux*, it is clear that the trial court's judgment cannot stand. The trial court's conclusion that the litigation privilege does not apply to the plaintiff's tortious interference

claim because it is more "akin to claims for vexatious litigation, abuse of process and malicious prosecution" is in direct conflict with our Supreme Court's decision in *Rioux*. In balancing the competing interests at stake, our Supreme Court in *Rioux* concluded that absolute immunity applies to such torts if the allegations supporting the claim are based on communications that took place in the course of a judicial or quasi-judicial proceeding. *Rioux* v. *Barry*, supra, 283 Conn. 351.

Because the litigation privilege is applicable to claims of tortious interference with business expectations if the claim is premised on communications or statements made in the course of prior judicial or quasi-judicial proceedings, the principal question for the trial court was whether the allegedly privileged communications or statements were in fact made in the course of judicial or quasi-judicial proceedings and relevant to the subject of the controversy. See *Hopkins* v. *O'Connor*, supra, 282 Conn. 838 (if "the communications are uttered or published in the course of judicial proceedings, even if they are published falsely and maliciously, they nevertheless are absolutely privileged provided they are pertinent to the subject of the controversy"). On appeal, the plaintiff argues that its claims do not arise out of the statements or communications made by the defendants in litigation because it is challenging the defendants' acts of filing certain actions and appeals. The plaintiff thus contends that its claims are based on the defendants' alleged wrongful *conduct* of filing frivolous and meritless actions and appeals, not any communications or statements in a judicial proceeding.

The defendants counter that the plaintiff has alleged that they commenced "frivolous actions," filed "meritless appeals," and manufactured "false evidence." They note that the plaintiff alleges that Caroline's filing of an action seeking a temporary restraining order and preliminary injunction resulted in an interference with

the business relations between the plaintiff and SHI. The defendants argue that these allegations strike at the very heart of the communications and actions before the Oslo enforcement court in Norway, the Borgarting Court of Appeal, the Supreme Court of Norway, and the United States District Court for the District of Connecticut. In their view, there can be no question that these actions fall within the scope of the litigation privilege. We agree with the defendants.

At least 30 paragraphs of the plaintiff's 173 paragraph complaint include allegations concerning the defendants' participation in or commencement of legal actions or appeals. Although the plaintiff argues that the act of filing an action or an appeal is not a communication in connection with a court proceeding, we can think of no communication that is more clearly protected by the litigation privilege than the filing of a legal action. The filing of a legal action, by its very nature, is a communicative act. See, e.g., *Scholz* v. *Epstein*, supra, 341 Conn. 28–29 (privilege applies to "*every step* of the proceeding until [its] final disposition . . . including to *statements made in pleadings* or other documents prepared in connection with a court proceeding" (citation omitted; emphasis added; internal quotation marks omitted)); *Rioux* v. *Barry*, supra, 283 Conn. 344 ("courts have recognized absolute immunity as a defense in certain retaliatory civil actions in order to remove this disincentive and thus encourage citizens to come forward *with complaints* or to testify" (emphasis added)).

Moreover, our case law does not speak about the privilege solely in terms of communications, but also in terms of *conduct* in the course of judicial or quasi-judicial proceedings. See *Simms* v. *Seaman*, supra, 308 Conn. 568–69 ("[w]e therefore conclude that the Appellate Court properly determined that attorneys are protected by the litigation privilege against claims of fraud

for their *conduct* during judicial proceedings" (emphasis added)); *Hopkins* v. *O'Connor*, supra, 282 Conn. 830 ("[w]hether particular *conduct* is by its nature part of or in furtherance of a judicial proceeding for the purposes of triggering absolute immunity, however, depends on the particular facts and circumstances of each case" (emphasis added)).

In support of its claim that the litigation privilege applies only to communications and not conduct, the plaintiff points to our Supreme Court's decision in *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 616. In that case, the court concluded that absolute immunity did not bar a claim of employer retaliation pursuant to General Statutes § 31-290a[5] based on the employer's filing of a lawsuit against the employee. Id., 617–18. The plaintiff seems to argue that, on the basis of this holding, the litigation privilege does not apply to the act of filing a lawsuit. That is not an accurate reading of *MacDermid, Inc.* The narrow issue in *MacDermid, Inc.*, was whether absolute immunity applied to an alleged violation of § 31-290a predicated on an employer's act of filing a lawsuit against an employee for the employee's exercise of his or her rights under Connecticut's workers' compensation law. Id., 625–26. In holding

[5] General Statutes (Rev. to 2013) § 31-290a provides in relevant part: "(a) No employer who is subject to the provisions of this chapter shall discharge, or cause to be discharged, or in any manner discriminate against any employee because the employee has filed a claim for workers' compensation benefits or otherwise exercised the rights afforded to him pursuant to the provisions of this chapter.

"(b) Any employee who is so discharged or discriminated against may . . . (1) Bring a civil action in the superior court . . . for the reinstatement of his previous job, payment of back wages and reestablishment of employee benefits to which he would have otherwise been entitled if he had not been discriminated against or discharged and any other damages caused by such discrimination or discharge. The court may also award punitive damages. Any employee who prevails in such a civil action shall be awarded reasonable attorney's fees and costs to be taxed by the court . . . ." See also *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 617–18 n.1.

that the litigation privilege did not apply, the court concluded that applying "absolute immunity under [those] circumstances would serve only to incentivize retaliatory litigation and discourage employees from exercising their rights under the [Workers' Compensation] [A]ct, a situation the legislature clearly intended to prevent when it enacted § 31-290a." Id., 640. Nothing in *MacDermid, Inc.*, suggests that the act of filing a lawsuit in other contexts is beyond the scope of the litigation privilege.

The plaintiff further contends that its complaint "does not allege harm based on statements or communications uttered in the course of those proceedings, but for the wrongful conduct of abusing the judicial system to drive down the Confirmit shares' sale price." The fact that the plaintiff characterizes the defendants' alleged legal actions as "frivolous" or "meritless" or as "abusing the legal system" does not mean that it is beyond the litigation privilege. As this court explained in *Tyler*, "[t]he fact that the plaintiffs characterized the defendant's allegedly fraudulent conduct as an abuse of the legal system does not mean that it falls within the limited exception" to the litigation privilege. *Tyler* v. *Tatoian*, supra, 164 Conn. App. 93. Our Supreme Court expanded on this in *Dorfman*, explaining that, "[a]lthough the plaintiff's complaint contains allegations that the defendant, through its litigation conduct, improperly used and abused the judicial process, unless the plaintiff's *cause of action* challenges the purpose of the litigation or litigation procedure, these allegations do not suffice to establish an improper use of the judicial system. A claim of abuse of process may be premised on the improper use of a particular judicial procedure. But allegations of the improper use of judicial procedure do not satisfy the requirement that the plaintiff's *cause of action* must itself challenge the purpose of the underlying litigation or litigation procedure."

(Emphasis added.) *Dorfman* v. *Smith*, supra, 342 Conn. 598–99. Otherwise, "any plaintiff could pierce the litigation privilege with any cause of action by merely including allegations that a defendant's conduct constituted an abuse of the judicial system."[6] Id., 599.

To reiterate, the fact that the plaintiff characterized the defendants' alleged conduct as meritless or frivolous or an abuse of the legal system does not bring it within the limited exception to the privilege. Unlike claims of vexatious litigation or abuse of process, the cause of action of tortious interference with business expectancy does not challenge the purpose of an underlying judicial proceeding.[7] Indeed, our Supreme Court in *Rioux* already applied the relevant factors to this cause of action and concluded that absolute immunity bars claims based on tortious interference with business and contractual relationships.

Lastly, we note that there are other remedies available to address claimed abuses like these. See *Dorfman* v. *Smith*, supra, 342 Conn. 619 ("there are other remedies available to deter the alleged conduct"). The plaintiff, for example, could have brought an abuse of process or vexatious litigation claim to remedy or obtain recourse for the behavior of which it complains. See

[6] In *Scholz*, our Supreme Court further stated: "[T]o the extent the plaintiff is arguing that he alleged in his complaint that the defendant improperly used the courts, in that the defendant's conduct in the underlying litigation constituted an abuse of process, such an allegation is not sufficient to bar the litigation privilege, but, rather, the plaintiff was required to, but did not, set forth sufficient allegations to establish a cause of action for abuse of process." *Scholz* v. *Epstein*, supra, 341 Conn. 15 n.5.

[7] It bears mentioning that many, if not the majority, of the plaintiff's allegations alleging frivolous or meritless litigation arise out of lawsuits commenced by the plaintiff itself. The complained of litigation primarily concerns the defendants' conduct in defense of those lawsuits and the prosecution of appeals. Thus, the majority of the allegations do not concern the defendants' use of the legal process against the plaintiffs in order to accomplish a purpose for which it was not designed; rather, they largely concern the defendant's participation in litigation the plaintiff initiated.

DeLaurentis v. *New Haven*, 220 Conn. 225, 264, 597 A.2d 807 (1991) ("Parties or their counsel who behave outrageously are subject to punishment for contempt of the court. Parties and their counsel who abuse the process by bringing unfounded actions for personal motives are subject to civil liability for vexatious suit or abuse of process."). The plaintiff chose not to do so.[8]

In sum, because the plaintiff's tortious interference with business expectancy claim is predicated on communications made during and relevant to prior judicial or quasi-judicial proceedings, the plaintiff's claim is barred by the litigation privilege.

II

We turn next to the plaintiff's count asserting a violation of CUTPA. In support of its CUTPA claim, the plaintiff incorporates by reference the same allegations it makes in support of its tortious interference with business expectancy claim and further alleges that, among other things, the "defendants engaged in unfair methods of competition and unfair and deceptive acts to interfere with this sale of the Confirmit shares. They did so by filing for injunctions in both Connecticut and Norway on the false premise that [Caroline] genuinely sought to exercise her purported [ROFR]." The plaintiff further alleges, inter alia, that "[Alexander] and his associates have targeted Confirmit, interfering with its business through the intentional prolonging of the enforcement lien and uncertainty of the company's ownership as well as through their continued obstructionist litigation."

[8] At oral argument before this court, the plaintiff's counsel argued that the complaint set forth the necessary allegations to support an abuse of process claim. A simple review of the plaintiff's complaint, however, discloses that it did not assert such a claim. The plaintiff's two count complaint clearly captions its claims "Tortious Interference with Business Expectancy" and "Violation of the Connecticut Unfair Trade Practices Act."

The parties make substantially similar arguments regarding this claim as they do with respect to the tortious interference claim. In particular, the defendants argue that the litigation privilege bars the plaintiff's CUTPA claim because it is premised on communications and conduct in prior litigation. Citing to numerous cases, the defendants argue that our courts uniformly have held that the litigation privilege applies to CUTPA claims based on communications made and actions taken during the course of past litigation. The plaintiff counters that the trial court properly found that the litigation privilege does not bar the plaintiff's claim because the claims do not arise out of the content of statements or communications by the defendants in litigation. For largely the same reasons that we concluded in part I of this opinion that the litigation privilege bars the plaintiff's tortious interference claim, we conclude that the plaintiff's CUTPA claim also is barred by the privilege.

Courts in Connecticut consistently have applied the litigation privilege to CUTPA claims based on communications made during and relevant to a prior judicial proceeding. See, e.g., *Dorfman* v. *Smith*, supra, 342 Conn. 618 (CUTPA claim based on violation of Connecticut Unfair Insurance Practices Act barred by litigation privilege); *Simms* v. *Seaman*, supra, 308 Conn. 561–62 (discussing federal case law that consistently has held that CUTPA claims premised on false communications made during and relevant to underlying judicial proceeding are barred by litigation privilege); *Bruno* v. *Travelers Cos.*, supra, 172 Conn. App. 727–29 (CUTPA claim against insurance companies was barred by litigation privilege); *Tyler* v. *Tatoian*, supra, 164 Conn. App. 86–87, 93–94 (CUTPA claim against attorney for communications made in course of prior judicial proceeding was barred by litigation privilege).[9]

[9] Connecticut federal courts similarly have concluded that the litigation privilege bars CUTPA causes of actions that are premised on communica-

Most recently, in *Dorfman* v. *Smith*, supra, 342 Conn. 582,[10] our Supreme Court considered whether a violation of CUTPA, based on a violation of the Connecticut Unfair Insurance Practices Act (CUIPA), General Statutes § 38a-815 et seq., was subject to the litigation privilege. The plaintiff argued that absolute immunity would undermine the legislative intent of CUIPA, which the plaintiff argued was to hold insurers accountable for misrepresenting facts relating to coverage issues. Id., 617. The court observed that there was minimal case law regarding the litigation privilege as it pertains to a claim brought under CUIPA, but pointed to the wealth of case law regarding the applicability of the litigation privilege to CUTPA claims. Id., 618. In light of that precedent, the court held that "the litigation privilege bars CUTPA claims, like the claim at issue, premised solely on general allegations of intentionally false discovery responses . . . ." Id., 619. It further stated: "We recognize that the legislature intended to prohibit certain unfair and deceptive business practices by enacting CUTPA and CUIPA, but the plaintiff has not cited, and we have not discovered, any provision of these statutes that explicitly abrogates the common-law litigation privilege, which, historically, has been applied to false and malicious statements made during and relevant to judicial proceedings." Id., 620. The court qualified its holding by stating that "[t]his does not mean, however, that a defendant enjoys absolute immunity from all CUTPA claims under the litigation privilege, even those premised on a violation of CUIPA," leaving open the possibil-

tions made during prior litigation. See, e.g., *Bailey* v. *Interbay Funding, LLC*, Docket No. 3:17-CV-1457 (JCH), 2018 WL 1660553 (D. Conn. April 4, 2018); *Weldon* v. *MTAG Services, LLC*, Docket No. 3:16-CV-783 (JCH), 2017 WL 776648 (D. Conn. February 28, 2017); *Costello* v. *Wells Fargo Bank National Assn.*, Docket No. 16-CV-1706 (VAB), 2017 WL 3262157 (D. Conn. July 31, 2017), aff'd, 739 Fed. Appx. 77 (2d Cir. 2018).

[10] *Dorfman* was decided after oral argument in this appeal. Following oral argument, both the plaintiff and the defendants filed notices of supplemental authority pursuant to Practice Book § 67-10 on April 13, 2022.

ity that other CUTPA claims may not be barred by absolute immunity under the privilege. Id.

On the basis of our review of the specific allegations advanced in support of the plaintiff's CUTPA claim, in addition to our case law, including our Supreme Court's recent decision in *Dorfman*, we conclude that absolute immunity bars the plaintiff's CUTPA claim. In *Dorfman*, our Supreme Court focused its analysis on whether the "legislature intended to abrogate a party's absolute immunity from CUTPA claims based on a business practice of filing false discovery responses." Id., 618. In discovering no provision in CUTPA or CUIPA "that explicitly abrogate[d] the common-law litigation privilege" with respect to false and malicious statements made during and relevant to judicial proceedings, the court concluded that the litigation privilege barred the plaintiff's CUTPA-CUIPA claim. Id., 620. Although the court left open the possibility that the litigation privilege may not bar other CUTPA claims, it did so in the context of its consideration of whether a particular set of allegations in support of a CUTPA claim might constitute a claim for which the legislature intended to abrogate the privilege. See id.

Here, while making general public policy arguments for why the litigation privilege should not apply in this instance, the plaintiff does not argue that the legislature intended to abrogate the litigation privilege for the type of CUTPA claim that it has brought. The plaintiff's CUTPA claim in this case, which is premised largely on the defendants' alleged communications and conduct in prior judicial proceedings, including the alleged introduction of false and/or fabricated evidence and the alleged filing of false and/or frivolous actions and appeals, closely resembles the CUTPA claims that our courts routinely have held are barred by the litigation privilege. See, e.g., id., 618; *Bruno* v. *Travelers Cos.*, supra, 172 Conn. App. 727–29; *Tyler* v. *Tatoian*, supra,

164 Conn. App. 86–87, 93–94; see also footnote 9 of this opinion. As such, we discern no appropriate basis for treating the plaintiff's CUTPA claim in this case differently than courts consistently have treated CUTPA claims in other cases, especially when other available remedies exist to deter the alleged conduct. See part I of this opinion.

Because we conclude that the litigation privilege is applicable to the plaintiff's CUTPA claim in this case, and because the plaintiff's CUTPA claim is premised in large part on communications made during and relevant to prior judicial proceedings; see part I of this opinion; we conclude that it, too, is barred by the litigation privilege.

III

As a final matter, the plaintiff argues that the litigation privilege does not bar its claims because they include allegations unrelated to communications made in the course of judicial proceedings. Although the complaint does include allegations of extrajudicial conduct, the complaint is permeated with allegations pertaining to the defendants' communications and participation in prior judicial proceedings, which are both central to the plaintiff's claims and inextricably intertwined with the allegations of extrajudicial conduct. Under these circumstances, we conclude that the plaintiff's claims are barred by the litigation privilege. To hold otherwise would permit parties to proceed with claims that otherwise are barred by the litigation privilege simply by adding allegations concerning conduct that is outside the privilege. Such a result would significantly undermine the objective the privilege was designed to promote.[11] See *Chadha* v. *Charlotte Hungerford Hospital*,

[11] Because the issue was not raised or decided below, we express no view as to whether the complaint, in the absence of the offending allegations, is sufficient to state claims for tortious interference with business expectancy or a violation of CUTPA.

supra, 272 Conn. 786 (like sovereign immunity, doctrine of absolute immunity "protects *against suit* as well as liability—in effect, against having to litigate at all" (emphasis added; internal quotation marks omitted)).

The judgment is reversed and the case is remanded with direction to grant the defendants' motion to dismiss the plaintiff's complaint in its entirety.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* NICO GONZALEZ (AC 44630)

Moll, Cradle and Eveleigh, Js.

Syllabus

The defendant, who had been convicted, on a plea of guilty, of the crimes of assault in the first degree and carrying a pistol without a permit, appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence. The defendant was sentenced in 2017 to a term of incarceration followed by a period of special parole. Subsequently, the legislature enacted No. 18-63, § 2, of the 2018 Public Acts (P.A. 18-63), which repealed and replaced subsection (b) of the special parole statute ((Rev. to 2017) § 54-125e), to require a trial court, when sentencing a person, to determine, based on various factors, whether a period of special parole was necessary to ensure public safety. The defendant alleged in his motion to correct an illegal sentence that P.A. 18-63 applied retroactively to his sentence of special parole and that the court should vacate that part of his sentence and hold a new sentencing hearing. The court denied the defendant's motion, concluding that P.A. 18-63 did not apply retroactively. On the defendant's appeal to this court, *held*:

1. The defendant could not prevail on his claim that § 2 of P.A. 18-63 was intended to apply retroactively to his sentence of special parole on the basis that § 54-125e is procedural in nature rather than substantive: this court concluded that the defendant's claim was governed by its decision in *State* v. *Omar* (209 Conn. App. 283), in which it determined that, because P.A. 18-63 repealed and replaced the imposition of a form of punishment for a criminal conviction, the plain meaning analysis set forth in *State* v. *Bischoff* (337 Conn. 739) controlled and the criminal savings statutes (§§ 54-194 and 1-1 (t)) applied to P.A. 18-63, and, having considered the plain language of § 2 of P.A. 18-63, determined that the act clearly and unambiguously prohibited retroactive application;

moreover, this court determined in *Omar* that, in the absence of a clear and unequivocal expression of legislative intent that an amendment to a criminal penalty applied retroactively, an act repealing and replacing the imposition of a form of punishment is governed by the presumption in the criminal savings statutes against retroactivity.

2. The defendant could not prevail on his claim that P.A. 18-63 was intended to apply retroactively to his sentence of special parole because the legislative history and amendatory language of P.A. 18-63 demonstrated that it was meant to clarify § 54-125e, rather than effect a change in the law: this court concluded that its decision in *State* v. *Smith* (209 Conn. App. 296) controlled this claim, this court having held in *Smith* that the legislature, in passing P.A. 18-63, did not intend to clarify § 54-125e, that the language in the prior version of § 54-125e (b) was already clear prior to the amendment, and the language that was added changed § 54-125e (b) by narrowing its application; moreover, contrary to the defendant's contention that *Smith* was concerned primarily with § 1 and not § 2 of P.A. 18-63, it was clear that this court in *Smith* considered both sections of P.A. 18-63 and determined that neither was intended to clarify the statutes at issue, including § 54-125e.

Argued May 11—officially released August 23, 2022

Procedural History

Substitute information charging the defendant with the crimes of assault in the first degree, attempt to commit murder, illegal discharge of a firearm, illegal possession of a weapon in a motor vehicle, and carrying a pistol without a permit, brought to the Superior Court in the judicial district of Waterbury, where the defendant was presented to the court, *Fasano*, *J.*, on a plea of guilty to assault in the first degree and carrying a pistol without a permit; judgment of guilty; thereafter, the court, *Hon. Roland D. Fasano*, judge trial referee, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

Vishal K. Garg, assigned counsel, for the appellant (defendant).

Kayla A. Steefel, certified legal intern, with whom were *Michele C. Lukban*, senior assistant state's attorney, and, on the brief, *Maureen Platt*, state's attorney,

and *Cynthia S. Serafini*, senior assistant state's attorney, for the appellee (state).

Opinion

CRADLE, J. The defendant, Nico Gonzalez, appeals from the judgment of the trial court denying his motion to correct an illegal sentence. On appeal, the defendant claims that the court improperly determined that No. 18-63, § 2, of the 2018 Public Acts (P.A. 18-63), which amended General Statutes (Rev. to 2017) § 54-125e (b) to require that a trial court determine that a period of special parole is necessary to ensure public safety before imposing a period of special parole, did not retroactively apply to his 2017 sentence. See General Statutes § 54-125e (b) (1). Specifically, the defendant claims that (1) § 54-125e, as amended by § 2 of P.A. 18-63, is a procedural statute presumed to apply retroactively, and (2) the legislature, through passing § 2 of P.A. 18-63, intended to clarify § 54-125e, rather than change the law. We affirm the judgment of the trial court.

