PAUL HARRIGAN *v.* FIDELITY NATIONAL TITLE INSURANCE COMPANY (AC 44424)

Alvord, Alexander and Vertefeuille, Js.

Syllabus

The plaintiff property owner sought to recover damages from the defendant title insurance company for an alleged violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.), based on a violation of the Connecticut Unfair Insurance Practices Act (CUIPA) (§ 38a-815 et seq.), in connection with a title insurance policy issued by the defendant to the plaintiff. The plaintiff brought the present action after protracted negotiations between the parties regarding the value of the plaintiff's claim as to a disputed property title. The plaintiff alleged that the defendant engaged in unfair and deceptive acts or practices in its administration of the policy and in its handling of the plaintiff's claim. Following a trial, the trial court found that the plaintiff had failed to demonstrate any unfair claim settlement practices under CUIPA by the defendant. On appeal, the plaintiff claimed, inter alia, that the evidence he presented at trial established that the defendant's unfair practices in failing to acknowledge and act with reasonable promptness upon communications with respect to his claim, in violation of the applicable provision (§ 38a-816 (6) (B)) of CUIPA, were part of a general business practice by the defendant, as required under § 38a-816 (6). *Held* that the trial court correctly rendered judgment in favor of the defendant with respect to the CUTPA claim, as the plaintiff, having failed to establish a general business practice of delaying communications by the defendant, failed to set forth a valid CUIPA claim, which was fatal to the plaintiff's CUTPA claim: the evidence presented by the plaintiff did not establish the existence of a general business practice by the defendant for purposes of § 38a-816 (6), as the cases relied on by the plaintiff to show a general business practice were factually distinguishable and had questionable evidentiary value in light of their differences, and the plaintiff failed to present any testimony or other documentary evidence relating to the alleged business practice of the defendant; moreover, the delays in the plaintiff's case were caused by both the plaintiff and the defendant, and, although some delays resulted from corporate inefficiencies and mismanagement by the defendant, a fair portion of the delays in the present case were due, in part, to other causes, including the plaintiff's own delayed responses to communications and his insistence on receiving compensation for the potential relocation of a replacement septic system, an issue that prolonged the negotiations and that the court

ultimately found to be of tenuous relevance to the diminution in value of the property.

Argued February 3—officially released September 6, 2022

Procedural History

Action to recover damages for, inter alia, a violation of the Connecticut Unfair Trade Practices Act, based on a violation of the Connecticut Unfair Insurance Practices Act, in connection with a title insurance policy issued by the defendant to the plaintiff, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Abrams*, *J.*; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Edward M. Schenkel, for the appellant (plaintiff).

Frank B. Velardi, *Jr.*, for the appellee (defendant).

Opinion

VERTEFEUILLE, J. The plaintiff, Paul Harrigan, appeals from the judgment of the trial court, following a bench trial, rendered in part in favor of the defendant, Fidelity National Title Insurance Company, in connection with a title insurance policy (title policy) issued by the defendant to the plaintiff. On appeal, the plaintiff challenges the judgment in favor of the defendant only with respect to count two of the operative complaint, the third revised complaint, which alleges that the defendant's conduct in handling an insurance claim filed by the plaintiff pursuant to the title policy violated the Connecticut Unfair Insurance Practices Act (CUIPA); General Statutes § 38a-815 et seq.; and that such unfair and deceptive acts or practices of the defendant thereby violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. Specifically, the plaintiff claims on appeal that (1) the court applied an incorrect standard in its analysis of whether the defendant violated CUIPA by requiring

a finding of common-law bad faith by the defendant for the plaintiff to establish a violation of CUIPA, (2) when the proper standard is applied, the record sufficiently demonstrates that the defendant violated the relevant provisions of CUIPA, and (3) the evidence submitted by the plaintiff establishes that the defendant's unfair practices were part of a general business practice, as required under General Statutes § 38a-816 (6).[1] We affirm the judgment of the court, albeit on different grounds.

The court found the following facts in its memorandum of decision: "The plaintiff . . . is the owner of a 1.52 acre piece of residential property known as 27 Brook Road . . . in Woodbridge . . . . The western boundary of [the plaintiff's] . . . property abuts a piece of residential property known as 25 Brook Road. . . . The aforementioned properties known as 25 Brook Road and 27 Brook Road were once one parcel . . . . On September 29, 1969, Helen Greene transferred the properties to James [Weir] and Margery Weir. . . . On March 6, 1979, James Weir quitclaimed his interest in the properties to Margery Weir. . . . In 1998, Margery Weir subdivided the properties into parcels of relatively equal size and transferred the 25 Brook Road parcel to Woodbridge Country Homes. She retained ownership of the 27 Brook Road parcel. . . .