The record reveals the following relevant procedural history. In connection with the defendant's commission of a shooting on January 2, 2017, the defendant was charged, by way of a substitute information, with one count of assault in the first degree in violation of General Statutes § 53a-59 (a) (5), one count of attempt to commit murder in violation of General Statutes §§ 53a-49 (a) (2) and 53a-54a, one count of illegal discharge of a firearm in violation of General Statutes § 53-203, one count of illegal possession of a weapon in a motor vehicle in violation of General Statutes § 29-38, and one count of carrying a pistol without a permit in violation of General Statutes § 29-35 (a).

On October 11, 2017, the defendant pleaded guilty, under the *Alford* doctrine,[1] to one count of assault in

[1] "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt . . . but consents to being punished as if he were guilty to avoid the risk of

the first degree in violation of § 53a-59 (a) (1); and one count of carrying a pistol without a permit in violation of § 29-35 (a). On December 15, 2017, the court, *Fasano*, *J.*, imposed a total effective sentence of five years of incarceration, followed by five years of special parole.

At the time the defendant was convicted, General Statutes (Rev. to 2017) § 54-125e authorized a court to impose a period of special parole "as a sentencing option in cases [in which] the judge wanted additional supervision of a defendant after the completion of his prison sentence." (Internal quotation marks omitted.) *State* v. *Victor O.*, 320 Conn. 239, 252, 128 A.3d 940 (2016). Specifically, special parole was intended by the legislature to "[ensure] intense supervision of convicted felons after they're released to the community and [allow] the imposition of parole stipulations on . . . released inmate[s] to ensure their successful incremental [reentry] into society or if they violate their stipulations, speedy [reincarceration] before they commit [other] crime[s]." (Internal quotation marks omitted.) Id.

After the defendant was sentenced, our legislature enacted P.A. 18-63, which eliminated special parole as a punishment for certain offenses.[2] See *State* v. *Smith*,

proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless." (Internal quotation marks omitted.) *State* v. *Celaj*, 163 Conn. App. 716, 718–19 n.3, 141 A.3d 870 (2016).

[2] Public Act 18-63 provides in relevant part: "Be it enacted by the Senate and House of Representatives in General Assembly convened:

"Section 1. Subsection (b) of section 53a-28 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2018*):

"(b) Except as provided in section 53a-46a, when a person is convicted of an offense, the court shall impose one of the following sentences . . . (9) a term of imprisonment and a period of special parole as provided in section 54-125e, *as amended by this act, except that the court may not impose a period of special parole for convictions of offenses under chapter 420b.*

209 Conn. App. 296, 299, 268 A.3d 127 (2021), cert. denied, 342 Conn. 905, 270 A.3d 691 (2022). Relevant to the present appeal is § 2 of P.A. 18-63, which amended General Statutes (Rev. to 2017) § 54-125e (b) by adding, in relevant part, that "the court may not impose a period of special parole unless the court determines, based on the nature and circumstances of the offense, the defendant's prior criminal record and the defendant's history of performance on probation or parole, that a period of special parole is necessary to ensure public safety." (Emphasis omitted.) Public Act 18-63 lists an effective date of October 1, 2018.

In July, 2020, the defendant, as a self-represented party, filed a motion to correct an illegal sentence, pursuant to Practice Book § 43-22.[3] The defendant subsequently was appointed counsel[4] and, on December 18,

"Sec. 2. Subsection (b) of section 54-125e of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2018*):

"(b) *(1)* When sentencing a person, *the court may not impose a period of special parole unless the court determines, based on the nature and circumstances of the offense, the defendant's prior criminal record and the defendant's history of performance on probation or parole, that a period of special parole is necessary to ensure public safety. . . .*" (Emphasis in original.)

[3] Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

[4] On October 23, 2020, the court, *Hon. Roland D. Fasano*, judge trial referee, appointed a special public defender to determine whether the defendant had a "sound basis" for filing his motion to correct an illegal sentence. See *State* v. *Casiano*, 282 Conn. 614, 627–28, 922 A.2d 1065 (2007) (holding that General Statutes § 51-296 (a) entitles indigent defendant to appointment of counsel for purpose of determining whether sound basis exists for him or her to file motion to correct illegal sentence, and, if such basis exists, to counsel for purpose of pursuing motion to its conclusion). The special public defender subsequently determined that the defendant's claim had merit and filed an amended motion to correct an illegal sentence on the defendant's behalf. The court thereafter appointed the special public defender to continue representing the defendant through the conclusion of the proceedings.

2020, filed an amended motion to correct an illegal sentence, alleging that § 2 of P.A. 18-63 applied retroactively to his sentence of special parole. Specifically, the defendant claimed that because P.A. 18-63 was a "procedural rule . . . intended to clarify a preexisting statute," the legislature intended that it apply retroactively. Accordingly, because the sentencing court never determined that a period of special parole was necessary to ensure public safety, the defendant claimed that the court should vacate that part of his sentence and hold a new sentencing hearing in order to consider the factors now set forth in § 54-125e (b) (1).

In response, the state filed an opposition to the defendant's motion to correct an illegal sentence arguing, inter alia, that the legislature did not intend P.A. 18-63 to apply retroactively. The state also contended that, even under the amended statute, the defendant would still qualify for a period of special parole due to his criminal history and the violent nature of the underlying offense. The court heard argument from both parties on February 10, 2021.

On February 23, 2021, the court denied the defendant's motion to correct an illegal sentence. In its memorandum of decision, the court found that there was "neither any evidence of an intent that [P.A. 18-63] be retroactive nor any authority in the case law for [that] proposition" and determined that "[t]he nature of the change to [§ 54-125e] [was] clearly substantive in that factual findings must be made by the court relative to [the defendant's] history and circumstances in order to place [the defendant] on special parole under the current guidelines." In addition, the court relied on our Supreme Court's decision in *State* v. *Bischoff*, 337 Conn. 739, 761–62, 258 A.3d 14 (2021), for the proposition that, in the absence of clear legislative intent, criminal

statutes that prescribe or define punishment apply prospectively. Accordingly, the court concluded that P.A. 18-63 did not apply retroactively. This appeal followed.

We begin by setting forth the standard of review applicable to this claim. "Ordinarily, claims that the trial court improperly denied a defendant's motion to correct an illegal sentence are reviewed pursuant to an abuse of discretion standard. . . . Nonetheless, a trial court's determination of whether a new statute is to be applied retroactively or only prospectively presents a question of law over which this court exercises plenary review." (Citation omitted.) *State* v. *Smith*, supra, 209 Conn. App. 301.

I

The defendant first claims that § 2 of P.A. 18-63 was intended to apply retroactively to his sentence of special parole because § 54-125e, as amended by § 2 of P.A. 18-63, is procedural in nature, rather than substantive. See *State* v. *Nathaniel S.*, 323 Conn. 290, 294–96, 146 A.3d 988 (2016) (explaining that, in absence of clear expression of legislative intent, procedural statutes are presumed to apply retroactively whereas substantive statutes apply only prospectively). We are not persuaded.

The defendant's claim is governed by this court's decision in *State* v. *Omar*, 209 Conn. App. 283, 268 A.3d 726 (2021), cert. denied, 342 Conn. 906, 270 A.3d 691 (2022). In *Omar*, the defendant argued, as does the defendant in the present case, that § 54-125e (b), as amended by § 2 of P.A. 18-63, is procedural in nature and therefore presumed to apply retroactively. Id., 289–90. Specifically, the defendant in *State* v. *Omar*, supra, 290, contended that this court should apply to P.A. 18-63 the retroactivity analysis set forth in *State* v. *Nathaniel S.*, supra, 323 Conn. 295, which provides, in relevant part, that "[p]rocedural statutes have been traditionally viewed as affecting remedies, not substantive rights,

and therefore leave the preexisting scheme intact. . . . [Accordingly] we have presumed that procedural . . . statutes are intended to apply retroactively absent a clear expression of legislative intent to the contrary . . . .'' (Internal quotation marks omitted.) This court rejected the argument that P.A. 18-63 is procedural in nature. Rather, this court determined that, unlike the court in *Nathaniel S.*, which concluded that No. 15-183 of the 2015 Public Acts (P.A. 15-183) was procedural due to the act's ''automatic transfer'' provision[5]; *State* v. *Nathaniel S.*, supra, 301; the special parole statutes at issue merely provided the ''option of imposing special parole as one of multiple punishments.'' *State* v. *Omar*, supra, 290–91. This court proceeded to clarify that ''choosing to impose special parole was an act of discretion, as opposed to the automatic transfer statute at issue in *Nathaniel S.*, which applies to every fifteen year old charged with certain types of crimes.'' Id., 291–92.

This court then determined that, because P.A. 18-63 repealed and replaced the imposition of a form of punishment for a criminal conviction, this court's retroactivity analysis was controlled by our Supreme Court's decisions in *State* v. *Kalil*, 314 Conn. 529, 107 A.3d 343

[5] Section 1 of P.A. 15-183 amended the juvenile transfer statute, General Statutes (Rev. to 2013) § 46b-127 (a) (1), by ''increas[ing] the age of a child whose case was subject to an automatic transfer by one year, [from fourteen] to fifteen years old. . . . Prior to this amendment, the court was required to transfer a case from the juvenile docket to the regular criminal docket [of the Superior Court] in which a child . . . had been charged with the commission of certain felonies and had attained the age of fourteen years prior to the commission of such offenses.'' (Citation omitted; emphasis omitted.) *State* v. *Nathaniel S.*, supra, 323 Conn. 292. On appeal, our Supreme Court concluded that P.A. 15-183 was procedural in nature and therefore presumed to apply retroactively. Id., 296. Specifically, our Supreme Court noted that it previously had characterized the juvenile transfer statute as ''akin to a change of venue,'' which, ''by its nature, [is] procedural,'' and that ''[t]he only change effectuated by P.A. 15-183 is to narrow the class of persons *to whom this procedure applies*.'' (Emphasis added; internal quotation marks omitted.) Id.

(2014), and *State* v. *Bischoff*, supra, 337 Conn. 739,[6] as well as our criminal savings statutes, General Statutes §§ 54-194[7] and 1-1 (t).[8] *State* v. *Omar*, supra, 290–92; see also *State* v. *Smith*, supra, 209 Conn. App. 307. Specifically, this court noted that the decisions in *Kalil* and *Bischoff* established that, in the absence of a clear and unequivocal expression of legislative intent that an

[6] In *State* v. *Kalil*, supra, 314 Conn. 550, our Supreme Court considered whether No. 09-138, § 2, of the 2009 Public Acts (P.A. 09-138), which increased the minimum value element of the second degree larceny statute from $5000 to $10,000, and which would have resulted in a downgrade of the defendant's second degree larceny charge to third degree larceny and a reduction in his sentence, applied retroactively under the amelioration doctrine. In declining to adopt the amelioration doctrine, our Supreme Court noted that, in determining whether a change in a criminal statute prescribing punishment applies retroactively, the court is bound by the presumption against retroactivity contained in our criminal savings statutes, General Statutes §§ 54-194 and 1-1 (t). Id., 552–53. Specifically, our Supreme Court rejected the argument that the criminal savings statutes did not apply to ameliorative changes in the law, holding instead that the savings statutes applied to all changes to criminal statutes defining or prescribing punishment, even if the change benefits defendants, unless the legislature explicitly provides otherwise. Id., 553–56.

In *State* v. *Bischoff*, supra, 337 Conn. 766–68, our Supreme Court reaffirmed its decision in *Kalil*, noting that the plain meaning rule set forth in General Statutes § 1-2z governs the retroactivity analysis for statutory amendments that define or prescribe the punishment for a crime. Accordingly, our Supreme Court concluded that our criminal savings statutes require that the legislature "use explicit—i.e., 'plain'—language to express its intent to apply such a statute retroactively . . . [and that §] 1-2z is . . . evidence of the legislature's intent that its statutes be taken at face value, and not only supports, but requires our conclusion that, unless explicitly stated otherwise, acts governed by §§ 54-194 and 1-1 (t) must be presumed to apply only prospectively." Id., 767.

[7] General Statutes § 54-194 provides: "The repeal of any statute defining or prescribing the punishment for any crime shall not affect any pending prosecution or any existing liability to prosecution and punishment therefor, unless expressly provided in the repealing statute that such repeal shall have that effect."

[8] General Statutes § 1-1 (t) provides: "The repeal of an act shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, or prosecution, or proceeding pending at the time of the repeal, for an offense committed, or for the recovery of a penalty or forfeiture incurred under the act repealed."

amendment to a criminal penalty applies retroactively, an act repealing and replacing the imposition of a form of punishment is governed by the criminal savings statutes' presumption against retroactivity. *State* v. *Omar*, supra, 292–96. Accordingly, this court concluded that the proper test for determining whether § 2 of P.A. 18-63, applied retroactively was pursuant to the plain meaning rule set forth in General Statutes § 1-2z.[9] Id., 295. After analyzing the text of P.A. 18-63, as well as the act's effective date, this court determined that the plain language of § 2 of P.A. 18-63 "clearly and unambiguously prohibits retroactive application and that this interpretation [did] not lead to an absurd or unworkable result, especially when viewed in context of the related savings statutes, §§ 54-194 and 1-1 (t)." Id., 296.

The defendant argues that the present case is distinguishable from *Omar* because the court in that decision did not consider "whether P.A. 18-63, § 2 (as opposed to § 1 or P.A 18-63 as a whole) applies retroactively in isolation." Specifically, the defendant contends that the analysis in *Omar* "turned heavily on the statutory change enacted by [§ 1 of P.A. 18-63]," which modified General Statutes (Rev. to 2017) § 53a-28 by prohibiting courts from imposing special parole for narcotics offenses, rather than § 2 of P.A. 18-63, which amended General Statutes (Rev. to 2017) § 54-125e to require that a trial court determine that a period of special parole is necessary to ensure public safety. We conclude that the defendant relies upon an incorrect reading of *Omar*. Indeed, this court in *Omar* found that P.A. 18-63, §§ 1 *and 2*, repealed and replaced both subsection (b) of § 53a-28 and *subsection (b) of § 54-125e*, respectively.

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

State v. *Omar*, supra, 209 Conn. App. 294. As such, this court correctly determined that the plain meaning analysis set forth in *State* v. *Bischoff*, supra, 337 Conn. 739, as well as our criminal savings statutes, §§ 54-194 and 1-1 (t), applied to both §§ 1 and 2 of P.A. 18-63. *State* v. *Omar*, supra, 294. This court then explicitly considered the plain language of both §§ 1 and 2 of P.A. 18-63 and determined that the act "clearly and unambiguously prohibits retroactive application . . . ." Id., 296. In light of this court's decision in *Omar*, we conclude that the defendant's claim must fail.

II

The defendant's second claim is that P.A. 18-63 was intended to apply retroactively because the legislative history and amendatory language of P.A. 18-63 demonstrate that the act was meant to clarify § 54-125e, rather than effect a change in the law. See *Estate of Brooks* v. *Commissioner of Revenue Services*, 325 Conn. 705, 720, 159 A.3d 1149 (2017) ("An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act. . . . Furthermore, an amendment that is intended to clarify the intent of an earlier act necessarily has retroactive effect." (Internal quotation marks omitted.)), cert. denied, U.S. , 138 S. Ct. 1181, 200 L. Ed. 2d 314 (2018). We disagree.

The defendant's claim is controlled by this court's decision in *State* v. *Smith*, supra, 209 Conn. App. 296. In *Smith*, this court held that the legislature, through passing P.A. 18-63, did not intend to clarify § 54-125e and, therefore, that the doctrine of clarifications did not govern the court's retroactivity analysis.[10] Id., 306–307.

[10] The defendant cites our Supreme Court's decision in *Estate of Brooks* v. *Commissioner of Revenue Services*, supra, 325 Conn. 719–21, for the proposition that this court is bound to consider the legislative history, alongside the plain text, when determining whether § 2 of P.A. 18-63 was intended to clarify § 54-125e. In particular, the defendant relies on language set forth in *Estate of Brooks*: "Resolution of the question of whether amendatory

Specifically, this court determined that P.A. 18-63 did

language is clarifying in nature does not first require full statutory construction of the original language or a predicate finding of ambiguity. . . . Rather, courts apply the multifactor test set forth and applied in this opinion." (Citation omitted.) Id., 724 n.18. This test includes, but is not limited to "(1) the amendatory language . . . (2) the declaration of intent, if any, contained in the public act . . . (3) the legislative history . . . and (4) the circumstances surrounding the enactment of the amendment, such as, whether it was enacted in direct response to a judicial decision that the legislature deemed incorrect . . . or passed to resolve a controversy engendered by statutory ambiguity . . . ." (Internal quotation marks omitted.) Id., 721.

This court rejected that argument in *Smith*, holding that the multifactor analysis did not apply to amendatory legislation relating to the punishment for crimes. *State* v. *Smith*, supra, 209 Conn. App. 303–304 (rejecting defendant's contention that multifactor test set forth in *Middlebury* v. *Dept. of Environmental Protection*, 283 Conn. 156, 927 A.2d 793 (2007), governed retroactivity analysis). Rather, this court concluded that the interpretation of amendments to criminal statutes that prescribe or define a punishment is controlled by our Supreme Court's decisions in *State* v. *Kalil*, supra, 314 Conn. 529, and *State* v. *Bischoff*, supra, 337 Conn. 739, along with our savings statutes, §§ 54-194 and 1-1 (t), which require that reviewing courts interpret the legislature's intent pursuant to § 1-2z. *State* v. *Smith*, supra, 307–308; see also *State* v. *Omar*, supra, 209 Conn. App. 292–96. In *Smith*, this court explicitly determined that the plain text of P.A. 18-63 was not intended to clarify § 54-125e but, rather, changed the statutory scheme governing special parole by narrowing its application. *State* v. *Smith*, supra, 307. Because the plain text of P.A. 18-63 was not ambiguous, our principles of statutory interpretation precluded this court from considering the legislative history behind the act. Id., 304, 307. Accordingly, the defendant's argument that this court is bound to consider the legislative history behind P.A. 18-63, pursuant to the multifactor test set forth in *Estate of Brooks*, must fail.

The defendant also relies on *State* v. *Evans*, 329 Conn. 770, 803–808, 189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019), for the proposition that this court in *Smith* should have considered the legislative history underlying P.A. 18-63 when determining whether P.A. 18-63 was intended to clarify § 54-125e (b). Although our Supreme Court in *Evans* did probe the legislative history underlying No. 17-17 of the 2017 Public Acts (P.A. 17-17) in determining whether that act was intended to be clarifying or substantive, it did so in the context of stare decisis, and not in determining whether P.A. 17-17 was intended to apply retroactively. To reiterate, the proper retroactivity analysis for amendments to criminal statutes that prescribe or define a punishment is controlled by our Supreme Court's decisions in *State* v. *Kalil*, supra, 314 Conn. 529, and *State* v. *Bischoff*, supra, 337 Conn. 739, along with our savings statutes, §§ 54-194 and 1-1 (t). "It is axiomatic that, [a]s an intermediate appellate court, we are bound by Supreme Court precedent and are unable to modify it . . . . [W]e are not

not resolve any ambiguity in the text of § 54-125e, but rather "eliminated a punishment that the plain language of [§] . . . 54-125e explicitly allowed the courts to impose . . . prior to its enactment." Id., 306. Stated otherwise, "the language in the prior [revision] of [§ 54-125e] was already clear prior to the [amendment], and the legislature added language to *change* [it] by narrowing [its] application." (Emphasis added.) Id., 307. This court then reaffirmed its holding in *Omar*, namely, that the retroactivity analysis for P.A. 18-63 was controlled by *State* v. *Kalil*, supra, 314 Conn. 529, and *State* v. *Bischoff*, supra, 337 Conn. 739, along with our savings statutes, §§ 54-194 and 1-1 (t). *State* v. *Smith*, supra, 307–308. Accordingly, this court concluded that "when the legislature enacted P.A. 18-63, which changed the law by prohibiting special parole as a sentence for certain . . . offenses, it did so prospectively, not retroactively." Id., 298.

Although the defendant's claim appears to be plainly governed by this court's decision in *Smith*, the defendant again attempts to distinguish the present case by arguing that his claim requires this court to consider "whether § 2 of P.A. 18-63, standing alone, was enacted with the intent to clarify the special parole statute," whereas the court in *Smith* considered "whether §§ 1 and 2 [of P.A. 18-63] *collectively* were clarifying legislation." (Emphasis in original.) Specifically, the defendant argues that this court's analysis in *Smith* was concerned primarily with § 1 of P.A. 18-63, rather than § 2 of P.A. 18-63, when considering whether the act was clarifying

at liberty to overrule or discard the decisions of our Supreme Court but are bound by them. . . . [I]t is not within our province to reevaluate or replace those decisions." (Internal quotation marks omitted.) *State* v. *Montanez*, 185 Conn. App. 589, 605 n.5, 197 A.3d 959 (2018), cert. denied, 332 Conn. 907, 209 A.3d 643 (2019). We conclude, accordingly, that the clarification analysis set forth in *Evans* does not govern the present appeal.

in nature. In concluding that P.A. 18-63 was not clarifying, however, this court explicitly stated that "the legislature did not incorporate into the title or text of P.A. 18-63 an explicit statement of its intent to clarify §§ 53a-28 (b) *and 54-125e (b)*" and that, "in enacting P.A. 18-63, the legislature eliminated a punishment that the plain language of §§ 53a-28 (b) *and 54-125e* explicitly allowed courts to impose on . . . offenders prior to its enactment." (Emphasis added.) *State* v. *Smith*, supra, 209 Conn. App. 306. It is clear, therefore, that this court in *Smith* considered both §§ 1 and 2 of P.A. 18-63 and determined that neither section was intended to clarify § 53a-28 (b) or § 54-125e (b). Id., 306–307. Accordingly, we conclude that *Smith* controls the present appeal to the extent that the defendant argues that § 2 of P.A. 18-63 was intended to clarify § 54-125e.

In the alternative, the defendant requests that we reconsider and overrule this court's decision in *Smith*. Specifically, the defendant contends that *Smith* is "inconsistent with binding Supreme Court precedent" insofar as it precludes this court from examining extratextual evidence when considering the retroactive effect of amendments to criminal statutes that prescribe or define a punishment. See footnote 9 of this opinion. It is well established, however, that "one panel of this court cannot overrule the precedent established by a previous panel's holding. . . . As we often have stated, this court's policy dictates that one panel should not, on its own, reverse the ruling of a previous panel. The reversal may be accomplished only if the appeal is heard en banc. . . . Prudence, then, dictates that this panel decline to revisit such requests." (Citations omitted; internal quotation marks omitted.) *Staurovsky* v. *Milford Police Dept.*, 164 Conn. App. 182, 202–203, 134 A.3d 1263 (2016), appeal dismissed, 324 Conn. 693, 154 A.3d 525 (2017). Accordingly, we decline to revisit this

court's well reasoned analysis regarding the retroactive effect of P.A. 18-63 set forth in *Smith*.

The judgment is affirmed.

In this opinion the other judges concurred.

TRACY SIMMS v. AUGUSTO ZUCCO
(AC 44407)

Prescott, Clark and DiPentima, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court opening the judgment of dissolution and modifying his alimony obligation. The defendant, who resided in Pennsylvania at the time the plaintiff filed her motion to modify alimony, claimed that the court improperly determined that the plaintiff's service of the notice of the motion to modify, which consisted of a certified mailing by a state marshal to his residence in Pennsylvania, was legally sufficient. He further claimed that the trial court erred in opening the judgment of dissolution following the automatic stay imposed by the defendant's petition for chapter 13 bankruptcy pursuant to federal law (11 U.S.C. § 362) and in ordering retroactive alimony resulting in a substantial arrearage. *Held*:

1. The trial court properly concluded that the plaintiff's service on the defendant of the notice of her motion to modify was legally sufficient: the trial court granted the plaintiff's motion for order of notice permitting her to serve the defendant with notice of her motion to modify by certified mail, the plaintiff served the defendant with a copy of the motion to modify through a state marshal pursuant to statutory requirements (§§ 52-50 and 52-52), as the state marshal made service on the defendant by certified mail, the receipt for which was signed by the defendant's stepdaughter, who resided with the defendant, and this court declined to hold that certified mail service by a state marshal was legally insufficient to comply with §§ 52-50 and 52-52; moreover, the signature by the defendant's stepdaughter at his residence was sufficient to confer actual notice on the defendant, the defendant's counsel conceded at oral argument that the defendant did not dispute that he received actual notice of the plaintiff's service, and none of the defendant's filings in the trial court contested the manner of the plaintiff's notice of service.
2. The trial court did not violate the automatic bankruptcy stay imposed by 11 U.S.C. § 362 in modifying the defendant's alimony obligation and opening the judgment of dissolution; the Bankruptcy Court's written order clearly expressed its intention to terminate the automatic stay

with respect to the plaintiff's request that the trial court modify the defendant's alimony payments, and that order, which expressly permitted the plaintiff to take "all actions necessary" to modify the defendant's alimony obligation, did not prohibit the opening of the judgment of dissolution or prohibit the plaintiff from seeking, and the trial court from ordering, the payment of retroactive alimony.

3. The trial court did not abuse its discretion by increasing the defendant's alimony obligation and ordering retroactive alimony to the date on which the plaintiff filed her motion for modification: the court, having opened the judgment of dissolution, was no longer restricted by the limitations in the parties' separation agreement incorporated therein, and, on the basis of the plaintiff's testimony at the hearing on her motion to modify, the court found that the defendant intentionally had concealed substantial assets at the time of the judgment of dissolution and that the plaintiff's income and assets had decreased significantly from the date of that judgment; moreover, although the defendant failed to provide updated financial records, his bankruptcy filing established a substantial increase in his earnings and earning capacity; furthermore, the defendant, despite every opportunity to present any defense to the plaintiff's motion to modify, failed to do so.

Argued March 8—officially released August 23, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the court, *Winslow*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Shaban*, *J.*, granted the plaintiff's motion for order of notice to serve the defendant by certified mail with a motion to modify alimony; subsequently, the court, *Truglia*, *J.*, granted the plaintiff's motions to open the judgment and to modify alimony and rendered judgment modifying the judgment of dissolution and ordering the defendant to pay increased alimony to the plaintiff, from which the defendant appealed to this court. *Affirmed.*

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

Tracy Simms, self-represented, the appellee (plaintiff).

Opinion

PRESCOTT, J. The defendant, Augusto Zucco, appeals from the judgment of the trial court opening the judgment of dissolution and modifying his alimony obligation to the self-represented plaintiff, Tracy Simms. On appeal, the defendant claims that the court improperly (1) determined that the plaintiff's service of the notice of her motion to modify alimony was legally sufficient, (2) opened the judgment of dissolution and modified the defendant's alimony obligation in violation of the automatic bankruptcy stay imposed by 11 U.S.C. § 362 as a result of the defendant's chapter 13 bankruptcy petition, and (3) increased his alimony obligation and ordered retroactive alimony resulting in a substantial arrearage.[1] We disagree and, accordingly, affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history.[2] On January 15, 2014, the court dissolved the marriage of the parties. The court incorporated into the judgment of dissolution the parties' sepa-

[1] The defendant frames his first claim by stating in part that "the service of process by marshal does not comport with due process under the United States and Connecticut constitutions," and his second claim by stating in part that the court's judgment "violated the supremacy clause of the United States constitution . . . ." The defendant's appellate briefs, however, contain no legal analysis to support his constitutional claims. We therefore decline to review the constitutional aspect of the defendant's claims because they are inadequately briefed. See, e.g., *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 803, 256 A.3d 655 (2021) (holding that claim is abandoned when it is presented by mere abstract assertion and without substantive analysis).

[2] In his appellate reply brief, the defendant requests, pursuant to Practice Book § 60-2 (3), that this court strike certain documents and facts within the plaintiff's appellee brief and appendix on the ground that they were not part of the record before the trial court. Because our review is confined to the record that was before the trial court, "we shall disregard those portions of the plaintiff's appendix that do not conform to the guidelines set forth in the rules of practice." *Janusauskas* v. *Fichman*, 264 Conn. 796, 804 n.6, 826 A.2d 1066 (2003); see id. (declining to consider improper material within party's appendix); see also *State* v. *Richard W.*, 115 Conn. App. 124, 135 n.6, 971 A.2d 810 (same), cert. denied, 293 Conn. 917, 979 A.2d 493 (2009).

ration agreement (agreement), which was executed on the same date. Article 2 of the agreement sets forth the parties' respective rights and obligations regarding alimony. Article 2.1 of the agreement provides in relevant part that the defendant shall pay to the plaintiff $1 of alimony per year for a period of five and one-half years from the date of dissolution, that his alimony obligation "shall be completely non-modifiable as to term by way of extension," and that "assets and income from assets that are being divided pursuant to the parties' separation agreement and divorce decree, shall not be considered by a court in any future modification proceedings. Only earned income from employment shall be considered in any future modification proceedings including, but not limited to, W-2, 1099, K-1 or Schedule C income."

On November 13, 2015, the plaintiff filed a postjudgment motion to modify alimony in which she sought to increase the amount of the defendant's alimony obligation. In support of her motion to modify, the plaintiff asserted that there had been a substantial change in circumstances since the judgment of dissolution, "including an increase in the defendant's income and assets and a decrease in the plaintiff's financial circumstances." The plaintiff filed, and the court granted, a motion for order of notice permitting her to serve the defendant with notice of her motion to modify by certified mail. The plaintiff then retained a Connecticut state marshal who, on December 1, 2015, sent, by certified mail return receipt requested, notice of the motion to modify to the defendant at his residence in Gettysburg, Pennsylvania. On December 7, 2015, the notice was received at the defendant's residence and signed for by his stepdaughter, Alicia Styer. The defendant does not dispute that he received the documents served by the plaintiff.

On March 21, 2016, the plaintiff filed a motion to open the judgment of dissolution on the ground that it was obtained through the defendant's fraud. Therein, the plaintiff asserted that the defendant, by and through his various business entities, had concealed substantial property, assets, and income around the time of the judgment of dissolution. The plaintiff specifically contended that the defendant's financial affidavit submitted prior to the judgment of dissolution underrepresented his income and assets by more than $400,000 and that he failed to disclose that he had purchased property in Gettysburg, Pennsylvania.[3]

On February 6, 2019, the defendant and his current wife, Hillary Styer, filed a voluntary chapter 13 petition for bankruptcy in the United States Bankruptcy Court for the Middle District of Pennsylvania. On May 30, 2019, the plaintiff filed in the Bankruptcy Court a motion for relief from the automatic bankruptcy stay imposed by 11 U.S.C. § 362, "so as to allow continued divorce proceedings . . . and other economic issues to proceed in the Connecticut" dissolution action. On July 2, 2019, the Bankruptcy Court issued a written order granting the plaintiff's motion for relief and terminating the automatic bankruptcy stay to permit the plaintiff to "take all actions necessary to commence or continue an action to establish or modify an order for a domestic support obligation."

On December 5, 2019, the court held an evidentiary hearing on the plaintiff's motion to modify alimony, at which only the plaintiff and her counsel appeared.[4] At

[3] Both the plaintiff's motion to modify alimony and motion to open remained pending for several years partially because the parties attempted to resolve those motions by way of a stipulation, dated April 26, 2018. In his principal appellate brief, the defendant alleges that he was unable to satisfy his obligations pursuant to this stipulation because he was unable to obtain the required funds.

[4] On December 3, 2019, the defendant filed a motion for a continuance of this hearing on the ground that his grandfather-in-law recently had passed away. The plaintiff filed an objection to this motion for a continuance,

the hearing, the plaintiff introduced as full exhibits her December 5, 2019 financial affidavit and the defendant's April 17, 2019 schedule of assets, liabilities, and creditors filed in his bankruptcy proceeding. The plaintiff testified regarding the defendant's concealed assets and the increase in his income since the judgment of dissolution.

On January 3, 2020, the court issued an order initially denying the plaintiff's motion to modify alimony. The court reasoned that it was unable to modify the defendant's alimony obligation as requested for two reasons. First, the court held that the motion to modify was not served on the defendant in compliance with General Statutes §§ 46b-86 (a) and 52-50 (a).[5] Second, the court stated that the term of the defendant's alimony obligation had expired because, pursuant to the agreement, his alimony obligation was restricted to "five and one-half years" from the judgment of dissolution. Consequently, the court denied the plaintiff's motion to modify alimony "without prejudice to the plaintiff's right to demonstrate that the motion was served upon the defendant pursuant to § 52-50."

On January 14, 2020, the plaintiff filed a motion to reconsider the court's decision denying her motion to modify alimony. Therein, the plaintiff asserted that her

arguing that the funeral was scheduled for the day prior to the hearing, and the court, on December 3, 2019, denied the motion for a continuance. The defendant conversely stated in an e-mail to the caseflow coordinator that he would not be in attendance at this hearing because his wife was ill. The defendant raises no claim on appeal that the court improperly conducted the hearing in his absence.

[5] It is not entirely clear why the court initially determined that the plaintiff's service of her motion to modify was legally insufficient. Nevertheless, we infer from the record that the court's denial of the motion to modify was due to the fact that the plaintiff had not provided evidence that she had served the defendant with the motion to modify, which prompted the court to deny it without prejudice so that the plaintiff could produce evidence of service.

motion to modify alimony "was properly served upon the defendant by a marshal pursuant to statute and pursuant to [the] order of notice" issued by the court. The plaintiff also asserted that her pending motion to open the judgment "provides a means for the court to establish a new alimony order based upon the defendant's repeated fraud upon the court, both prior to and following the entry of [the] judgment [of dissolution]." The plaintiff attached to her motion to reconsider documents evincing the certified mail service of the notice of her motion to modify alimony to the defendant's residence. On February 10, 2020, the court held a hearing on the plaintiff's motion to reconsider at which counsel for both parties attended.

On July 9, 2020, the court issued a memorandum of decision in which it granted the plaintiff's motion to reconsider, the plaintiff's motion to modify alimony, and the plaintiff's motion to open. First, the court granted the plaintiff's motion to reconsider and held that the plaintiff's service of the notice of her motion to modify alimony was proper because she had "served the defendant with a copy of the motion to modify through a state marshal pursuant to the court's order of notice in accordance with General Statutes §§ 52-50 and 52-52. The service upon the defendant was sufficient to enable this court to consider making the plaintiff's motion for modification retroactive to the date of service, December 1, 2015."

Second, the court granted the plaintiff's motion to modify alimony, holding that the plaintiff had met her burden to establish a substantial change in circumstances. The court found that, during the relevant time period, the defendant's assets and income significantly had increased and the plaintiff's assets significantly had decreased. Accordingly, the court ordered the defendant "to pay the plaintiff $2000 per month in alimony on the first day of each month until further order of

[the] court," that "the alimony award is made retroactive from December 1, 2015 through July 1, 2020," and that "the total amount due [was] therefore $110,000 . . . ."

Third, the court granted the plaintiff's motion to open the judgment of dissolution. The court found that the plaintiff proved, by clear and convincing evidence, that the defendant intentionally had concealed significant assets from the court at the time of the judgment of dissolution. The court reasoned that it had "the authority to open the judgment solely as to the alimony order and modify the term of alimony as well as the amount paid" because the Bankruptcy Court's July 2, 2019 order terminating the stay "authorize[d] the plaintiff to take 'all action necessary to commence or continue an action to establish or modify an order for a domestic support obligation.' " The court modified the judgment of dissolution by deleting from article 2 of the incorporated agreement the five and one-half year limitation and the restriction that future modification of alimony be based solely on the defendant's employment income, and held that "[t]he remainder of the terms of article 2 of the agreement were to remain in full force and effect." On July 29, 2020, the defendant filed a motion to reargue the court's July 7, 2020 decision, which the court denied. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the court incorrectly determined that the plaintiff's service of the notice of her motion to modify alimony was legally sufficient. The defendant specifically argues that the plaintiff's service was improper because neither § 52-50 nor § 52-52 expressly permits a state marshal to serve notice of a postjudgment motion to modify alimony on a nonresident party by certified mail. The defendant further

argues that, even if service by certified mail was legally sufficient, there was no evidence that the defendant was served. Accordingly, the defendant contends that, because the plaintiff's service of her notice was improper, she was not entitled to retroactive alimony, pursuant to § 46b-86, spanning back to the service of the notice of her motion to modify alimony in December, 2015. We disagree.

The following additional facts and procedural history are relevant to our resolution of the defendant's first claim. On November 13, 2015, the plaintiff filed a post-judgment motion to modify alimony in which she sought to increase the amount of the defendant's alimony obligation. In her motion to modify, the plaintiff alleged that, "since the entry of the [judgment of dissolution], there has been a substantial change in the circumstances of the parties, including an increase in the defendant's income and assets and a decrease in the plaintiff's financial circumstances." The court scheduled a hearing on the plaintiff's motion to modify alimony for December 21, 2015, and ordered that the plaintiff provide notice of the motion to modify and of the corresponding hearing to the defendant "as prescribed by law."

Also on November 13, 2015, the plaintiff filed a motion for order of notice by way of a standard form, JD-FM-167 (Rev. 2-11). In this motion, the plaintiff sought the court's permission to serve the defendant—who was residing in Gettysburg, Pennsylvania—with notice of her motion to modify alimony "by registered or certified mail (to be done by a state marshal or other proper officer) or by an authorized person in the state where the party to be notified lives, or to make such other order of notice as the court deems reasonable." On November 23, 2015, the court granted the plaintiff's motion for order of notice and permitted the plaintiff to serve the defendant with notice "by registered or

certified mail, personal return receipt requested . . . .'' The plaintiff then directed a state marshal to provide this notice to the defendant.

The state marshal's returns of service[6] provide that he ''made service'' on the nonresident defendant. Particularly, those returns of service provide that, on December 1, 2015, the state marshal sent, by certified mail return receipt requested, to the defendant at his address in Gettysburg, Pennsylvania, a true and attested copy of the court's order of notice, the plaintiff's motion for order of notice, the plaintiff's motion to modify alimony, the order for a hearing, and the summons for the hearing. The state marshal's returns of service further state that, on December 12, 2015, he ''received the RETURN RECEIPT(S) undelivered [l]etter addressed to the . . . defendant . . . .''[7] The certified mail return receipt attached to the returns show that the service addressed to the defendant was signed on December 7, 2015, by the defendant's stepdaughter, Alicia Styer, who was residing at the defendant's residence at that time.

The court, in its July 9, 2020 memorandum of decision, granted the plaintiff's motion to reconsider and held that the plaintiff's service of the notice of her motion to modify alimony was proper because she had ''served the defendant with a copy of the motion to modify through a state marshal pursuant to the court's order of notice in accordance with . . . §§ 52-50 and 52-52. The service upon the defendant was sufficient

[6] The state marshal prepared both an original return of service and a supplemental return of service. The original return of service indicates that the state marshal sent the defendant the service, and the supplemental return of service provides that the service was received and signed for at the defendant's residence, as evidenced by the certified mail return receipts attached thereto.

[7] We construe the marshal's use of the phrase ''undelivered'' in his return of service to be a misnomer because the certified mail return receipts establish that service was made because the documents were received and signed for at the defendant's residence by Alicia Styer.

to enable [the] court to consider making the [modification of the defendant's alimony obligation] retroactive to the date of service, December 1, 2015." The court further held that "counsel appeared for the defendant in this case on December 17, 2015, and filed numerous pleadings in opposition to the plaintiff's motion to modify alimony."

We next set forth the standard of review and legal principles relevant to our resolution of this claim. Whether the plaintiff's service of the notice of her motion to modify and the court's order of notice was legally sufficient pursuant to §§ 52-50 and 52-52 raises an issue of statutory interpretation over which we exercise plenary review.[8] See, e.g., *Lopez* v. *William Raveis Real Estate, Inc.*, 343 Conn. 31, 42, 272 A.3d 150 (2022) (exercising plenary review over question of statutory construction). "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." (Internal quotation marks omitted.) *Day* v. *Seblatnigg*, 341 Conn. 815, 826, 268 A.3d 595 (2022).

[8] The narrow issue presented by the defendant's first claim is whether the method of service used by the plaintiff complied with the statutory requirements of §§ 52-50 and 52-52 because there is no factual dispute that a state marshal sent the defendant service by certified mail and that the defendant received the service.

Before turning to §§ 52-50 and 52-52, we emphasize that there is no dispute on appeal that the plaintiff must comply with the requirements of § 46b-86 to be entitled to an award of retroactive alimony. Section 46b-86 (a), which governs postjudgment motions to modify alimony, provides in relevant part: "No order for periodic payment of permanent alimony or support may be subject to retroactive modification, except that the court may order modification with respect to any period during which there is a pending motion for modification of an alimony or support order from the date of service of notice of such pending motion upon the opposing party pursuant to section 52-50. . . ." See *Cannon* v. *Cannon*, 109 Conn. App. 844, 849–50, 953 A.2d 694 (2008) (holding that § 46b-86 authorizes retroactive modification of alimony beginning on date notice of motion to modify was served).[9]

Section 52-50 (a), which authorizes certain individuals to serve process, provides in relevant part: "All process shall be directed to a state marshal, a constable or other proper officer authorized by statute, or . . . to an indifferent person. A direction on the process 'to any proper officer' shall be sufficient to direct the process to a state marshal, constable or other proper officer." There is no mandate within § 52-50 prescribing the method by which a proper officer is to effectuate service on the opposing party.

We next set forth the relevant language of § 52-52, which was cited by the court in its decision and on

[9] The defendant does not raise on appeal the question of whether the court was permitted to modify alimony retroactive to the date that the marshal sent the notice by certified mail service to the defendant (December 1, 2015) or the date that Alicia Styer signed the certified mail return receipt at the defendant's residence (December 7, 2015). We note that, in related contexts, a party is determined to be served by certified mail when they receive actual notice of the mail, not when the certified mail is placed in the mail by a state marshal. See generally *Kinity* v. *US Bancorp*, 212 Conn. App. 791, 851–52, A.3d (2022).

which the defendant substantially relies on appeal. See footnote 10 of this opinion. Section 52-52 (a), which governs the provision of judicial orders of notice, provides: "Orders of notice of legal or judicial proceedings need not be directed to or attested by any officer or person, as is required of process under section 52-50, but all copies of complaints or other papers thereby ordered, served or mailed shall be so attested as true copies of the original. Such order shall not require publication of any recital stating where the designated newspaper is printed or recital of any other details in or pertinent to the application for the order which are not essential parts of the notice to be given."

Accordingly, in order to be entitled to an award of retroactive alimony pursuant to § 46b-86 (a), a party must comply with the service requirements of § 52-50 by ensuring that a proper officer, such as a state marshal, serves notice of the motion to modify on the opposing party. See *Shedrick* v. *Shedrick*, 32 Conn. App. 147, 148, 151, 627 A.2d 1387 (1993) (holding that service of motion to modify that contained certification that "a copy was mailed to all counsel and pro se parties of record" did not strictly comply with § 52-50 because such mail service was not made "by a sheriff, a deputy sheriff, a constable or other proper statutorily authorized officer"). On the other hand, to comply with § 52-52, a party need not use the services of a proper officer, and can either serve, mail, or publish true copies of the order of notice to the opposing party.[10]

[10] Our discussion of both §§ 52-50 and 52-52 in this decision is due to the fact that the defendant's claim challenges the court's conclusion that the plaintiff's service complied with both of these statutes. We note, however, that the defendant's appellate briefs appear to conflate the distinction between §§ 52-50 and 52-52. As explained herein, to be entitled to retroactive alimony, § 46b-86 requires that a party serve a motion to modify in compliance with § 52-50. In contrast, there is no requirement in § 46b-86 that a party also comply with § 52-52 to be entitled to retroactive alimony.