"The aforementioned transfer of the 25 Brook Road parcel from Margery Weir to Woodbridge Country Homes included an area approximately 0.2 acres . . . in size that runs along the boundary between the 25 Brook Road and 27 Brook Road properties and is shaped like a long, thin football . . . [disputed area]. This area is undeveloped, featuring trees and brush.

[1] Although § 38a-816 (6) was the subject of technical amendments in 2012; see Public Acts 2012, No. 12-145, § 37; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

. . . By warranty deed dated August 18, 1999, Woodbridge Country Homes transferred the 25 Brook Road property, including the disputed area, to Ron [Nudel] and Debra Nudel. . . . By warranty deed dated July 23, 2008, Margery Weir transferred the 27 Brook Road property to [the plaintiff] . . . in this matter. The warranty deed's description of the 27 Brook [Road] property's boundary with the 25 Brook Road property lacks clarity, making it unclear whether the deed purports to transfer the disputed area to [the plaintiff]. . . .

"At the time of [the plaintiff's] purchase of the 27 Brook Road property, he was under a good faith belief that his purchase included the disputed area. . . . As part of the foregoing transfer, [the defendant] . . . issued [an] owner's title insurance policy . . . to [the plaintiff] in relation to his ownership interest in the 27 Brook Road property. . . . [The plaintiff] purchased the 27 Brook Road property with the intention of renovating and expanding the existing house on the property and then selling it. . . . In furtherance of [his] efforts to improve the existing house on the property, [the plaintiff] commissioned a survey that resulted in the creation of a site plan dated March 26, 2009. . . . Upon reviewing the site plan, [the plaintiff] first recognized that a potential issue existed regarding ownership of the disputed area, but he continued to possess a good faith belief that he held title to the area. . . .

"[The plaintiff] eventually completed a renovation that nearly doubled the size of the existing house on the 27 Brook Road property. He entered into a listing agreement with Coldwell Banker on May 20, 2011, marketing the property for $1.2 million . . . . During the period when [the plaintiff] had the 27 Brook Road property on the market, he contacted James Nugent, the attorney who represented him when he purchased the property, and inquired about whether issues regarding

ownership of the disputed area could potentially interfere with a closing were he to secure a buyer. . . .

"Sometime in the late fall of 2011, [the plaintiff] conclusively learned that he did not, in fact, hold title to the disputed area. . . . By letter to [the defendant] dated December 3, 2011, [the plaintiff] made a claim upon his title insurance policy regarding the disputed area. . . . [The defendant] initially assigned Senior Claims Counsel Jeffrey Hansen to handle [the plaintiff's] claim. . . . By letter to [the plaintiff] dated January 5, 2012, [the defendant] acknowledged receipt of his claim. . . . By letter to [the plaintiff] dated February 3, 2012, [the defendant] essentially accepted his claim. At no time during the subsequent protracted negotiations between the parties regarding [the plaintiff's] claim did [the defendant] indicate any unwillingness to pay the claim. Rather, the issue between the parties always involved the claim's value. . . .

"[The defendant] subsequently decided to commission an appraisal designed to yield a figure representing the diminution in value of [the plaintiff's] property as a result of the loss of the disputed area. . . . Subsequent to [the defendant's] decision to commission the appraisal, its personnel engaged in internal discussions regarding what date should be considered the date of loss upon which the diminution in value figure should be based. They attempted to reach out to [the plaintiff] regarding the issue without apparent success. . . . There is no evidence that [the defendant] actively pursued the possibility of purchasing the disputed area from the owners of 25 Brook Road. . . .

"The appraisal commissioned by [the defendant] eventually issued on June 5, 2012. It was prepared by Barbara Pape . . . [Pape appraisal] and quantified the property's [diminution in] value by virtue of the loss of the disputed area as $17,500, assigning the property a

value of $332,000 with the disputed area and $314,500 without it. At [the defendant's] direction . . . Pape used March 26, 2009, as the date of loss, which was the date the plaintiff first recognized that a potential issue existed regarding ownership of the disputed area based on his review of the aforementioned site plan. . . .

"On July 6, 2012, [the defendant] forwarded to [the plaintiff] a copy of the Pape appraisal, together with a check in the amount of $17,500. Apparent difficulties arose surrounding delivery of the appraisal and the check, so [the plaintiff] did not receive them until several weeks later. . . . By letter to [the defendant] dated September 7, 2012, [the plaintiff] took exception, in great detail, to the methods . . . Pape employed in arriving at the [diminution in] value figure in her appraisal. . . . By letter dated October 10, 2012 . . . Pape responded to some of the concerns regarding her appraisal that [the plaintiff] raised in his September 7, 2012 letter. [The defendant] did not forward . . . Pape's letter to [the plaintiff] until December 22, 2012. . . . Over the next few months, the parties exchanged frequent correspondence in an attempt to reach an agreement regarding the [diminution in] value of the property. . . . One of [the plaintiff's] major concerns during this period was the alleged impact that the loss of the disputed area had on the property's septic system. While the evidence indicates that the [septic] system is not located in the disputed area, [the plaintiff] repeatedly expressed concern that the disputed area is the location where a replacement system could be most economically located in the event the current system needs to be replaced. . . .