In the present case, the plaintiff complied with the requirements of both §§ 52-50 and 52-52. The plaintiff filed, and the court granted, a motion for order of notice in which the plaintiff specifically sought to serve the defendant—who was residing in Gettysburg, Pennsylvania—with notice of her motion to modify alimony "by registered or certified mail (to be done by a state marshal or other proper officer) or by an authorized person in the state where the party to be notified lives, or to make such other order of notice as the court deems reasonable." In accordance with this order of notice, the plaintiff retained a state marshal, who "made service" of the notice of her motion to modify as well as the court's order of notice on the nonresident defendant by certified mail to his address in Gettysburg, Pennsylvania. The certified mail receipt was signed by the defendant's stepdaughter, who was residing at the defendant's residence at that time. Consequently, the plaintiff complied with § 52-50 because she retained a state marshal who served notice of her motion to modify on the defendant. The plaintiff complied with § 52-52 because the state marshal served by certified mail a true copy of the court's order of notice on the defendant.

The defendant contends that certified mail service was legally insufficient because neither § 52-50 nor § 52-52 contains a provision expressly permitting a state marshal to serve notice only by certified mail.[11] The

[11] When asked at oral argument before this court what would have constituted effective service in this circumstance, the defendant's counsel stated that the plaintiff should have hired a Pennsylvania service processor to provide the defendant in hand service of the notice. The defendant's position is unpersuasive. There is no language in §§ 52-50 and 52-52 providing that notice of a motion to modify may only be served in hand. We also emphasize that the court already had acquired personal jurisdiction over the defendant at the outset of this dissolution action. Thus, we are not inclined to read into §§ 52-50 and 52-52 a service requirement as strict as the one that exists for the initiation of an action.

Moreover, the defendant's position is belied by the manner in which he chose to serve the plaintiff with notice of his own motion to modify alimony. On June 23, 2021, the defendant served notice of his June 8, 2021 postjudg-

defendant's argument, however, has no basis in the plain language of §§ 52-50 and 52-52 because neither statute expressly prescribes the method by which such service must be accomplished. If the legislature intended to limit, or specifically delineate, the proper method of service within §§ 52-50 and 52-52, it could have done so. We decline the defendant's invitation to graft an exception into both §§ 52-50 and 52-52 that service on a nonresident party cannot be accomplished by certified mail. See *Rainbow Housing Corp.* v. *Cromwell*, 340 Conn. 501, 520, 264 A.3d 532 (2021) ("[W]e are not in the business of writing statutes; that is the province of the legislature. Our role is to interpret statutes as they are written. . . . [We] cannot, by [judicial] construction, read into statutes provisions [that] are not clearly stated. . . . [W]e are not permitted to supply statutory language that the legislature may have chosen to omit . . . ." (Citations omitted; internal quotation marks omitted.)). The defendant fails to cite a single case in support of this argument and, thus, we decline to hold for the first time that certified mail service by a state marshal is legally insufficient to comply with §§ 52-50 and 52-52.

The defendant alternatively contends that, even if certified mail service was legally sufficient, "there was no evidence that [he] was ever served at all" because the service package was signed for by his stepdaughter at his residence. We reject the defendant's argument on both legal and factual grounds. Legally, the purpose of service of a notice of a motion to modify is to ensure that a party has notice of their potential liability. See *Shedrick* v. *Shedrick*, supra, 32 Conn. App. 151–52; see

ment motion to modify alimony through the *same* method of service that he claims in this appeal was legally insufficient. Specifically, the defendant retained a Connecticut state marshal who sent by certified mail return receipt requested notice of the defendant's motion to modify to the plaintiff at her address in Patterson, New York.

also *Johnson* v. *Preleski*, 335 Conn. 138, 149, 229 A.3d 97 (2020) (generally noting that proper service "promotes the public policy of ensuring actual notice to [opposing party]" (internal quotation marks omitted)). The signature by the defendant's stepdaughter at his residence was sufficient to confer actual notice on the defendant, and the defendant has presented no evidence or legal authority to the contrary. Indeed, the defendant's position is contrary to our Supreme Court's decision in *Reiner*, *Reiner & Bendett*, *P.C.*, which affirmed the trial court's finding that actual notice was sufficiently conferred on a party when certified mail was sent to a proper address and signed for by a different individual at that address because " '[a] letter properly addressed, stamped and mailed is presumed to have been duly delivered to the addressee' " and "an individual ordinarily would not sign a return receipt for an envelope if the individual had no connection to the addressee." *Reiner*, *Reiner & Bendett*, *P.C.* v. *Cadle Co.*, 278 Conn. 92, 111–12, 897 A.2d 58 (2006).

Factually, the plaintiff's filing of her motion to modify, and the court's adjudication of it, came as no surprise to the defendant. In direct conflict with his argument in his written briefs, the defendant's counsel stated at oral argument before this court that he does not dispute that the defendant received actual notice of the plaintiff's service, which included the motion to modify as well as the court's order of notice. In fact, on December 18, 2015, eleven days after the service of the plaintiff's motion to modify, the defendant filed a motion for extension of time seeking to postpone the December 21, 2015 hearing on the plaintiff's motion to modify. On January 19, 2016, the defendant filed an objection to the plaintiff's motion to modify. Neither of these filings contested the manner in which the plaintiff served the notice of her motion to modify on the defendant. The defendant did not attend the December 5, 2019 hearing

on the plaintiff's motion to modify and, instead, he claimed in an e-mail sent to the caseflow coordinator that he would not be in attendance because his wife was ill. Additionally, the court held twenty-five status conferences during the four years that the plaintiff's motion to modify was pending, and the defendant entered into a stipulation and attempted to resolve the plaintiff's motion to modify.[12] On the basis of these circumstances, we are unpersuaded by the defendant's factual assertion that he never was served the notice of the plaintiff's motion to modify. In sum, we reject the defendant's claim as legally and factually unsupported, and we agree with the court's conclusion that the plaintiff properly served on the defendant notice of her motion to modify.

II

The defendant next claims that the court's opening of the judgment of dissolution and modification of the defendant's alimony obligation violated the automatic bankruptcy stay imposed by 11 U.S.C. § 362 as a result of the defendant's chapter 13 bankruptcy petition. In support, the defendant argues that the court lacked the authority to open the judgment of dissolution on the basis of a theory of fraud, to establish an alimony arrearage of $110,000, and to modify the terms of article 2 of the agreement because the automatic stay was terminated only as to "the establishment, modification, and

[12] The defendant alternatively argues that the court incorrectly concluded that he did not timely file a motion to dismiss the plaintiff's motion to modify alimony. Particularly, the defendant challenges the court's determination that he waived any challenge to the improper service of the motion to modify because he failed to file a motion to dismiss within thirty days of filing an appearance pursuant to Practice Book § 10-30. We need not reach this issue in light of our conclusion that service was legally sufficient, regardless of whether the defendant was required to timely file a motion to dismiss the motion to modify. See, e.g., *Riley* v. *Travelers Home & Marine Ins. Co.*, 333 Conn. 60, 87 n.11, 214 A.3d 345 (2019) (declining to reach alternative argument).

enforcement of a domestic support obligation and nothing else." We disagree.

The following additional facts and procedural history are relevant to our resolution of the defendant's second claim. On February 6, 2019, the defendant filed a voluntary chapter 13 petition for bankruptcy in the United States Bankruptcy Court for the Middle District of Pennsylvania. On May 30, 2019, the plaintiff filed in the Bankruptcy Court a motion for relief from the automatic bankruptcy stay imposed by 11 U.S.C. § 362, "so as to allow continued divorce proceedings . . . and other economic issues to proceed in the Connecticut jurisdiction where the action is still pending." The defendant filed an answer to the plaintiff's motion for relief, and the motion was heard by the Bankruptcy Court on June 25, 2019.

On July 2, 2019, the Bankruptcy Court issued a written order in which it granted the plaintiff's motion for relief and terminated the automatic bankruptcy stay only as to the defendant's alimony obligation. The Bankruptcy Court's order for relief from the automatic stay provides in relevant part: "ORDERED AND DECREED that pursuant to 11 U.S.C. [§] 362 (b) (2) (A) (ii) [the plaintiff] is hereby authorized to take all actions necessary to commence or continue an action to establish or modify an order for a domestic support obligation.

"FURTHER ORDERED that the automatic stay of 11 U.S.C. [§] 362 (a) is hereby terminated to permit [the plaintiff] to take all action necessary to enforce any said order for a domestic support obligation;

"FURTHER ORDERED that the automatic stay of 11 U.S.C. [§] 362 (a) is not terminated as to any issues in any way related to the divorce action referenced above other than an action to establish, modify or enforce an order for a domestic support obligation . . . ." [13]

[13] Although not squarely addressed by the Bankruptcy Court in its order, we note that 11 U.S.C. § 362 states that proceedings related to domestic

In its July 9, 2020 memorandum of decision, the court reasoned that it "has the authority to open the judgment solely as to the alimony order and modify the term of the alimony as well as the amount paid" because "the order of the Bankruptcy Court dated July 2, 2019, authorize[d] the plaintiff to take 'all action necessary to commence or continue an action to establish or modify an order for a domestic support obligation.' " The court accordingly ordered that the defendant pay to the plaintiff $2000 per month in alimony retroactive to the date of the filing of the motion to modify and modified the terms of article 2 of the agreement as to the defendant's alimony obligation.

We next set forth the standard of review and legal principles relevant to our resolution of this claim. The interpretation of an order of a Bankruptcy Court terminating an automatic stay is a question of law over which we exercise plenary review. See *Astoria Federal Mortgage Corp.* v. *Genesis Holdings, LLC*, 159 Conn. App. 102, 114, 122 A.3d 694 (2015). "As a general rule, judgments are construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The judgment should admit of a consistent construction as a whole. . . . To determine the meaning of a judgment, we must ascertain the intent of the court from the language used and, if necessary, the surrounding circumstances." (Internal quotation marks omitted.) *U.S. Bank Trust, N.A.* v. *Giblen*, 190 Conn. App. 221, 227, 209 A.3d 1266, cert. denied, 333 Conn. 903, 215 A.3d 159 (2019).

support obligations statutorily are exempt from the automatic bankruptcy stay. Specifically, exempt from the automatic bankruptcy stay is a party's "commencement or continuation of a civil action or proceeding . . . for the establishment or modification of an order for domestic support obligations . . . ." 11 U.S.C. § 362 (b) (2) (A) (ii) (2018). Accordingly, the plaintiff's motion for relief from the bankruptcy stay may have been superfluous.

Pursuant to 11 U.S.C. § 362, "the filing of a bankruptcy petition creates an automatic stay of execution against the commencement or continuation of all actions against the debtor that were, or could have been, filed against the debtor prior to the bankruptcy filing." *Webster Bank* v. *Zak*, 259 Conn. 766, 769 n.3, 792 A.2d 66 (2002). Although a bankruptcy stay imposed by § 362 is "extremely broad in scope," the "Bankruptcy Court . . . is authorized to grant a creditor relief from the stay for cause by terminating, annulling, modifying, or conditioning the stay. . . . The terms of an order modifying an automatic stay must be strictly construed because a stay under § 362 [of the Bankruptcy Code] freezes in place all proceedings against the debtor and his property." (Internal quotation marks omitted.) *Astoria Federal Mortgage Corp.* v. *Genesis Holdings, LLC*, supra, 159 Conn. App. 113; see also *U.S. Bank National Assn.* v. *Crawford*, 333 Conn. 731, 756, 219 A.3d 744 (2019) (explaining that "state courts have jurisdiction to interpret the provisions of the bankruptcy code and orders of the [B]ankruptcy [C]ourt to determine whether, under their plain terms, the automatic stay provision applies to a state court proceeding"); *Krondes* v. *O'Boy*, 69 Conn. App. 802, 810, 796 A.2d 625 (2002) ("[a]ny 'actions taken in violation of [an automatic bankruptcy] stay are void and without effect' ").

In the present case, the court's modification of the defendant's alimony obligation did not violate the automatic bankruptcy stay. The Bankruptcy Court's July 2, 2019 order unambiguously terminated the automatic bankruptcy stay to permit the plaintiff "to take all actions necessary to commence or continue an action to establish or modify an order for a domestic support obligation," and "to take all action necessary to enforce any said order for a domestic support obligation . . . ." This order clearly expresses the Bankruptcy Court's intention to terminate the automatic stay to permit the

plaintiff to request that the court modify the defendant's alimony payments. This is precisely what the plaintiff sought to do and what the trial court's July 9, 2020 memorandum of decision accomplished. Particularly, the court *modified* the original alimony order incorporated into the judgment of dissolution as to the amount, term, and conditions on the prospective modification of the defendant's alimony obligation.

The defendant further argues that "the order of the . . . Bankruptcy Court not to open the judgment was not respected in the decision of the Superior Court" and that the Bankruptcy Court's order did not permit an award of retroactive alimony. To start, the Bankruptcy Court's order did not prohibit the opening of the judgment of dissolution. Contrary to the defendant's argument, the order of the Bankruptcy Court expressly permitted the plaintiff to take "all actions necessary" to modify the defendant's alimony obligation, and there is no limitation that such modification be accomplished without opening the judgment that fixed the defendant's alimony payments. Likewise, there is nothing in the Bankruptcy Court's order prohibiting the plaintiff from seeking, and the court from ordering, that the defendant pay retroactive alimony. Instead, the Bankruptcy Court's order clearly provides the plaintiff the ability to seek to "establish," "modify," or "enforce" the defendant's alimony obligation. The defendant's argument that the court lacked authority to modify retroactively his alimony obligation is belied by the terms of the Bankruptcy Court's order. See, e.g., *U.S. Bank Trust, N.A.* v. *Giblen*, supra, 190 Conn. App. 227–28 (rejecting defendant's narrow interpretation of Bankruptcy Court order terminating stay as contrary to unambiguous and clear purpose of order permitting committee to pursue approval of foreclosure sale). Therefore, we conclude that the court's modification of the defendant's alimony

obligation and its opening of the judgment of dissolution did not violate the automatic bankruptcy stay.

III

The defendant's final claim is that the court abused its discretion by increasing his alimony obligation and ordering retroactive alimony to the date on which the plaintiff filed her motion for modification.[14] In support of this claim, the defendant specifically argues that the evidence presented by the plaintiff at the hearing on her motion to modify established that modification was not warranted because the defendant "is bankrupt and [the plaintiff] is financially healthy." We disagree.

The following additional facts and procedural history are relevant to our resolution of the defendant's third claim. On January 15, 2014, the parties first filed financial affidavits in this dissolution proceeding. The plaintiff's first financial affidavit shows that she had a total net weekly income of $198.88 (gross income minus deductions), total weekly expenses of $1456.94, total cash value of assets of $1,769,607.41, and total liabilities of $12,129.46. The defendant's first financial affidavit shows that he had a total net weekly income of $768 (gross income minus deductions), total weekly

[14] The defendant frames his third claim and devotes one sentence of his appellate briefs to assert that the court abused its discretion by opening the judgment of dissolution and modifying the terms of article 2 of the agreement. This assertion is unaccompanied by any supporting analysis and, thus, we decline to review this claim on the ground that it is inadequately briefed. See, e.g., *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 749, 183 A.3d 611 (2018) (declining to review claim asserted in single sentence as inadequately briefed); *Studer* v. *Studer*, 320 Conn. 483, 493 n.11, 131 A.3d 240 (2016) (declining to review claim that was made in four sentences in appellate brief as inadequately briefed). Further, the defendant does not claim on appeal that the court's modification of his alimony obligation violated those terms of article 2 that survived the court's decision opening the judgment of dissolution. See, e.g., *State* v. *Elson*, 311 Conn. 726, 766, 91 A.3d 862 (2014) ("to receive review, a claim must be raised and briefed adequately in a party's principal brief, and . . . the failure to do so constitutes the abandonment of the claim").

expenses of $2661, total cash value of assets of $1,192,450, and total liabilities of $524,604.

On December 5, 2019, the court held an evidentiary hearing on the plaintiff's motion to modify alimony. Only the plaintiff and her counsel appeared; the defendant's motion for a continuance was denied, and he stated in an e-mail to the caseflow coordinator that he would not be in attendance because his wife was ill. At the hearing, the plaintiff introduced as full exhibits her December 5, 2019 financial affidavit and the defendant's April 17, 2019 schedule of assets, liabilities, and creditors filed in his bankruptcy proceeding. The plaintiff's financial affidavit shows that she had a net weekly income of $394 (gross income minus deductions), total weekly expenses and liabilities of $1571, total cash value of assets of $702,779, and total liabilities of $70,183. The defendant's bankruptcy filing shows that he had approximately $2000 per week in income, and he shares with his current wife, Hillary Styer, approximately $1500 of weekly expenses, $1.2 million of assets, and $1 million of liabilities.[15] The plaintiff testified that the defendant's $1 alimony obligation prescribed by the judgment of dissolution was founded on the defendant's fraudulent concealment of substantial assets. The plaintiff testified that the defendant failed to disclose at the time of the judgment of dissolution: (1) a $69,000 transfer to the defendant from one of his business entities, HGAE, LLC; (2) his ownership of real property in

[15] As the court recognized in its decision, its comparison of the parties' financial circumstances was hindered because "the plaintiff made every effort to obtain financial information from the defendant through ordinary and customary discovery," but the defendant had failed to "comply with numerous clear orders to provide the plaintiff with his personal financial information." Although the plaintiff's financial affidavit and the defendant's joint bankruptcy filing are different forms that do not contain the same inputs, definitions, or calculations, the defendant does not claim on appeal that the court improperly used these different forms to compare the parties' financial circumstances.

Gettysburg, Pennsylvania; (3) that his bank account had more than $5000; (4) that he transferred approximately $28,000 to HGAE, LLC; (5) that he withdrew $45,000 from a "supposedly frozen" Morgan Stanley account; and (6) that he had a total income of $426,000 the year of the judgment of dissolution. The plaintiff then requested $2000 per month of alimony retroactive to December 1, 2015, which is the date that she served her motion to modify. See footnote 9 of this opinion.

On July 9, 2020, the court issued a memorandum of decision opening the judgment of dissolution. The court then removed from article 2 of the agreement the provision that alimony was payable only for five and one-half years and the restriction that any future modifications of alimony be based solely on employment income. The court also stated that "the remainder of the terms of article 2 of the agreement were to remain in full force and effect."

In the same memorandum of decision, the court also granted the plaintiff's motion to modify alimony and ordered the defendant to pay the plaintiff $2000 per month in alimony, which was retroactive to the service of her motion to modify on December 1, 2015. The court relevantly held that "the plaintiff has carried her burden of proof to show by a preponderance of the evidence that there was a substantial change in circumstances" and that the "statutory criteria in General Statutes § 46b-82" were satisfied. On the basis of the plaintiff's testimony at the hearing, the court found that the defendant intentionally had concealed substantial assets at the time of the judgment of dissolution and that his assets "were significantly greater" than what he had represented. The court further found that the "plaintiff's income and assets decreased significantly" from the date of the judgment of dissolution because it "no longer include[d] Social Security disability payments," and her liability "sharply increased" because the defendant

failed to pay his share of a joint portfolio loan. The court also stated that, although it did not have many of the defendant's financial records because he had obstructed the plaintiff's discovery attempts, the defendant's bankruptcy filing established that "there has been a substantial increase in the defendant's earnings and earning capacity which warrants an upward modification of the current alimony award."

We next set forth the standard of review and legal principles relevant to our resolution of this claim. We review for an abuse of discretion the court's modification of alimony as well as whether the court properly made such a modification retroactive. See *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 372, 999 A.2d 721 (2010) (abuse of discretion standard applies to review of modification of alimony award); *Callahan* v. *Callahan*, 192 Conn. App. 634, 648, 218 A.3d 655 (abuse of discretion standard applies to review order of retroactive alimony), cert. denied, 333 Conn. 939, 218 A.3d 1050 (2019).

To modify an existing alimony obligation pursuant to § 46b-86, "a court must determine whether there has been a substantial change in the financial circumstances of one or both of the parties. . . . Second, if the court finds a substantial change in circumstances, it may properly consider the motion and, on the basis of the § 46b-82 criteria, make an order for modification. . . . The court has the authority to issue a modification only if it conforms the order to the distinct and definite changes in the circumstances of the parties." (Internal quotation marks omitted.) *Olson* v. *Mohammadu*, 310 Conn. 665, 673–74, 81 A.3d 215 (2013). First, "the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it. Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent

for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order." (Internal quotation marks omitted.) Id., 672. Second, § 46b-82 "require[s] the court to consider the needs and financial resources of each of the parties and their children, as well as such factors as the causes for the dissolution of the marriage and the age, health, station, occupation, employability and amount and sources of income of the parties." (Internal quotation marks omitted.) Id., 673.

To render an award of retroactive alimony pursuant to § 46b-86, " 'there is no bright line test' "; *Callahan* v. *Callahan*, supra, 192 Conn. App. 649; instead, a court may consider a series of common-law factors, including "the long time period between the date of filing a motion to modify, or . . . the contractual retroactive date, and the date that motion is heard . . . . The court may examine the changes in the parties' incomes and needs during the time the motion is pending to fashion an equitable award based on those changes. . . . Moreover, § 46b-86 (a) accords deference to the trial court by permitting it to make a modification . . . retroactive to *any* period during which there is a pending motion for modification." (Citation omitted; emphasis in original; internal quotation marks omitted.) Id.; see also *Olson* v. *Mohammadu*, supra, 310 Conn. 686 n.16.

In the present case, the court did not abuse its discretion by increasing the defendant's alimony obligation and ordering that he pay retroactive alimony. The court fully considered the change in the parties' financial circumstances since the judgment of dissolution. Moreover, it was no longer restricted by the limitations within article 2 of the parties' agreement because the court had opened that judgment and removed those limitations.[16] The record indicates that, since the judgment of dissolution, the plaintiff's total cash value of

[16] We reiterate that the defendant failed to brief adequately his assertion that the court abused its discretion by opening the judgment of dissolution

assets decreased from $1,769,607.41 to $702,779. The plaintiff's evidence further established that her net weekly income no longer included Social Security payments, nor dividend income from the parties' financial management accounts due to the defendant's failure to pay the corresponding portfolio loan. On the other hand, the defendant's financial circumstances improved since the time of the judgment of dissolution, as his weekly income increased by approximately $1200 and he now shares with his current wife $1000 less weekly expenses. The court's modification also is supported by the defendant's concealment of substantial assets at the time of dissolution, which rendered his original $1 per month alimony obligation inequitable. The fact that the defendant filed for bankruptcy, standing alone, is not a sufficient ground for him to avoid paying alimony. See, e.g., *Norberg-Hurlburt* v. *Hurlburt*, 162 Conn. App. 661, 671 n.5, 133 A.3d 482 (2016) (filing of bankruptcy petition, standing alone, does not compel conclusion that party financially is unable to comply with domestic support orders). Thus, the record supports the court's determination that the financial resources of both parties substantially changed since the judgment of dissolution. See, e.g., *Nappo* v. *Nappo*, 188 Conn. App. 574, 590–91, 205 A.3d 723 (2019) (holding that trial court did not abuse its discretion in increasing party's alimony obligation on basis of parties' changed financial circumstances). These circumstances demonstrate a substantial change sufficient to justify the increase of the defendant's alimony obligation, both retroactively and prospectively.

The defendant's argument essentially requests that this court reweigh on appeal the plaintiff's evidence introduced at the hearing. We decline to do so because the trial court is "the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . [When] there is conflicting evidence

and modifying the terms of article 2 of the agreement. See footnote 14 of this opinion.

. . . we do not retry the facts or pass on the credibility of the witnesses. . . . The probative force of conflicting evidence is for the trier to determine." (Internal quotation marks omitted.) *Barlow* v. *Commissioner of Correction*, 343 Conn. 347, 359, 273 A.3d 680 (2022). This is particularly true in light of the fact that the defendant chose not to attend the hearing to present any evidence in opposition to the plaintiff's motion to modify. Thus, the defendant did not introduce any of his own evidence, present his own witnesses, cross-examine the plaintiff, or advance any evidentiary objections to the plaintiff's testimony or exhibits. The defendant has had every opportunity to appear before the court and present any defense to the plaintiff's motion to modify.[17] Therefore, we conclude that the court did not abuse its discretion by increasing the defendant's alimony obligation and ordering retroactive alimony.[18]

The judgment is affirmed.

In this opinion the other judges concurred.

[17] In contrast to the opening statement in the defendant's principal appellate brief that he was deprived of the opportunity to present his case, the defendant repeatedly sought continuances to attend the court's hearings and conferences because his grandfather-in-law had passed away, and he was unwilling or unable to pay for new tires and brakes for his car, as well as spend $60 in gas to travel to Connecticut.

[18] We also are unpersuaded by the defendant's additional argument that the court's modification of his alimony obligation violates the strictures set forth in *Dan* v. *Dan*, 315 Conn. 1, 105 A.3d 118 (2014). In *Dan*, our Supreme Court held that an increase in the payee's income, standing alone, does not justify reconsideration of a prior alimony award unless "the initial award was not sufficient to fulfill the underlying purpose of the award" or if other exceptional circumstances exist. Id., 15–17. The holding of *Dan* does not preclude the court's modification in the present case because the new alimony order was not based *only* on the increase of the defendant's income; rather, the change in circumstances included the defendant's increased income *combined with* the financial decline of the plaintiff and the defendant's concealment of assets at the time of the judgment of dissolution. Additionally, the court reasoned that the defendant's original $1 alimony obligation was insufficient because it was founded on his concealment of substantial assets. See *Cohen* v. *Cohen*, 327 Conn. 485, 499–500, 176 A.3d 92 (2018) (holding that *Dan* does not prohibit reconsideration of original alimony award based on substantial change in circumstances).

JOHN DOE *v.* CITY OF NEW HAVEN ET AL.
(AC 44406)

Prescott, Clark and DiPentima, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, the city of New Haven, the city's board of education and J, a high school principal, for injuries he allegedly sustained as a result of sexual abuse by F, a theater teacher at the high school. F supervised and directed an extracurricular school play in which the plaintiff had a part. F occasionally met with the plaintiff and other students involved in the play for one-on-one singing and acting lessons. Although J did not know that F met with students privately for lessons, other employees at the high school were aware of those meetings. F sent text messages from her personal cell phone to the plaintiff and other students about matters related to the play. The conversations between F and the plaintiff eventually became more intimate, and the plaintiff began going to F's classroom in the mornings before classes started and they would kiss. The plaintiff, along with other students at the high school, was enrolled in afternoon classes at an arts center and therefore was dismissed from the high school at 12:30 p.m. Monday through Thursday. One Friday, when the plaintiff did not have classes at the arts center, he went to F's classroom after his last class ended at 12:30 p.m. and she performed oral sex on him. On another day, the plaintiff and F went to an adjacent dressing room adjoining the auditorium stage. A security guard entered the dressing room and discovered them; the police and high school administration were immediately notified and an investigation ensued. The plaintiff alleged, inter alia, that the defendants failed to supervise employees and classrooms and teachers' use of cell phones. The plaintiff further alleged that J violated a ministerial duty to report suspected child abuse under the mandatory reporting statutes (§ 17a-101 et seq.) because she had reasonable cause to suspect that, prior to the incident between the plaintiff and F in the dressing room, the plaintiff or other students were imminently at risk of being sexually abused by F. The defendants thereafter filed a motion for summary judgment, claiming that they were entitled to governmental immunity. The trial court granted the defendants' motion, concluding, inter alia, that nothing in the record supported the plaintiff's assertion that the defendants had knowledge of or reasonable cause to suspect that, prior to the date of the incident in the dressing room, F had been sexually abusing the plaintiff. The court also concluded that governmental immunity barred the plaintiff's claims of negligence that arose from discretionary acts by the defendants because he failed to establish a genuine issue of material fact as to whether he was an identifiable person subject to imminent harm. The

trial court rendered judgment for the defendants, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly concluded that no genuine issue of material fact existed as to whether J breached the ministerial duty under § 17a-101a to report a reasonable suspicion of child abuse or that the defendants violated ministerial duties to prohibit free class periods and to take attendance in every class:

a. The plaintiff failed to demonstrate the existence of a genuine issue of material fact as to whether J or any other staff member had reasonable cause to suspect that F was sexually abusing or exposing the plaintiff to an imminent risk of sexual abuse: F's personnel file was devoid of complaints or disciplinary actions prior to the events at issue, her application for her teaching position was accompanied by positive recommendations from her references, there was nothing inherently suspicious about a teacher occasionally meeting with a student privately in connection with a supervised extracurricular activity, and, although the school administration knew F had collected contact information from the students involved in the play, neither that nor the nontraditional, relaxed setting of F's classroom that included a couch would cause a reasonable person to suspect that any of those students were at imminent risk for sexual abuse; moreover, none of the evidence suggested that J or any other staff member was aware that F had exchanged sexually suggestive messages with the plaintiff, as neither F nor the plaintiff disclosed to anyone that they were communicating by text message; furthermore, the plaintiff ensured that he and F were alone before any inappropriate contact occurred between them, both took measures to be discreet and no staff member had witnessed them engaging in sexual conduct.

b. Contrary to the plaintiff's assertion, J's deposition testimony was insufficient to give rise to genuine issues of material fact as to whether the defendants violated ministerial duties requiring that attendance be taken in every class and prohibiting students from having free periods in their class schedules: J did not testify unequivocally that she had communicated to her employees a mandatory method for creating class schedules without free periods but, rather, highlighted a general practice that lacked the specificity necessary to establish a ministerial duty, and her testimony did not constitute the specific and clearly stated directives to school employees required to establish a ministerial duty to take attendance in every class and notify parents about student absences, as J merely observed that no student should have had a free period in his or her class schedule and that students were dismissed early when their schedules ended before the school day concluded; moreover, even if J's testimony were sufficient to give rise to a genuine issue of material fact as to whether the defendants had a ministerial duty to take attendance in every class, the defendants still would be entitled to summary judgment because there was no evidence that they breached that duty; furthermore, contrary to the plaintiff's related contention that he was allowed to visit

F's classroom unnoticed because the defendants failed to account for students who were dismissed early but did not leave the high school building, J's testimony plainly established that there was no general practice or requirement for staff members to account for students permitted to leave the building, much less a clear directive compelling them to account for the whereabouts of those students in a prescribed manner.

2. The plaintiff's claim that he fell within the identifiable person-imminent harm exception to discretionary act immunity was unavailing, as nothing in the record gave rise to a genuine issue of material fact that it would have been apparent to J or other staff members that F was so likely to harm the plaintiff that the defendants had an unequivocal duty to act to prevent such harm: the record made clear that the plaintiff and F took steps to avoid raising suspicion about the nature of their relationship, and there was no evidence to suggest that the plaintiff's repeated visits to F's classroom should have made it apparent that a sexual assault was imminent, particularly when the plaintiff had an ostensibly legitimate reason for visiting F's classroom due to his involvement in the school play; moreover, the defendants received no complaints concerning F prior to the discovery of the abuse, her recommendations for the theater teaching position were all positive, and nothing in the record suggested that any staff member reasonably would have anticipated that a sexual assault of the plaintiff or any student would be the immediate result of F's relaxed classroom setting, particularly in light of the fact that it was a space intended for dramatic arts instruction; furthermore, there was no basis in the record to conclude that J or any staff member wilfully ignored circumstances that otherwise would have alerted them to the possibility of imminent and immediate harm, as they were under no duty to ask questions beyond that which was immediately apparent.

Argued March 8—officially released August 23, 2022

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Wahla*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Rosalie D. Louis, for the appellant (plaintiff).

Thomas R. Gerarde, with whom, on the brief, was *Beatrice S. Jordan*, for the appellees (defendants).

Opinion

CLARK, J. The plaintiff, John Doe,[1] brought this negligence action against the defendants, the Board of Education of the City of New Haven (board) and Edith Johnson, principal of Wilbur Cross High School (high school), for injuries he allegedly sustained as a result of sexual abuse by Jennifer Frechette, a former teacher at the high school. The plaintiff appeals from the trial court's decision rendering summary judgment in favor of the defendants on the ground that the defendants were entitled to governmental immunity.[2] The plaintiff claims that the court improperly concluded that (1) no genuine issues of material fact existed with respect to whether Johnson had a ministerial duty to report suspected child abuse under General Statutes § 17a-101 et seq., (2) Johnson's deposition testimony did not establish the existence of two additional ministerial duties—specifically, a duty to prohibit free class periods and a duty to take attendance, and (3) the plaintiff was not an identifiable person subject to imminent harm for purposes of the identifiable person-imminent harm exception to governmental immunity for discretionary acts.[3] We affirm the judgment of the trial court.

[1] This action was commenced on behalf of John Doe, a minor, by and through his parent, Jane Doe, as next friend.

[2] The city of New Haven (city) was also a defendant in the underlying action. The court rendered summary judgment in favor of the city on all counts of the plaintiff's complaint. The plaintiff does not challenge that judgment on appeal, and the city has not participated in this appeal. For clarity, we refer to the board and to Johnson individually by name and collectively as the defendants.

The plaintiff also brought a separate action against Frechette, seeking damages for assault, intentional infliction of emotional distress and negligent infliction of emotional distress. See *Doe* v. *Frechette*, Superior Court, judicial district of New Haven, CV-17-5039317-S. The trial court in that action granted the plaintiff's motion to consolidate that matter with the underlying action. The plaintiff's action against Frechette is not at issue in this appeal.

[3] In his brief to this court, the plaintiff additionally argues that the trial court improperly rendered summary judgment with respect to his allegation that the defendants violated a ministerial duty owed to him under General Statutes § 10-220 (a) (4), which provides, inter alia, that each local board

The following facts, which we view in the light most favorable to the plaintiff as the nonmoving party, and procedural history provide the necessary background for our resolution of this appeal. During the 2016–2017 academic year, the plaintiff was fifteen years old and a sophomore at the high school. He and approximately sixty to seventy-five students at the high school were enrolled in afternoon classes at the Educational Center for the Arts (arts center) and therefore were dismissed from the high school at 12:30 p.m. Monday through Thursday.

Frechette began working for the board as a theater teacher at the high school in 2013. It was her first experience teaching high school students. Prior to that position, she had taught second and third grade students for fifteen years. The board offered Frechette the position after conducting a background check, which revealed no prior criminal history, and contacting her professional references, each of whom provided a positive recommendation. Prior to the events giving rise to this appeal, neither Johnson nor the board had received any complaints about Frechette, and her personnel file was devoid of any disciplinary actions.

In addition to her teaching duties, Frechette supervised and directed an extracurricular school play. In October, 2016, Frechette held a meeting for students interested in participating in the play and asked them

of education has a duty to provide an appropriate learning environment, including a safe school setting. Other than a cursory reference to that statute, however, the plaintiff's brief is wholly devoid of any legal authority or analysis to support the bald assertion that § 10-220 (a) (4) imposes a ministerial rather than a discretionary duty. When a party cites no law and provides no analysis in support of a claim, we may decline to review it. See, e.g., *Jahn* v. *Board of Education*, 152 Conn. App. 652, 665–66 n.8, 99 A.3d 1230 (2014); see also *Marvin* v. *Board of Education*, 191 Conn. App. 169, 178 n.8, 213 A.3d 1155 (2019) ("[c]laims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion" (internal quotation marks omitted)). We therefore do not address this claim.

to disclose their contact information, including a cell phone number, and sign a commitment form.[4] Frechette collected this information to communicate with students about the rehearsal schedule. Frechette also occasionally met with students involved in the play for one-on-one singing and acting lessons. Johnson did not know that Frechette met with students privately for lessons, but the school's guidance counselor and other teachers were aware of that.

The plaintiff was not enrolled in any of Frechette's classes, but he auditioned for and was cast in the play. In November, 2016, Frechette began to send text messages from her personal cell phone to the plaintiff and other students about rehearsals and matters related to the play. Subsequently, after learning that the plaintiff was not performing well in his English class, Frechette told the plaintiff's English teacher that she would "get [the plaintiff] back on track" and began sending text messages to the plaintiff about his English assignments. The plaintiff also sent text messages to Frechette after rehearsals to inquire about whether she had any feedback about his performance. Eventually, the plaintiff and Frechette's conversations became more intimate, and Frechette disclosed to the plaintiff that she was having marital problems.[5]

By December, 2016, Frechette and the plaintiff had begun exchanging sexually suggestive messages. One evening in mid-December, Frechette and the plaintiff discussed wanting to kiss each other. The next day, the

[4] By signing the commitment form, a student agreed to accept any role assigned, participate in rehearsals, and abide by certain standards of conduct.

[5] Johnson testified that some teachers used text messaging to communicate with students but that most teachers used other communication platforms designed to transmit messages to groups. Although it was known that Frechette had collected students' contact information, there is no evidence that Johnson or any other staff member knew that Frechette was text messaging the plaintiff on an individual basis.

plaintiff went to Frechette's classroom in the morning before classes started. When they were alone, the plaintiff approached Frechette to hug her and she kissed him. During the following week, the plaintiff would immediately go to Frechette's classroom after he arrived at the high school in the morning, and the two would kiss. On the Friday before winter break, a day he did not have classes at the arts center, the plaintiff went to Frechette's classroom after his last high school class ended at 12:30 p.m. and remained there until approximately 2 p.m. During that time, Frechette removed her blouse and brassiere and performed oral sex on the plaintiff.

The plaintiff did not tell anyone that he and Frechette had sexual contact because she had warned him that she could "get in big trouble" and he was concerned that she would be fired. Before any such contact occurred, the plaintiff ensured that he and Frechette were alone in her classroom and that the classroom door was closed. Additionally, they both tried to keep quiet to avoid alerting anyone passing by the classroom. According to the plaintiff, no one witnessed any of the sexual conduct between them.

On January 5, 2017, Frechette picked up the plaintiff from the arts center after his afternoon classes ended and drove him to the high school. They had agreed to meet that day under the guise that she was providing him a one-on-one voice lesson. Frechette previously had met with the plaintiff privately on two other occasions for voice lessons. After they arrived at the high school, they went to her classroom and started kissing. They eventually moved to one of the dressing rooms adjoining the auditorium stage, which was near Frechette's classroom. Shortly thereafter, a security guard entered the dressing room and discovered the plaintiff sitting with his shoes off on a makeshift bed and Frechette, who had also removed her shoes, hiding between two

costume racks. The New Haven Police Department and the high school administration immediately were notified, and a criminal investigation ensued. Johnson also reported the incident to the Department of Children and Families (department) that same day. Frechette was placed on administrative leave the following day and resigned from her position in May, 2017. She subsequently pleaded guilty to one count of risk of injury to a child and was sentenced to ten years of imprisonment, execution suspended after nine months, followed by ten years of probation.

On July 12, 2018, the plaintiff commenced this negligence action, seeking damages pursuant to General Statutes § 52-557n[6] and General Statutes § 7-465.[7] In his complaint, the plaintiff alleged, inter alia, that the defendants failed (1) to supervise employees and classrooms in order to prevent the sexual assault of students by employees, (2) to supervise teachers' use of social media and cell phones to ensure that teachers were not

[6] General Statutes § 52-557n (a) provides in relevant part: "(1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties; (B) negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit; and (C) acts of the political subdivision which constitute the creation or participation in the creation of a nuisance . . . . (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law."

[7] General Statutes § 7-465 provides in relevant part: "(a) Any town, city or borough . . . shall pay on behalf of any employee of such municipality . . . all sums which such employee becomes obligated to pay by reason of the liability imposed upon such employee by law for damages awarded . . . for physical damages to person or property, except as set forth in this section, if the employee, at the time of the occurrence, accident, physical injury or damages complained of, was acting in the performance of his duties and within the scope of his employment . . . ."

sexually harassing or assaulting students, (3) to satisfy affirmative duties imposed under Connecticut's mandatory reporting statutes, and (4) to provide a safe and secure educational environment. The defendants filed an answer on October 4, 2018, denying the material allegations of the complaint and asserting, by way of a special defense, that they were entitled to governmental immunity.

On October 30, 2019, following discovery, the defendants moved for summary judgment on all counts of the complaint on, inter alia, the grounds that the plaintiff's claims were barred by statutory and common-law governmental immunity. In support of their motion, they argued that they had satisfied any ministerial duties owed to the plaintiff under the mandatory reporting statutes and that the other conduct alleged in the complaint involved discretionary governmental acts. In addition, the defendants argued that the claim against the board pursuant to § 7-465 failed as a matter of law because such a claim must be predicated on a finding that an employee had acted negligently and that Johnson, whose alleged negligence underlay the indemnity claim, was entitled to immunity. In response, the plaintiff countered that the defendants were not entitled to summary judgment because there existed genuine issues of material fact with respect to whether the defendants had breached the mandatory reporting statutes and whether the defendants were liable for their discretionary acts because the plaintiff was an identifiable person subject to imminent harm. The plaintiff additionally argued that Johnson's deposition testimony established two ministerial duties that precluded summary judgment on the basis of governmental immunity. Specifically, he asserted that (1) his free period between 12:30 through 2 p.m. on Fridays violated a school policy prohibiting free class periods, and (2) students attending the arts center in the afternoons were not adequately accounted for in violation of an attendance policy.

In a memorandum of decision filed November 13, 2020, the trial court granted the defendants' motion for summary judgment. Relevant to this appeal, the court concluded that nothing in the record supported the plaintiff's assertion that the defendants had knowledge of, or reasonable cause to suspect prior to January 5, 2017, that Frechette was sexually abusing the plaintiff. The court noted the plaintiff's testimony that, to his knowledge, no one had observed the inappropriate physical contact between him and Frechette and that they took measures to avoid being discovered. The court also concluded that the complaint did not allege a violation of any ministerial duties by the defendants. In addition, on the basis of the pleadings and evidentiary record, the court concluded that, to the extent the plaintiff alleged that the defendants were liable for negligence arising from discretionary acts, those claims were barred by governmental immunity because the plaintiff failed to establish that there existed a genuine issue of material fact with respect to whether he was an identifiable person subject to imminent harm. In light of its determination that Johnson was entitled to governmental immunity, the court concluded that the plaintiff's indemnification claim under § 7-465, which sought to hold the board liable for damages arising from Johnson's alleged negligence, also failed as a matter of law.[8] This appeal followed. Additional facts will be set forth as necessary.

[8] Pursuant to § 7-465 (a), a plaintiff may seek "indemnification against a municipality in conjunction with a common-law action against a municipal employee . . . ." (Citation omitted.) *Manson* v. *Conklin*, 197 Conn. App. 51, 53 n.1, 231 A.3d 254 (2020). The duty to indemnify, however, attaches only when a municipal official, agent or employee incurs liability. *Kusy* v. *Norwich*, 192 Conn. App. 171, 174 n.2, 217 A.3d 31, cert. denied, 333 Conn. 931, 218 A.3d 71 (2019); see also *Daley* v. *Kashmanian*, 193 Conn. App. 171, 175 n.2, 219 A.3d 499 (2019) (duty to indemnify arises upon finding that employee acted negligently within scope of employment), cert. granted, 335 Conn. 939, 237 A.3d 1 (2020), and cert. denied, 335 Conn. 940, 237 A.3d 1 (2020).

Before turning to the merits of the plaintiff's claims on appeal, we set forth the standards that govern our review of a trial court's decision to grant a motion for summary judgment and provide an overview of the doctrine of governmental immunity. A party is entitled to summary judgment "if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Practice Book § 17-49. "In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle [the party] to a judgment as a matter of law . . . ." (Internal quotation marks omitted.) *Ramos* v. *Branford*, 63 Conn. App. 671, 677, 778 A.2d 972 (2001). "The party opposing a motion for summary judgment must present evidence that demonstrates the existence of some disputed factual issue . . . . The movant has the burden of showing the nonexistence of such issues but the evidence thus presented, if otherwise sufficient, is not rebutted by the bald statement that an issue of fact does exist. . . . To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents." (Internal quotation marks omitted.) *McCarroll* v. *East Haven*, 180 Conn. App. 515, 521, 183 A.3d 662 (2018).

"A motion for summary judgment is properly granted if it raises at least one legally sufficient defense that would bar the plaintiff's claim and involves no triable issue of fact. . . . Our review of the trial court's decision to grant a motion for summary judgment is plenary." (Internal quotation marks omitted.) *Thivierge* v. *Witham*, 150 Conn. App. 769, 773, 93 A.3d 608 (2014).

Accordingly, we must determine whether "the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Kusy* v. *Norwich*, 192 Conn. App. 171, 176, 217 A.3d 31, cert. denied, 333 Conn. 931, 218 A.3d 71 (2019).

As a general rule, municipalities are "immune from liability unless the legislature has enacted a statute abrogating such immunity." *Gaudino* v. *East Hartford*, 87 Conn. App. 353, 355, 865 A.2d 470 (2005). "The common-law doctrine of governmental immunity has been statutorily enacted and is now largely codified in . . . § 52-557n." (Internal quotation marks omitted.) *Doe* v. *Flanigan*, 201 Conn. App. 411, 426, 243 A.3d 333, cert. denied, 336 Conn. 901, 242 A.3d 711 (2020). Pursuant to § 52-557n (a) (1) (A), a municipality may be liable for damages to a person or property caused by the negligent acts or omissions of the municipality or its employees, officers, and agents acting within the scope of their duties.

Whether a municipality may be held liable for its negligent acts or omissions, however, depends on the nature of the alleged acts. "[Section] 52-557n (a) (2) (B) . . . explicitly shields a municipality from liability for damages to person or property caused by the negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." (Internal quotation marks omitted.) *Haynes* v. *Middletown*, 314 Conn. 303, 312, 101 A.3d 249 (2014). Thus, a municipality may be held liable for its employee's negligently performed ministerial acts but is, generally speaking, entitled to immunity for the performance of discretionary governmental acts. "A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment [or discretion] upon the propriety of the act being done.

. . . In contrast, when an official has a general duty to perform a certain act, but there is no city charter provision, ordinance, regulation, rule, policy, or any other directive [requiring the government official to act in a] prescribed manner, the duty is deemed discretionary." (Citation omitted; internal quotation marks omitted.) *Borelli* v. *Renaldi*, 336 Conn. 1, 12, 243 A.3d 1064 (2020).

"The [common-law] doctrines that determine the tort liability of municipal employees are well established. . . . Generally, a municipal employee is liable for the misperformance of ministerial acts, but has a qualified immunity in the performance of [discretionary] governmental acts. . . . Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature. . . . The hallmark of a discretionary act is that it requires the exercise of judgment." (Internal quotation marks omitted.) *Cole* v. *New Haven*, 337 Conn. 326, 336–37, 253 A.3d 476 (2020). Ministerial acts, on the other hand, "are performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the action." (Internal quotation marks omitted.) *Segreto* v. *Bristol*, 71 Conn. App. 844, 851, 804 A.2d 928, cert. denied, 261 Conn. 941, 808 A.2d 1132 (2002).

"Municipal officials are immunized from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . . Discretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury.

. . . In contrast, municipal officers are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion. . . . This is because society has no analogous interest in permitting municipal officers to exercise judgment in the performance of ministerial acts." (Internal quotation marks omitted.) *Merritt* v. *Bethel Police Dept.*, 120 Conn. App. 806, 811, 993 A.2d 1006 (2010).

I

On appeal, the plaintiff first contends that there is a genuine issue of material fact with respect to whether the defendants breached a ministerial duty to report suspected child abuse under § 17a-101 et seq. Second, the plaintiff claims that Johnson's deposition testimony established a genuine issue of material fact regarding whether the defendants violated two additional ministerial duties. We address each of these claims in turn.

A

The plaintiff first asserts that the trial court improperly rendered summary judgment in favor of the defendants because there exists a genuine issue of material fact with respect to whether Johnson violated a ministerial duty to report suspected child abuse pursuant to § 17a-101 et seq.[9] We are not persuaded.

We begin our discussion by noting that the parties agree that Johnson had a ministerial duty to report

[9] General Statutes § 17a-101 (b) (9) provides in relevant part that "any school employee, as defined in [General Statutes §] 53a-65" shall be a mandated reporter.

General Statutes § 17a-101a (a) (1) provides in relevant part that "[a]ny mandated reporter, as described in section 17a-101, who in the ordinary course of such person's employment or profession has reasonable cause to suspect or believe that any child under the age of eighteen years (A) has been abused or neglected . . . or (C) is placed at imminent risk of serious harm . . . shall report or cause a report to be made in accordance with the provisions of [General Statutes §§] 17a-101b to 17a-101d, inclusive."

suspected child abuse; see General Statutes § 17a-101 (b) (9); when, in the ordinary course of her duties, she obtained "reasonable cause to suspect" that a student has been abused or was at "imminent risk of serious harm . . . ."[10] General Statutes § 17a-101a (a) (1) (C). The plaintiff argues that the trial court improperly required him to produce evidence that Johnson had actual knowledge of abuse, rather than "reasonable cause to suspect" the abuse or that there was a risk of imminent harm. He further contends that summary judgment was improper because there existed a genuine issue of material fact regarding whether, *prior* to January 5, 2017, when Johnson filed a report with the department, Johnson had reasonable cause to suspect that the plaintiff or other students were imminently at risk of sexual abuse by Frechette and therefore violated a ministerial duty by failing to file a report earlier under the mandatory reporting statutes.

In support of his contention that the evidence raises a genuine issue of material fact regarding whether Johnson had reasonable cause to suspect that he was at imminent risk of sexual abuse, the plaintiff directs our

[10] In *Doe* v. *Madison*, 340 Conn. 1, 23 n.22, 262 A.3d 752 (2021), our Supreme Court observed that numerous Superior Court decisions have held that § 17a-101a (a) (1) imposes a ministerial, rather than a discretionary, duty. See, e.g., *Doe* v. *Kennedy*, Superior Court, judicial district of Waterbury, Docket No. CV-09-0513921-S (November 29, 2012) (55 Conn. L. Rptr. 193, 196). The defendants in the present case contend that, although the mandatory reporting statutes impose a ministerial duty, it is triggered only when a mandated reporter has actual knowledge of or "reasonable cause to suspect" abuse and that determining whether reasonable cause exists is a discretionary act because such a determination requires the exercise of judgment and discretion. Thus, the defendants appear to assert that, in the absence of actual knowledge, acts or omissions by municipal officials or employees in relation to their duty to report suspected child abuse are discretionary. Because we conclude that the plaintiff cannot prevail with respect to his claim that the defendants breached duties owed under § 17a-101 et seq., it is unnecessary to address the defendants' argument. Accordingly, for purposes of this appeal, we assume, without deciding, that the relevant mandatory reporting statutes impose a ministerial duty.

attention to the following facts: Frechette's classroom, which was adjacent to the gymnasium and cafeteria, was isolated from other classrooms and afforded Frechette privacy; no one could view the inside of her classroom from the hallway because the side-by-side doors to the room did not have windows; and Frechette had created a relaxed, lounge environment in her classroom, including a couch, piano, keyboard, and lamps that provided soft lighting. In short, the plaintiff argues that Johnson and other staff members had reasonable cause to believe a student was at imminent risk of sexual abuse by Frechette because her classroom, the nature of which was known to Johnson and other staff members, was inappropriate for an educational setting. Additionally, the plaintiff contends that (1) certain staff members were aware that Frechette met privately with students for lessons, and (2) the school administration knew that Frechette had collected students' contact information, that she had access to the school building after hours, and that she was inexperienced in teaching high school students. According to the plaintiff, these additional facts, taken together, were enough to create a reasonable suspicion of imminent abuse.

In response, the defendants argue that the mere fact that Frechette had created a relaxed environment in her classroom, met with students one on one, and sent text messages to students participating in the play about the rehearsal schedule could not, as a matter of law, constitute reasonable cause to suspect that the plaintiff or any other student was at imminent risk of sexual abuse. The defendants emphasize that, prior to January 5, 2017, they never had received any complaints about Frechette's communications or contact with students and that there had been no disciplinary notations in her record. Additionally, they note that it is undisputed that Frechette and the plaintiff always ensured that they were alone before any sexual contact occurred between

them and that there was no evidence that any staff member or Johnson knew of the communications between Frechette and the plaintiff.

The defendants also argue that the plaintiff in this case has produced even less evidence in support of his claim that they had reasonable cause to suspect that he was at imminent risk of sexual abuse than the plaintiffs had produced in *Doe* v. *Madison*, 340 Conn. 1, 262 A.3d 752 (2021),[11] a recent case in which our Supreme Court concluded that municipal defendants had no reasonable cause to suspect that students were at imminent risk of sexual abuse. Id., 24–25. In that appeal, the plaintiffs, three male students, had brought separate and consolidated negligence actions against a board of education and a high school principal (*Madison* defendants), seeking damages for injuries arising from sexual abuse by a female teacher. Id., 5. The trial court rendered summary judgment in favor of the defendants on the ground of governmental immunity, and the plaintiffs appealed. Id. On appeal to our Supreme Court, the plaintiffs argued that the trial court improperly had granted summary judgment in favor of the *Madison* defendants because the evidence demonstrated that the school principal and staff had reasonable cause to suspect child abuse and failed to report the abuse to the department. Id. Specifically, the plaintiffs argued that the teacher, who also served as a core conditioning coach for the football team, wore to football practice "skimpy shorts and sports bras that exposed her genitalia and breasts," creating reasonable cause to suspect that the plaintiffs were at imminent risk of sexual abuse, which should have been reported by the team's coaches, some

[11] In their appellate brief, the defendants cited to *Doe* v. *Madison*, Superior Court, judicial district of New Haven, CV-17-5037671-S (March 29, 2019), which was pending before our Supreme Court. Prior to oral argument, the defendants filed a notice of supplemental authority pursuant to Practice Book § 67-10, citing *Doe* v. *Madison*, supra, 340 Conn. 1, which was officially released after the parties had filed their briefs in the present appeal.

of whom had testified that they had thought the teacher dressed in that manner to attract the attention of male student athletes. (Internal quotation marks omitted.) Id., 21. Additionally, the plaintiffs argued that the teacher's husband, who was also employed at the school, had known that his wife had communicated with one of the plaintiffs on social media and that the husband had claimed to be aware of her flirtatious behavior with students. Id. The plaintiffs also asserted that the *Madison* defendants had reasonable cause to suspect that they were at imminent risk of sexual abuse because they repeatedly had visited the teacher's classroom, and two of the plaintiffs had been summoned out of other classes by her on multiple occasions. Id.

Our Supreme Court concluded that the trial court properly had granted summary judgment, noting that the mandatory reporting statute was "[c]onsistent with case law governing the concept of 'reasonable suspicion' in the criminal law context . . . ." Id., 24. Similar to the concept of reasonable suspicion, a mandated reporter's suspicion or belief that a child is at imminent risk of abuse "does not require certainty or probable cause." (Emphasis omitted; internal quotation marks omitted.) Id.; see also General Statutes § 17a-101a (d). Rather, "reasonable cause to suspect is an objective standard that focuses not on the actual state of mind of the [decision maker], but on whether a reasonable person, having the information available to and known by the [decision maker], would have had that level of suspicion." (Internal quotation marks omitted.) *Doe* v. *Madison*, supra, 340 Conn. 24. Such belief or suspicion "may be based on factors including, but not limited to, observations, allegations, facts or statements by a child, victim . . . or third party." General Statutes § 17a-101a (d). In assessing whether there existed "reasonable cause to suspect" that a child has been abused or was at imminent risk of serious harm, the court held that

a reviewing court must consider "the totality of the circumstances at the time of the decision . . . based on [the] specific and articulable facts and rational inferences taken therefrom." (Internal quotation marks omitted.) *Doe* v. *Madison*, supra, 24. It further observed that "[w]hether reasonable cause or suspicion exists in view of a given set of facts presents a question of law subject to plenary review." Id.

Applying the foregoing principles, our Supreme Court in *Doe* v. *Madison*, supra, 340 Conn. 1, reasoned that, based on the totality of the circumstances, none of the school's employees had reasonable cause to suspect that the plaintiffs were at imminent risk of sexual abuse by the teacher. See id., 24–25. It emphasized that, prior to the incidents giving rise to the plaintiffs' actions, the teacher had been held in high regard by her colleagues, and her record was unblemished. See id., 25. Furthermore, even though her husband occasionally had concerns about her conduct and attire, he thought that she simply intended to elicit attention and did not believe that she was engaging or was going to engage in sexual conduct with the plaintiffs. Id., 14 and n.14. The court noted that there was no evidence that any of the employees had ever witnessed the teacher flirting with a student, that the plaintiffs' visits to her classroom did not appear out of the ordinary to other faculty members, and that she took measures to avoid the appearance of impropriety when summoning two of the plaintiffs from their other classes. See id., 25–26. With respect to her attire during football practices, the court observed that, albeit pushing the bounds of decorum in an educational setting, one's appearance does not establish an inclination to engage in sexual misconduct and that there was no evidence of nudity in front of students. See id., 26.

Finally, the court disagreed that it should have been apparent to school employees that the plaintiffs were being sexually abused when viewing the evidence in

the aggregate, stating that such a "piling of inferences distorts the actual reality apparent to the various employees in real time." Id., 27. The court concluded that attributing knowledge of all of the facts to each employee for purposes of determining whether there existed "reasonable cause to suspect sexual abuse or imminent risk thereof [was] akin to charging the various high school employees with the responsibility of viewing a completed jigsaw puzzle, when all any of them could see at any relevant time was a piece or two." Id., 28.

Turning to the facts of the present case, viewed in the light most favorable to the plaintiff, we conclude that the plaintiff has failed to demonstrate that there is a genuine issue of material fact with respect to whether Johnson or any other staff member had reasonable cause to suspect that Frechette was sexually abusing the plaintiff or exposing him to an imminent risk of sexual abuse. Frechette's personnel file was devoid of complaints or disciplinary actions prior to the events underlying this appeal, and her application for the high school teaching position was accompanied by positive recommendations from her references. See id., 25 (no reasonable cause to suspect abuse where, inter alia, teacher's "personnel record was unblemished, and she was held in uniformly high regard by her colleagues and students"). And, although the school administration knew that Frechette had collected contact information from all of the students involved in the play, that act alone simply would not cause a reasonable person to suspect that any of those students were at imminent risk for sexual abuse. Nor would that fact, when considered in conjunction with other generally known circumstances, such as the nontraditional setting of Frechette's classroom, give rise to reasonable suspicion that Frechette's students were at risk of serious harm. There similarly is nothing inherently suspicious about a

teacher occasionally meeting with a student privately in connection with a supervised extracurricular activity. See id., 26 (teacher had "seemingly legitimate" reason for summoning students to her classroom in her capacity as faculty yearbook advisor). Johnson testified to that effect, stating that it was "[n]ot uncommon at all" for a student involved in an extracurricular activity to be seen with a staff member supervising that activity. See *Doe* v. *Madison*, supra, 340 Conn. 25–26 (observing that staff member and faculty testimony established that students' repeated visits to teacher's classroom did not appear unusual because it was not uncommon for teachers to summon students to different classrooms for academic and extracurricular activities).

Moreover, even if we were to assume that the school administration knew that Frechette was sending text messages to students about school related matters, none of the evidence presented suggests that Johnson or any other staff member was aware that Frechette had exchanged sexually suggestive messages with the plaintiff. Although Frechette used her personal cell phone to converse with the plaintiff, neither the plaintiff nor Frechette disclosed to anyone that they were communicating by text message prior to the commencement of the investigation into Frechette's conduct.

Finally, before any sexual contact occurred between the plaintiff and Frechette, the plaintiff testified that he had ensured that they were alone and that both he and Frechette took measures to be discreet so as to not be discovered. According to the plaintiff, no staff member had witnessed them engaging in any sexual conduct. The plaintiff produced no evidence to the contrary.

In sum, considering the totality of the circumstances, the plaintiff has failed to establish the existence of a genuine issue of material fact regarding whether the

defendants had knowledge or reasonable cause to believe that Frechette had abused or was imminently likely to sexually abuse a student prior to the date on which a report was made. Consequently, we conclude that the trial court correctly determined that the plaintiff failed to raise a genuine issue of material fact regarding whether the defendants violated a ministerial duty under Connecticut's mandated reporter statutes.

B

The plaintiff next claims that the trial court failed to recognize two additional ministerial duties that he claims were established by Johnson's deposition testimony and, therefore, improperly rendered summary judgment in favor of the defendants on the ground that the acts complained of were discretionary. The defendants counter that Johnson's testimony did not raise a genuine issue of material fact regarding the existence of a "nondiscretionary, unwritten municipal rule or policy" and that the trial court correctly determined that, in the absence of a clear directive, the alleged negligent acts were discretionary in nature. We agree with the defendants, albeit partly on different grounds.

"[O]ur courts consistently have held that to demonstrate the existence of a ministerial duty on the part of a municipality and its agents, a plaintiff ordinarily must point to some statute, city charter provision, ordinance, regulation, rule, policy, or other directive that, *by its clear language*, compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion." (Emphasis added; internal quotation marks omitted.) *Kusy* v. *Norwich*, supra, 192 Conn. App. 177. A ministerial duty, however, "need not be written and may be created by oral directives from superior officials, the existence of which are established by testimony." *Doe* v. *Madison*, supra, 340 Conn. 32; see also *Wisniewski* v. *Darien*, 135 Conn. App. 364,

374, 42 A.3d 436 (2012) (municipal official's testimony may provide evidentiary basis for existence of ministerial duty). In relying on an official's testimony to establish the existence of a ministerial duty, "[s]pecificity is required in all aspects of the directive," and, therefore, descriptions of general practices or expectations that merely guide an employee's exercise of discretion are insufficient to establish a ministerial duty. *Doe* v. *Madison*, supra, 32; see also *Strycharz* v. *Cady*, 323 Conn. 548, 566–67, 148 A.3d 1011 (2016) (school superintendent's testimony that school principal "had a duty to assign school staff members to different posts, including the bus port, and that he lacked the discretion not to do so" provided sufficient basis from which "to conclude that school administrators had the ministerial duty to assign staff members to monitor students throughout the school" but lacked specificity with respect to certain aspects of directive and, consequently, there was no basis to conclude that those same administrators had duty to ensure staff performed their assignments). Whether a discretionary or ministerial duty exists presents a question of law and, therefore, is subject to plenary review. See, e.g., *Ventura* v. *East Haven*, 330 Conn. 613, 634, 199 A.3d 1 (2019); see also *Thivierge* v. *Witham*, supra, 150 Conn. App. 773–74 ("[t]he issue of governmental immunity is simply a question of the existence of a duty of care, and this court has approved the practice of deciding the issue of governmental immunity as a matter of law" (internal quotation marks omitted)).

In support of his claim that the record establishes two additional ministerial duties, the plaintiff first points to Johnson's deposition testimony in which she stated that, "technically, actually, nobody should have had a free period" during the relevant school year. During her deposition, Johnson explained that some students who were teachers' assistants incorrectly believed that the

class period in which they assisted a teacher was a free period but that, technically, it was not, and that all other students who did not have a full load of classes were dismissed after their last class ended. The plaintiff claims that the defendants violated this alleged duty because he did not have classes at the high school or arts center on Fridays between 12:30 and 2 p.m., resulting in a free period in his schedule. He argues that the defendants' negligence in adhering to the prohibition against free class periods allowed him to be "lure[d]" into Frechette's classroom and sexually abused.

Second, in response to a question in her deposition about whether "attendance [is] taken in every class," Johnson answered in the affirmative and subsequently stated that teachers are "required to notify the parent . . . [a]t some point in the day" if a student is absent from class. The plaintiff contends that this testimony established a ministerial duty for teachers to take attendance and that the defendants violated this purported duty when they failed to monitor students who were dismissed early, such as the arts center students, to ensure they actually exited the high school when their high school classes ended and, instead, only verified that students leaving the building prior to the end of the school day were permitted to do so.

On the basis of our review of Johnson's deposition testimony, we conclude that the trial court properly determined that the plaintiff failed to establish a genuine issue of material fact about whether the defendants violated a ministerial duty prohibiting free periods. Johnson merely observed that no student "*should* have had" a free period in his or her schedule and that students whose class schedule ended before the school day concluded were dismissed early. (Emphasis added.) Johnson did not state unequivocally that she had com-

municated to her employees a mandatory and prescribed method for creating class schedules without free periods or allude to the existence of any such policy. See *Doe* v. *Madison*, supra, 340 Conn. 30 (athletic director's statement that he expected subordinates "to enforce certain standards of professionalism, including requiring any coach, male or female, to cover up if shirtless," was insufficient to establish ministerial duty because there was no evidence that director's views on professional attire were ever communicated to staff in manner that clearly established duty to dress in prescribed way (internal quotation marks omitted)); cf. *Ventura* v. *East Haven*, supra, 330 Conn. 640 n.14 (noting that testimony relied on to establish ministerial duties in *Strycharz* unequivocally established such duties). Johnson's testimony simply highlighted a general practice with respect to class schedules and lacked the specificity necessary to establish the existence of a ministerial duty.[12]

The same is true with respect to Johnson's testimony about the school's attendance policy. Her statements, in context, are not the type of specific and clearly stated oral directives that our cases have recognized as sufficient to establish a ministerial duty. See *Strycharz* v. *Cady*, supra, 323 Conn. 566–67; *Wisniewski* v. *Darien*, supra, 135 Conn. App. 374–78. And, even if we were to agree with the plaintiff that Johnson's affirmative answer to the question of whether "attendance [is] taken in every class" and her subsequent statement that teachers are "required to notify the parent . . . [a]t some point in the day" when a student is absent are

[12] Furthermore, we are somewhat perplexed by the plaintiff's argument that the defendants violated the alleged ministerial duty of prohibiting free periods in class schedules. Johnson plainly stated that students who did not have a full class load did not have a free class period but, rather, were dismissed when they were done with their scheduled classes. The plaintiff undeniably fell within that category of students.

sufficient to create a genuine issue of material fact about whether the defendants had a ministerial duty to take attendance in every *class*, the defendants would nevertheless be entitled to summary judgment because the plaintiff proffered no evidence establishing that the defendants had breached this duty. Nothing within the evidentiary record in this case establishes that any of the plaintiff's teachers failed to take attendance in class on the days and times in question or subsequently failed to notify his parents of his absence from class. On the contrary, the plaintiff fails to even allege as much in support of this claim.

The crux of the plaintiff's argument with respect to an alleged ministerial duty to take attendance is that the defendants failed to account for students who were dismissed early but chose not to leave the high school building. He argues that the defendants' lack of oversight concerning whether arts center students exited the building when dismissed after their last high school class ended allowed him to visit Frechette's classroom unnoticed, leading to an instance of sexual abuse. Johnson did not testify, however, that teachers were required to take attendance in every class and also account for students who had been excused, yet remained in the building. In fact, Johnson repeatedly testified to the contrary. She explicitly stated that security staff did not routinely attempt to locate students who had been dismissed but had failed to leave the premises.[13] Her testimony plainly established that there was no general practice or requirement for staff members to account for students permitted to leave the building, much less a clear directive compelling them to account for the whereabouts of those students in a prescribed manner.

[13] Johnson testified, for example, that staff members would not attempt to locate a student who had permission to leave but failed to do so unless there was an issue, such as security staff being alerted that a parent had arrived to pick up a student and the student failed to show up at the designated time.

As a result, we conclude that Johnson's deposition testimony did not create a genuine issue of material fact about whether the defendants violated a ministerial duty to prohibit free periods or take class attendance.

II

The plaintiff next claims that, even if the defendants' acts or omissions were discretionary in nature, the court improperly concluded that the defendants were entitled to governmental immunity because there exists a genuine issue of material fact about whether he was an identifiable person subject to imminent harm. In support of this claim, he essentially relies on the same evidence and arguments set out in part I A of this opinion.

As we previously have noted, municipalities and their employees generally are shielded from liability arising from their negligent acts or omissions that require the exercise of judgment or discretion in the performance of official functions. See, e.g., *Cole* v. *New Haven*, supra, 337 Conn. 336–38. Nonetheless, our courts recognize three exceptions to discretionary act immunity under which liability may attach; see, e.g., *Doe* v. *Board of Education*, 76 Conn. App. 296, 300, 819 A.2d 289 (2003); each representing "a situation in which the public official's duty to act is [so] clear and unequivocal that the policy rationale underlying discretionary act immunity—to encourage municipal officers to exercise judgment—has no force." (Internal quotation marks omitted.) *Northrup* v. *Witkowski*, 175 Conn. App. 223, 234, 167 A.3d 443 (2017), aff'd, 332 Conn. 158, 210 A.3d 29 (2019).

The plaintiff claims that he falls within the identifiable person-imminent harm exception to governmental immunity.[14] The identifiable person-imminent harm

[14] The other exceptions to discretionary act immunity recognized in Connecticut are when (1) "the alleged conduct involves malice, wantonness or intent to injure" or (2) "a statute provides for a cause of action against a

"exception applies when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . ." (Internal quotation marks omitted.) *Grady* v. *Somers*, 294 Conn. 324, 350, 984 A.2d 684 (2009). To fall within this exception to discretionary act immunity, a plaintiff must establish "(1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm. . . . All three must be proven in order for the exception to apply." (Internal quotation marks omitted.) *Doe* v. *Madison*, supra, 340 Conn. 36. "[T]he ultimate determination of whether [governmental] immunity applies is ordinarily a question of law for the court . . . [unless] there are unresolved factual issues material to the applicability of the defense . . . [in which case] resolution of those factual issues is properly left to the jury." (Internal quotation marks omitted.) *Washburne* v. *Madison*, 175 Conn. App. 613, 629, 167 A.3d 1029 (2017), cert. denied, 330 Conn. 971, 200 A.3d 1151 (2019). Our analysis of the plaintiff's claim in the present appeal focuses on the imminence and apparentness prongs of the identifiable person-imminent harm exception.[15]

For purposes of determining whether a plaintiff was subject to imminent harm, "[i]mminent does not simply mean a foreseeable event at some unspecified point in the not too distant future." *Bonington* v. *Westport*, 297

municipality or municipal official for failure to enforce certain laws." (Internal quotation marks omitted.) *Northrup* v. *Witkowski*, supra, 175 Conn. App. 234.

[15] The defendants argued in their motion for summary judgment that the plaintiff was not an identifiable person with respect to any of the allegations arising from Frechette's conduct that occurred outside of regular school hours. See, e.g., *St. Pierre* v. *Plainfield*, 326 Conn. 420, 437–38, 165 A.3d 148 (2017); *Maselli* v. *Regional School District No. 10*, 198 Conn. App. 643, 656–57, 235 A.3d 599, cert. denied, 335 Conn. 947, 238 A.3d 19 (2020). The defendants, however, have not raised that argument on appeal.

Conn. 297, 314, 999 A.2d 700 (2010); see also *Silberstein* v. *54 Hillcrest Park Associates, LLC*, 135 Conn. App. 262, 275, 41 A.3d 1147 (2012). Rather, "the proper standard for determining whether a harm was imminent is whether it was apparent to the municipal defendant that *the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm*." (Emphasis in original; internal quotation marks omitted.) *Doe* v. *Madison*, supra, 340 Conn. 37.

In *Doe* v. *Madison*, supra, 340 Conn. 1, our Supreme Court held that the plaintiffs in that case failed to satisfy the imminent harm to identifiable person exception to governmental immunity. See id., 36–39. Although it acknowledged that sexual assault victims suffer unmistakable serious harm, the court concluded that the record on summary judgment in that case failed to create a genuine issue of material fact about whether any observer reasonably would have anticipated a sexual assault given the teacher's "generally clandestine pattern of behavior" to avoid raising suspicion. Id., 38. It further noted that, like the factual record in the present appeal, the teacher's professional record was unblemished prior to the discovery of the assaults and that there was undisputed evidence that students routinely visited teachers' classrooms for legitimate extracurricular reasons, and, therefore, it would not have been apparent to any staff members that the plaintiffs may be subjected to an imminent harm. Id., 38–39.

For many of the same reasons our Supreme Court articulated in rejecting the plaintiffs' claim in *Doe* v. *Madison*, supra, 340 Conn. 1, we conclude that the summary judgment record in this case fails to create a genuine issue of material fact about whether it was reasonably apparent to Johnson or to any other staff member that Frechette was so likely to harm the plaintiff that any of the defendants had an unequivocal duty

to act to prevent the harm.[16] The record makes clear that the plaintiff and Frechette took steps to avoid raising suspicion about the nature of their relationship. The plaintiff himself testified that he ensured that he and Frechette were alone before engaging in sexual conduct. Although the plaintiff was not enrolled in Frechette's classes, there is no evidence to suggest that his repeated visits to Frechette's classroom should have made it apparent to any staff member that a sexual assault was imminent, particularly in light of the fact that he had an ostensibly legitimate reason for visiting her classroom due to his involvement in the school play. It also bears emphasizing that the defendants received no complaints concerning Frechette prior to the discovery of the abuse and that Frechette's recommendations for the theater teaching position were all positive. Additionally, nothing in the record suggests that any staff member reasonably would have anticipated that a sexual assault of the plaintiff or any student would be the immediate result of Frechette's relaxed classroom setting, particularly in light of the fact that it was a space intended for dramatic arts instruction. See id., 38 (noting that teacher's attire at practices was too attenuated from sexual assault for staff member to reasonably have

[16] In support of his claim that he satisfies the identifiable person-imminent harm exception, the plaintiff also cites to the fact that Frechette often would greet students involved in the play, including the plaintiff, by hugging them before rehearsals. Johnson, however, testified that she did not recall witnessing Frechette hug any students and that, in any event, she previously had seen teachers hug students and that it is not conduct that, by itself, would raise a concern. We make no pronouncement as to the propriety of this type of physical contact between an educator and student but simply note that, on the facts of the record in the present appeal, there is nothing to suggest that Frechette's conduct or interactions with students made it apparent to any staff member that a failure to take immediate action would subject the plaintiff to imminent harm. See *Washburne* v. *Madison*, supra, 175 Conn. App. 630 ("we consider a 'clear and unequivocal duty' . . . to be one that arises when the probability that harm will occur from the dangerous condition is high enough to necessitate that the defendant[s] act to alleviate the defect" (internal quotation marks omitted)).

anticipated that harm was imminent). In sum, there is nothing within the record that gives rise to a genuine issue of material fact with respect to the applicability of the identifiable person-imminent harm exception to discretionary act immunity.

We also reject the plaintiff's assertion that the imminence of the harm would have been apparent to Johnson and other staff members if they had chosen to make further inquiries instead of deliberately overlooking circumstances that culminated in his being sexually abused. There is no basis in the record to conclude that Johnson or any staff member wilfully ignored circumstances that otherwise would have alerted them to the possibility of imminent and immediate harm. Moreover, the plaintiff's contention is at odds with our Supreme Court's precedent, which has held that, in considering whether a harm is apparent for the purposes of the identifiable person-imminent exception, "there is no inquiry into the ideal course of action for the government officer under the circumstances. Rather, the apparentness requirement contemplates an examination of the circumstances of which the government officer could be aware, thereby ensuring that liability is not imposed solely on the basis of hindsight . . . ." *Edgerton* v. *Clinton*, 311 Conn. 217, 228 n.10, 86 A.3d 437 (2014). A government actor is under no duty to ask questions beyond that which is immediately apparent. See *Doe* v. *Madison*, supra, 340 Conn. 39 (neither staff members nor hallway monitors had duty to ask questions beyond what was immediately apparent with respect to teacher summoning students from other classes for seemingly legitimate reasons); *Fleming* v. *Bridgeport*, 284 Conn. 502, 535, 935 A.2d 126 (2007) (although police officers might have made further inquiry by asking more pertinent questions, nothing in record demonstrated that it was apparent to officers

that plaintiff would have been subjected to imminent harm).

The plaintiff has failed to identify any facts in the record creating a genuine issue of material fact about whether it was reasonably apparent to the defendants that their failure to act would subject him to imminent harm. Accordingly, we conclude that the trial court properly granted the defendants' motion for summary judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* COREY TURNER
(AC 44806)

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

Syllabus

The defendant, who had been convicted of the crimes of murder and assault in the first degree, appealed to this court from the judgment of the trial court dismissing his motion to correct an illegal sentence. At the time the defendant committed the crimes, he was twenty-one years old. Following trial, the defendant was sentenced to sixty years of incarceration. In his motion to correct, the defendant argued that his right to due process was violated when the court made assumptions at his sentencing proceeding regarding his future rehabilitative potential that were materially false when contrasted with the brain science underlying the continuous growth and development of young adults during late adolescence. He also contended that he was entitled to a resentencing hearing because the due process clause of the fourteenth amendment to the United States constitution permitted him to present evidence demonstrating that juvenile criminal records are not indicative of rehabilitation potential. The court dismissed the motion to correct, concluding that the defendant failed to state a colorable claim for relief under *Miller* v. *Alabama* (567 U.S. 460), and its progeny. On the defendant's appeal to this court, *held*:

1. Although the trial court erred in holding that the defendant failed to state a colorable claim for relief, the defendant could not prevail on his motion to correct an illegal sentence: because the defendant's claim relied on the theory of youth related brain science set forth in *Miller* and its progeny for purposes of sentence mitigation, the defendant properly

invoked the trial court's subject matter jurisdiction as his claim challenged his sentence or sentence proceedings and not the underlying conviction, his claim having been predicated on the theory that the court impermissibly failed to properly consider his potential for rehabilitation when imposing the sentence of incarceration; moreover, it is well settled that a defendant who was an adult at the time he committed the offense for which he was sentenced could not succeed on a federal constitutional claim that he was entitled to be resentenced based on the youth related brain science underlying *Miller* and its progeny, and, here, the defendant was twenty-one years of age when he committed the underlying offenses; accordingly, because the defendant stated a colorable claim properly invoking the court's subject matter jurisdiction, but could not prevail on his motion to correct an illegal sentence, the court should have denied rather than dismissed his motion.

2. The defendant could not prevail on his claim that he was entitled to an evidentiary hearing to present expert testimony on juvenile brain science in support of his motion to correct; although the defendant relied on a state case, *State* v. *Miller* (186 Conn. App. 654), in which it was contended that the state constitution could be interpreted as permitting youth related sentencing mitigation for defendants above the age of eighteen, the defendant's state constitutional due process claim was not advanced in either his appellate brief or at oral argument on appeal, and, therefore, the claim was abandoned.

Argued May 17—officially released August 23, 2022

Procedural History

Substitute information charging the defendant with the crimes of murder and assault in the first degree, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Koletsky, J.*; verdict and judgment of guilty, from which the defendant appealed to the Supreme Court, which affirmed the judgment of the trial court; thereafter, the court, *Graham, J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Improper form of judgment*; *reversed*; *judgment directed.*

Corey Turner, self-represented, the appellant (defendant).

Jordan C. Levin, certified legal intern, with whom were *Michele C. Lukban*, senior assistant state's attorney, and, on the brief, *Sharmese L. Walcott*, state's

attorney, and *Vicki Melchiorre*, supervisory assistant state's attorney, for the appellee (state).

Opinion

CRADLE, J. The self-represented defendant, Corey Turner, appeals from the judgment of the trial court dismissing his motion to correct an illegal sentence pursuant to Practice Book § 43-22. On appeal, the defendant claims (1) that the court erred in dismissing his motion to correct an illegal sentence, in which he alleged that the sentencing court made materially false assumptions about his potential for rehabilitation, for failure to state a colorable claim, and (2) he is entitled to an evidentiary hearing to present expert testimony on juvenile brain science in support of his motion to correct. We agree with the defendant's contention that the court improperly dismissed his motion to correct on the ground that he failed to state a colorable claim but, nevertheless, conclude that the defendant was not entitled to a new sentencing hearing on the basis of the ground alleged in his motion. Additionally, we disagree with the defendant's assertion that he was entitled to an evidentiary hearing. Accordingly, the form of the trial court's judgment is improper in that the court should have denied, rather than dismissed, the defendant's motion to correct an illegal sentence.

The record reflects the following relevant procedural history. On August 8, 1997, the defendant was convicted, following a jury trial, of murder in violation of General Statutes § 53a-54a, and assault in the first degree in violation of General Statutes § 53a-59. At the time he committed the underlying offenses in 1995, the defendant was twenty-one years old.

On October 10, 1997, the court, *Koletsky*, *J.*, held a sentencing hearing. At the hearing, the court noted: "Your record is not the worst I've seen, but it indicates a very poor rehabilitative potential. You're bright and

you're able, but you have yet to demonstrate any willingness to live within the norms of our society, and that makes you a dangerous item on the street. The nature of the crime itself is vicious; it's premeditated; it's an ugly crime. It's a murder by ambush and an assault by ambush, from behind in the middle of the night—midnight. And it's on a crowded, active street, with people all around. There is no more—there is no crime that attacks the very fabric of society, where people are entitled to live on a street without bullets suddenly flying through the air. The crime is serious indeed." After considering these factors, the court sentenced the defendant to sixty years of incarceration. Our Supreme Court affirmed the judgment of conviction on direct appeal. *State* v. *Turner*, 252 Conn. 714, 750, 751 A.2d 372 (2000).

On September 3, 2019, the defendant filed a motion to correct an illegal sentence, pursuant to Practice Book § 43-22.[1] The defendant subsequently filed an amended motion on February 23, 2021, in which he argued that "[t]he sentencing court's conclusion that the defendant's prior criminal history was an indicator of his future rehabilitative potential . . . [was] a materially false assumption rendering the entire sentencing procedure invalid as a violation of due process."[2] Citing *United States* v. *Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970), the defendant claimed that, "when contrasted with the brain science underlying the continuous growth and development of young adults during late

[1] Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

[2] A public defender was appointed as defense counsel, but, on October 30, 2019, the public defender filed a motion for permission to withdraw his appearance. The motion was granted on January 14, 2020. The defendant was self-represented for the filing of the amended motion to correct an illegal sentence.

adolescence, the sentencing court's assumptions regarding the defendant's future rehabilitative potential [were] materially false in violation of his right to due process." (Footnote omitted.) The defendant contended that he was entitled to a resentencing hearing because the due process clause of the fourteenth amendment to the United States constitution requires that he be permitted to introduce evidence, including expert testimony, demonstrating that juvenile criminal records are not indicative of rehabilitative potential.

The state filed its response to that motion on March 26, 2021, in which it countered that the sentencing court acted within its discretion in conducting an inquiry into the defendant's prior criminal record and relied only on materially accurate facts therefrom. Further, the state argued that *Miller* v. *Alabama*, 567 U.S. 460, 480, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012)—which requires that a sentencing court consider youth related mitigating factors if it imposes a sentence of life imprisonment, or its functional equivalent, without parole, on a juvenile defendant—did not apply to the defendant because he was twenty-one years old at the time of the offense.

After hearing argument from both parties on March 31, 2021, the court, *Graham*, *J.*, dismissed the motion to correct, concluding that "the sentencing court properly relied upon the defendant's criminal record." The court explained: "In essence, the defendant has focused on only one factor out of multiple factors that the sentencing court used to determine his sentence and the defendant has done so to the exclusion of the others. The defendant argues that the court was subjectively wrong in its conclusion, but has not challenged the accuracy of his prior criminal record, which was a factual predicate for the sentencing court's conclusion.

"The defendant has tried to do, what I will characterize, as use the side door into a *Miller* argument. However, the defendant was twenty-one years of age at the

time of the crime, an age which entitles him to no special consideration under the *Miller* line of cases.

"In short, the defendant has failed to state a colorable claim for relief with regard to his sentence falling within the parameters of Practice Book [§] 43-22. Therefore, the court has no choice but to dismiss his motion to correct." (Citation omitted.) This appeal followed.

We begin by setting forth the relevant standard of review and relevant legal principles. "The issue of whether a defendant's claim may be brought by way of a motion to correct an illegal sentence, pursuant to Practice Book § 43-22, involves a determination of the trial court's subject matter jurisdiction and, as such, presents a question of law over which our review is plenary." (Footnote omitted; internal quotation marks omitted.) *State* v. *Vivo*, 197 Conn. App. 363, 368–69, 231 A.3d 1255 (2020).

Our Supreme Court recently clarified the jurisdictional requirements to raise a colorable claim in a motion to correct an illegal sentence. "A trial court generally has no authority to modify a sentence but retains limited subject matter jurisdiction to correct an illegal sentence or a sentence imposed in an illegal manner. . . . Practice Book § 43-22 codifies this common-law rule. . . . Therefore, we must decide whether the defendant has raised a colorable claim within the scope of Practice Book § 43-22 . . . . In the absence of a colorable claim requiring correction, the trial court has no jurisdiction . . . ." (Footnote omitted; internal quotation marks omitted.) *State* v. *Myers*, 343 Conn. 447, 459, 274 A.3d 100 (2022). "[T]o raise a colorable claim within the scope of Practice Book § 43-22, the legal claim and factual allegations must demonstrate a possibility that the defendant's claim challenges his or her sentence or sentencing proceedings, not the underlying conviction. The ultimate legal correctness of the

claim is not relevant to our jurisdictional analysis." *State* v. *Ward*, 341 Conn. 142, 153, 266 A.3d 807 (2021).[3] "[T]he jurisdictional and merits inquiries are separate; whether the defendant ultimately succeeds on the merits of his claim does not affect the trial court's jurisdiction to hear it." (Internal quotation marks omitted.) *State* v. *Myers*, supra, 459. Stated otherwise, where a defendant's motion to correct "plausibly [challenges] the defendant's sentence," that claim is "colorable," and the court has subject matter jurisdiction over that claim *even where* "*the* [*claim has*] *no merit*." (Emphasis added.) Id., 459–60.

On appeal, the defendant claims that the court improperly dismissed his motion to correct an illegal sentence for failure to state a colorable claim.[4] Because

[3] We note that neither party addressed *State* v. *Ward*, supra, 341 Conn. 142, or *State* v. *Myers*, supra, 343 Conn. 447, in their briefs to this court. *Ward* was officially released two weeks after the defendant filed his appellant's brief, and *Myers* was officially released after the oral argument.

[4] "We emphasize that a Superior Court traditionally loses jurisdiction over a criminal case once the defendant begins serving a sentence; a motion to correct pursuant to Practice Book § 43-22 is an exception. Few categories of claims qualify for consideration under that exception." *State* v. *Mukhtaar*, 179 Conn. App. 1, 8-9, 177 A.3d 1185 (2017). Among those exceptions are claims alleging cruel and unusual punishment concerning life sentences without parole for juveniles; see id., 7–8; and claims alleging due process violations manifested by a sentencing court's reliance on materially false information. See *State* v. *Belcher*, 342 Conn. 1, 13, 268 A.3d 616 (2022).

The defendant argues that he is advancing a due process claim rather than a claim under *Miller* v. *Alabama*, supra, 567 U.S. 460. We note that at least one member of our Supreme Court has alluded to the possibility that a defendant might have a due process claim based on a sentencing court's reliance on materially false information pertaining to the brain science of juvenile offenders. See *State* v. *McCleese*, 333 Conn. 378, 429, 215 A.3d 1154 (2019) (*Palmer*, *J.*, concurring) (noting that "when a juvenile is sentenced to life in prison or its functional equivalent—even if the juvenile is later afforded the opportunity for parole in satisfaction of the requirements of the eighth amendment" to United States constitution, any principles of fairness violated thereby are rooted "in the due process clauses of the federal and state constitutions"). Nevertheless, that possibility was recognized only as to *juvenile* defendants. Id. (defendant was seventeen years old when he committed offense).

the defendant's motion to correct plausibly challenged his sentence, rather than his underlying conviction, we agree that the court had jurisdiction to consider the defendant's motion to correct an illegal sentence and, therefore, that the dismissal was improper. See *State* v. *Ward*, supra, 341 Conn. 153. Indeed, the defendant's claim is predicated upon the theory that the sentencing court impermissibly failed to properly consider his potential for rehabilitation when imposing the sixty year sentence of incarceration. Under *Ward*, this meets the threshold for subject matter jurisdiction. See id. Although we conclude that the defendant has set forth a colorable claim properly invoking the trial court's subject matter jurisdiction, we further conclude that, because the defendant's claim relies on the theory of youth related brain science set forth in *Miller* and its progeny, for purposes of sentence mitigation, he cannot prevail on his motion to correct an illegal sentence.[5]

We begin with the holding in *Miller* and how it has been applied by our Supreme Court and this court. *Miller* highlighted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds—for example, in parts of the brain involved in behavior control. . . . [The Supreme Court of the United States] reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed." (Citation omitted; footnote omitted; internal quotation

[5] Typically, if we determine that a court improperly dismissed a case for lack of subject matter jurisdiction, we will remand the case for a consideration of the merits. In this case, however, the court determined that it did not have subject matter jurisdiction precisely because it concluded that, on the merits, the defendant had failed to set forth a colorable claim. Furthermore, because the defendant's claim fails as a matter of law, a remand for further consideration of the merits would serve no useful purpose.

marks omitted.) *Miller* v. *Alabama*, supra, 567 U.S. 471–72. As a result, "[i]n *Miller* . . . the United States Supreme Court held that the [e]ighth [a]mendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."[6] (Citation omitted; internal quotation marks omitted.) *State* v. *Arnold*, 205 Conn. App. 863, 865 n. 2, 259 A.3d 716, cert. denied, 339 Conn. 904, 260 A.3d 1225 (2021). Our Supreme Court subsequently held "that the dictates set forth in *Miller* may be violated even when the sentencing authority has discretion to impose a lesser sentence than life without parole if it fails to give due weight to evidence that *Miller* deemed constitutionally significant before determining that such a severe punishment is appropriate." *State* v. *Riley*, 315 Conn. 637, 653, 110 A.3d 1205 (2015), cert. denied, 577 U.S. 1202, 136 S. Ct. 1361, 194 L. Ed. 2d 376 (2016).

It is well settled that a defendant who was an adult at the time he committed the offense for which he was sentenced cannot succeed on a federal constitutional claim that he is entitled to be resentenced based upon the brain science of *Miller*, even without relying on the precise holding of that case. See *State* v. *Mukhtaar*, 179 Conn. App. 1, 4, 177 A.3d 1185 (2017).[7] In *Mukhtaar*,

[6] *Montgomery* v. *Louisiana*, 577 U.S. 190, 212, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016) clarified that the doctrine announced in *Miller* applied retroactively to individuals sentenced to life without parole. However, it further stated that *Miller* did not require courts to relitigate every such sentence, and permitted remedy for the aforementioned violations of the eighth amendment to the United States constitution by allowing juvenile offenders to be considered for parole. Id. We recently noted that our Supreme Court subsequently held, in *State* v. *Delgado*, 323 Conn. 801, 810–13, 151 A.3d 345 (2016), that No. 15-84 of the 2015 Public Acts, "providing an opportunity for parole to those who previously had been sentenced as juveniles to life without parole," was constitutional, because it "sufficiently negated any violations created by the retroactive application of the rule established in *Miller*." *State* v. *Arnold*, 205 Conn. App. 863, 866 n.5, 259 A.3d 716, cert. denied, 339 Conn. 904, 260 A.3d 1225 (2021).

[7] In *State* v. *Mukhtaar*, supra, 179 Conn. App. 9, this court reversed a judgment denying a motion to correct an illegal sentence on the ground that it failed to state a colorable claim and therefore should have been

the defendant was twenty years old at the time of his underlying offense, and acknowledged that the federal constitutional protections afforded to juveniles under the holding of *Miller* did not apply to him. Id., 3, 4. However, the defendant stated that he was not relying on the precise holding of *Miller* but, rather, "based [his constitutional claims] on the brain science underlying that case." (Internal quotation marks omitted.) Id., 4. "In his motion to correct, the defendant asserted that *Miller* should be extended to apply to adult defendants whose mental age, at the time of the crime, was not substantially different from that of juveniles." Id., 7. This court rejected the defendant's argument under the eighth amendment to the United States constitution, noting that "the brain science referenced in *Miller*, upon which the defendant seeks to rely, also emphasized the differences between juveniles and adults." (Internal quotation marks omitted.) Id., 8. This court concluded that only juvenile offenders could avail themselves of a federal constitutional argument based on the brain science of *Miller*, and clarified that "juvenile offenders" refers "to persons who committed a crime when they were younger than eighteen years of age." (Internal quotation marks omitted.) Id., 7. Because the defendant in *Mukhtaar* was twenty years old at the time he committed the crime for which he was sentenced, this court concluded that the defendant was not entitled to consideration of the mitigating factors of youth at the time of sentencing and, thus, was precluded from raising an argument based on the brain science underlying *Miller*. Id., 9. Resultantly, this court concluded that his arguments brought under the eighth *and* fourteenth amendments to the United States constitution were barred

dismissed. Although the jurisdictional conclusions in *Mukhtaar* have proven incorrect in light of our Supreme Court's recent decisions in *State* v. *Ward*, supra, 341 Conn. 153, and *State* v. *Myers*, supra, 343 Conn. 459–60, the substantive analysis proscribing youth related sentencing mitigation claims brought with regard to nonjuvenile offenses remains good law.

because the defendant was not a juvenile offender. Id., 3 n.1, 9.

In the present case, there is no dispute that the defendant's claim is predicated on the brain science underlying *Miller*. Indeed, the defendant argues that the sentencing court erred in "explicitly [relying] upon [his] criminal record as an indicator of his future rehabilitative prospects" and claims that "when contrasted with the brain science underlying the continuous growth and development of young adults during late adolescence, the sentencing court's assumptions regarding the defendant's future rehabilitative potential was materially false . . . ." (Internal quotation marks omitted.) He also expressly acknowledges that his claim may 'bear a striking similarity to' a *Miller* claim insofar as both claims are grounded in the same brain science . . . ." Allowing the defendant to present evidence pertaining to juvenile brain science for the purpose of mitigating the negative effect his criminal record had on his sentence would, in effect, allow him to bring a youth based mitigation argument as an adult, which is exactly what this court proscribed in *Mukhtaar*. See *State* v. *Mukhtaar*, supra, 179 Conn. App. 9. Because the defendant was twenty-one years of age at the time he committed the crime for which he was sentenced, he cannot succeed on a claim to correct an illegal sentence predicated on the theory of juvenile brain science set forth under *Miller* and its progeny. See id., 3 n.1, 4, 9.

Finally, we address the defendant's claim that he is entitled to an evidentiary hearing based on this court's decision in *State* v. *Miller*, 186 Conn. App. 654, 200 A.3d 735 (2018). The defendant in *State* v. *Miller*, supra, 662–63, filed a motion to correct an illegal sentence that attempted to raise an issue of first impression that—although the mandate of youth related sentencing mitigation under the eighth amendment to the United States constitution was limited to offenders under the age of

eighteen—the *Connecticut state constitution* could be interpreted as permitting such sentencing mitigation for defendants above the age of eighteen. The trial court, sua sponte, denied the defendant's motion to correct an illegal sentence without a hearing. Id., 656. On appeal, this court agreed with the defendant that "the trial court improperly denied his motion to correct an illegal sentence without first providing him an opportunity to be heard on the motion." Id., 658. Furthermore, this court concluded that, "[i]n order to pursue this novel claim,[8] including any subsequent appellate review thereof, the defendant . . . was entitled to make an evidentiary record of any facts that would be relevant to it, including evidence of the underlying brain science that would justify treating a nineteen year old like a seventeen year old." (Footnote added.) Id., 663.

The defendant in the present case briefly mentioned our state constitution in his motion to correct. However, unlike in *State* v. *Miller*, supra, 186 Conn. App. 662, the defendant's state constitutional due process claim was not advanced in either his appellate brief or at oral argument on appeal.[9] Therefore, that claim is abandoned. See *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016) (appellate courts are not required to review issues that have been abandoned by way of insufficient analysis in appellant's brief). Therefore, the defendant was not entitled to an evidentiary hearing.

In sum, because the defendant stated a colorable claim by demonstrating "a possibility that the [defendant] . . . [challenged his] sentence or sentencing proceedings, not the underlying conviction," the court had subject matter jurisdiction over his motion. *State* v. *Ward*, supra, 341 Conn. 153. Therefore, the court should

[8] This novel claim remains undecided by any Connecticut court.

[9] We note that the defendant also did not meaningfully pursue his state constitutional claim before the trial court.

have denied, rather than dismissed, the defendant's motion to correct.[10] See *State* v. *Myers*, supra, 343 Conn. 468.

The form of the judgment is improper, the judgment dismissing the defendant's motion to correct an illegal sentence is reversed and the case is remanded with direction to render judgment denying the defendant's motion to correct an illegal sentence.

In this opinion the other judges concurred.

IN RE PROBATE APPEAL OF RICHARD HARRIS (AC 43983)

Alvord, Moll and Clark, Js.

Syllabus

The plaintiff appealed to the trial court from the decree of the Probate Court admitting the decedent's will to probate. Following the decedent's death, the defendant D filed an application to admit the decedent's will to probate. At the hearing on D's application, S, the notary public who took the attestation of the witnesses to the execution of the decedent's will, testified, inter alia, that she was a notary at the time the will was executed, she would never notarize a document unless all persons who signed the document were present, she recognized the names of the two witnesses as fellow bank employees, she wrote the names of the witnesses on the will directly below where the decedent signed the document, the witnesses signed the self-proving affidavit, and she then signed as notary directly below those signatures, after taking their oath as to the matters contained in the self-proving affidavit. Following the hearing, the Probate Court admitted the decedent's will to probate, concluding that the will complied with the statutory (§ 45a-251) requirements pertaining to the execution of a valid will. In reaching its decision, the Probate Court concluded that S's testimony, which it found credible, satisfied D's burden of proving that the decedent signed the will in the presence of two witnesses. Specifically, the Probate Court found that the decedent signed the will in the presence of the witnesses who then signed the self-proving affidavit in the presence of the decedent. Relying on our Supreme Court's decision in *Gardner* v. *Balboni* (218 Conn. 220), the Probate Court concluded that, under such circumstances, it could see no reason why the same considerations that supported the Probate

[10] See footnote 5 of this opinion.

Court in that case being able to rely on the testator's signature in a self-proving affidavit would not support the same result for the witnesses' signatures in this case because § 45a-251 does not specify the exact place where witnesses must sign a will for it to be valid and the concept of strict compliance connotes strict compliance with the statutory requirements, not strict compliance with forms drafted with the intention of satisfying the statutory requirements. Thereafter, the plaintiff appealed to the trial court, and the parties agreed to have the appeal proceed on the record. The trial court denied the appeal, and, in doing so, it expressly agreed with the Probate Court's reasoning and concluded that the will properly was admitted to probate. On the plaintiff's appeal to this court, *held* that the plaintiff could not prevail on his claim that the trial court erred in concluding that the will was validly attested by two witnesses as required by § 45a-251 because the witnesses signed only the self-proving affidavit: this court, like the trial court, agreed with and adopted the Probate Court's reasoning in its decree, as there was no challenge to the authenticity of the signatures or to the Probate Court's factual findings that the decedent signed the will in the presence of the witnesses, that the witnesses signed the document containing the will in the presence of the decedent, and that they did so as part of a single transaction, and, under such circumstances, there was no basis not to extend *Gardner* to the facts of the present case; accordingly, this court concluded that the will was properly attested by two witnesses as required by § 45a-251 because to conclude otherwise would be to elevate form over substance in a manner not contemplated by our rule of strict compliance with the statutory requirements.

Argued October 14, 2021—officially released August 23, 2022

Procedural History

Appeal from the decree of the Probate Court for the district of Newington admitting to probate the will of Freida Harris, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Aurigemma, J.*; judgment denying the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Andrew S. Knott, with whom, on the brief, was *Robert J. Santoro*, for the appellant (plaintiff).

Peter J. Boorman, with whom, on the brief, was *Ronald P. Denault*, for the appellee (defendant Dora-Lynn Harris).

Opinion

PER CURIAM. The plaintiff, Richard Harris, appeals from the judgment of the Superior Court denying his appeal from a decree of the Newington Probate Court admitting the will of his mother, Freida Harris (decedent), to probate upon the application of the defendant Dora-Lynn Harris.[1] On appeal, the plaintiff claims that the court erred in concluding that the will was validly attested by two witnesses as required by General Statutes § 45a-251. We disagree and, accordingly, affirm the judgment of the Superior Court.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. On July 28, 2017, the decedent passed away leaving a last will and testament dated March 16, 2010 (will). The decedent was predeceased by her husband. The decedent's will contained, inter alia, the following provisions: (1) "I give One Dollar to my sons, Gary Lee Harris and Richard Sherman Harris, not for lack of love or affection, but for reasons known by all parties"; (2) "I give all my real estate in equal shares to my daughters, Dora-Lynn Friedman and Sheryl Beth Dedek, who survive me and to the issue who survive me of those of my children who predecease me, in equal shares per stirpes"; (3) "I give all tangible personal property owned by me at the time of my death . . . to those of my daughters, Dora-Lynn Friedman and Sheryl Beth Dedek, who survive me, in substantially equal shares, to be divided among them as they shall agree, or if they cannot agree, as my Executrix shall determine"; (4) "I give all the rest, residue and remainder of my property and estate . . . [t]o my daughters who survive me and to

[1] Although the plaintiff's complaint named Sheryl Beth Dedek and Gary Harris as additional defendants, both were defaulted for failure to appear, and they are not participating in this appeal. Therefore, all references to the defendant are to Dora-Lynn Harris, and all references to the parties are to the plaintiff and the defendant collectively.

the issue who survive me of those of my daughters who predecease me"; and (5) "I appoint Dora-Lynn Friedman to be my Executrix."[2]

On August 31, 2017, the defendant filed an application to admit the will to probate. On December 11, 2017, the Probate Court, *Randich*, *J.*, held a hearing on the defendant's application. On December 28, 2017, the Probate Court issued a decree admitting the will to probate.

The plaintiff appealed from the Probate Court's December 28, 2017 decree to the Superior Court. On April 5, 2019, pursuant to Practice Book § 10-76, the plaintiff filed his amended reasons of appeal, contending that "[t]he Probate Court erred [in] admitting the [decedent's will] to probate . . . because the purported will lacked a proper formality, as it was not witnessed by two witnesses, in violation of . . . § 45a-251." In lieu of proceeding with a trial de novo, the parties agreed to have the probate appeal proceed as an on the record appeal.[3] On January 13, 2020, following the submission of the parties' stipulation and written memoranda, the Superior Court, *Aurigemma*, *J.*, heard the appeal. On February 13, 2020, the court issued its memorandum of decision denying the plaintiff's appeal and concluding that the will properly was admitted to probate. This appeal followed. Additional facts and procedural history will be set forth as necessary.

The plaintiff claims on appeal that the Superior Court erred in concluding that the will was validly attested

[2] The defendant's name appears in the decedent's will as Dora-Lynn Friedman; the complaint and subsequent court filings refer to the defendant as Dora-Lynn Harris.

[3] On April 8, 2019, the parties filed a stipulation with the Superior Court stipulating, inter alia, that the court adopt the factual findings of the Probate Court as set forth in the December 28, 2017 decree. The parties further stipulated that "the sole issue before the court is a question of law: 'Was the will attested by two witnesses?' If the court finds in the affirmative, then the appeal is to be denied. If the court finds in the negative, then the appeal is to be sustained."

by two witnesses as required by § 45a-251, which provides in relevant part: "A will or codicil shall not be valid to pass any property unless it is in writing, subscribed by the testator and attested by two witnesses, each of them subscribing in the testator's presence . . . ." Specifically, the plaintiff argues that the will was not properly attested because the witnesses signed only the self-proving affidavit, which technically is not part of the will. The defendant responds that the court did not err in determining that the will was attested by two witnesses because, consistent with *Gardner* v. *Balboni*, 218 Conn. 220, 588 A.2d 634 (1991), the due execution requirements of § 45a-251 were met. We agree with the defendant.

We begin with the standard of review, which is set forth in General Statutes § 45a-186b, applicable to probate appeals taken under General Statutes § 45a-186[4] from a matter heard on the record in the Probate Court. Section 45a-186b provides in relevant part: "[T]he Superior Court shall not substitute its judgment for that of the Probate Court as to the weight of the evidence on questions of fact. The Superior Court shall affirm the decision of the Probate Court unless the Superior Court finds that substantial rights of the person appealing have been prejudiced because the findings, inferences, conclusions or decisions are: (1) In violation of the federal or state constitution or the general statutes, (2) in excess of the statutory authority of the Probate Court, (3) made on unlawful procedure, (4) affected by other error of law, (5) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or (6) arbitrary or capricious or characterized by abuse

[4] General Statutes § 45a-186 provides in relevant part: "(b) Any person aggrieved by an order, denial or decree of a Probate Court may appeal therefrom to the Superior Court. . . .

"(d) An appeal from a decision rendered in any case after a recording of the proceedings is made under section 17a-498 . . . shall be on the record and shall not be a trial de novo. . . ."

of discretion or clearly unwarranted exercise of discretion. . . .'' This standard of review governing probate appeals also applies to our appellate courts. See *In re Probate Appeal of Nguyen*, 199 Conn. App. 498, 503, 236 A.3d 291 (2020).

Our Supreme Court's decision in *Gardner* v. *Balboni*, supra, 218 Conn. 220, is particularly instructive on the question before us. In *Gardner*, the testatrix had signed a document purporting to be her will on one of the witness lines of the self-proving affidavit, instead of immediately below the execution clause. Id., 226. The plaintiffs, who contested the will, which was ''prepared apparently without advice of counsel'' and ''contain[ed] irregularities,'' claimed, inter alia, that there was insufficient evidence that the will's execution met statutory requirements. Id., 221. Specifically, they contended that, because the testatrix signed the will below the self-proving affidavit and attestation clause, instead of immediately below the execution clause, she had not '' 'subscribed' '' the will, as required by § 45a-251.[5] Id., 226. Our Supreme Court rejected the plaintiffs' claim, first emphasizing that the attestation clause, the unexecuted self-proving affidavit, and the testatrix's signature all appeared at the end of a single document. Id., 228. The court held that the testatrix validly subscribed the will, reasoning that, ''while it is certainly true that the self-proving affidavit and the attestation clause are not parts of the testatrix's 'will,' their intervening presence does not suggest an incomplete expression of the testamentary purpose, nor the presence of counterfeit dispositions. More importantly, our statute does not require the testatrix to sign *at* the end of the will, but to *subscribe* it, '[l]iterally to write underneath.' Black's Law Dictionary (5th Ed. 1979) p. 1279. Rejecting the testatrix's signature as a valid subscription of the will would

[5] The plaintiffs did not challenge the signature's authenticity. See *Gardner* v. *Balboni*, supra, 218 Conn. 227.

elevate form over substance in a manner not contemplated by our rule of strict compliance with the wills act." (Emphasis in original.) *Gardner* v. *Balboni*, supra, 228.

Against this framework, we set forth the following additional facts, as found by the Probate Court and adopted by the Superior Court, which are relevant to our consideration of the plaintiff's claim. Amy Stoto, the notary public who took the attestation of the witnesses to the decedent's will execution in March, 2010, was employed at the Newington branch of TD Bank at that time. Stoto testified before the Probate Court, among other things, that (1) she was a notary at that time, (2) she would never notarize a document unless all persons who signed the document were present, (3) she recognized the names of the two witnesses as fellow TD Bank employees and thus was confident that the document was executed during banking hours, (4) she wrote the names of the witnesses on the will document directly below where the decedent signed the document, and (5) the two witnesses signed the self-proving affidavit, and she then signed as notary directly below those signatures after taking their oath as to the matters contained in the self-proving affidavit.

The Probate Court concluded that Stoto's testimony, which it found credible, "satisfie[d] the proponent's burden of proving that the [decedent] signed the will in the presence of two witnesses." Accordingly, the Probate Court found that "the [decedent] signed the will in the presence of the witnesses and . . . the witnesses then signed the self-proving affidavit in the presence of the [decedent]." The Probate Court then relied on *Gardner* to conclude that, "[u]nder such circumstances, the court sees no reason why the same considerations which support a Probate Court being able to rely on a testator's signature in the self-proving affidavit section of the will would not support the same result

for the signature of witnesses. [Section 45a-251] does not require the exact place where witnesses must sign a will for it to be valid, and, under the circumstances, the court can find with a high level of confidence that this will was executed by the [decedent] in the presence of two witnesses who then signed the document which contained the will. Accordingly, the court will find that the will document complies with the statutory requirements and should be admitted to probate. The concept of strict compliance connotes strict compliance with the statutory requirements, not strict compliance with forms drafted with the intention of satisfying the statutory requirements." The Superior Court, in denying the plaintiff's appeal, agreed with the Probate Court's reasoning and concluded that the will should be admitted to probate.

We also agree with the Probate Court's reasoning and adopt it as our own. Here, as in *Gardner*, there is no challenge to the authenticity of any of the signatures. Nor is there any challenge to the Probate Court's factual findings that the decedent signed the will in the presence of the witnesses, that the witnesses signed the document containing the will in the presence of the decedent, and that they did so as part of a single transaction. Under these circumstances, we cannot conceive of any basis not to extend *Gardner* to the facts before us. Accordingly, we conclude that the will was properly attested by two witnesses as required by § 45a-251. To conclude otherwise would be to "elevate form over substance in a manner not contemplated by our rule of strict compliance with the wills act." *Gardner* v. *Balboni*, supra, 218 Conn. 228. We refuse to contradict this guidance from our Supreme Court, and, therefore, we conclude that the Superior Court did not err in determining that the will was validly attested by two witnesses as required by § 45a-251.

The judgment is affirmed.