"By letter dated March 13, 2013, [the defendant] informed [the plaintiff] that [it was] reassigning responsibility for his claim to Assistant Claims Counsel Cassandra Dorr. . . . By letter dated April 29, 2014, [the defendant] offered [the plaintiff] $29,500 to resolve his

claim. . . . By email dated June 26, 2014, [the defendant] offered [the plaintiff] an additional $500. . . . At some point prior to February 4, 2015, [the plaintiff] made a demand of $73,456 to resolve his claim. . . . In May, 2015, [the plaintiff] retained appraiser Charles Liberti to perform a diminution in value appraisal on the property. Around the same time, [the plaintiff] also retained Attorney Max Case to represent him [with] regard to his claim. . . .

"Liberti produced an appraisal dated February 10, 2016 . . . [Liberti appraisal], which quantified the property's [diminution in] value as $92,000 by virtue of the loss of the disputed area, assigning the property a value of $920,000 with the disputed area and $828,000 without it. At [the plaintiff's] direction . . . Liberti used December 3, 2011, as the date of loss, which was the date the plaintiff indicates that he conclusively learned that he did not own the disputed area and made his claim to [the defendant]. . . . Liberti did not factor in any issues regarding the septic system in arriving at the $92,000 [diminution in] value figure. He attributed the vast difference in the property values between the appraisals almost entirely to the significant improvements [the plaintiff] made to the property between the different dates of loss. . . .

"By letter dated March 21, 2016 . . . Case forwarded the Liberti appraisal to [the defendant] along with a demand of $92,000 to resolve the claim. . . . Not long thereafter, [the defendant] reassigned responsibility for [the plaintiff's] claim to Associate Claims Counsel Victoria Mack. . . . Between March . . . and November, 2016 . . . Case made repeated efforts to get [the defendant] to respond to . . . Liberti's appraisal and the accompanying $92,000 demand. . . . By email dated November 9, 2016, from . . . Mack to . . . Case, she informed him that part of the cause of [the defendant's] delay in responding was that the appraiser assigned to

conduct a review of the Liberti appraisal had mistakenly reviewed, and found fault with, the Pape appraisal instead. . . . Subsequent correspondence reveals that [the defendant] concluded that there were problems with both the Pape appraisal and the Liberti appraisal. As a result, it commissioned a third appraisal performed by Robert Marsele. . . . By letter dated December 2, 2016, [the defendant] informed [the plaintiff] that it had reassigned responsibility for his claim to Associate Claims Counsel Robert Fregosi. . . .

"On February 13, 2017 . . . Marsele produced an appraisal that quantified the property's [diminution in] value as $25,000 by virtue of the loss of the disputed area, assigning the property a value of $335,000 with the disputed area and $310,000 without it. At [the defendant's] direction . . . Marsele used March 26, 2009, as the date of loss, which was the date the plaintiff first recognized that a potential issue existed regarding ownership of the disputed area based on his review of the aforementioned site plan. . . .

"By letter from . . . Fregosi to . . . Case dated March 14, 2017, [the defendant] offered $31,000 to settle the claim and took issue with the December 3, 2011 date of loss contained in the Liberti appraisal. . . . By letter from . . . Case to . . . Fregosi dated April 24, 2017, [the plaintiff] renewed his demand of $92,000 and took issue with the March 26, 2009 date of loss contained in the Pape and Marsele appraisals. . . . By email from . . . Fregosi to . . . Case dated June 5, 2017, [the defendant] offered $40,000 to settle the claim. . . . By letter from . . . Fregosi to . . . Case dated August 7, 2017, [the defendant] offered $50,000 to settle the claim. . . . By letter from . . . Case to . . . Fregosi dated August 24, 2017, [the plaintiff] lowered his demand. It is unclear from the letter whether the new demand was $77,000 or $87,000. Regardless . . . Fregosi refused the demand by email to . . . Case dated

October 2, 2017. . . . The plaintiff brought this [action] against [the defendant] by complaint dated November 13, 2017."

In a third revised complaint, the plaintiff alleges four counts against the defendant. The second count, which alleges a violation of CUTPA, is the only count at issue in this appeal.[2] In count two, the plaintiff alleges that "[t]he defendant is involved in the trade or commerce of [providing] title insurance coverage to individuals and entities who hold title to real property" and that "[t]he defendant engaged in unfair and deceptive acts or practices in its administration of the [title] policy and handling of the plaintiff's claim . . . in violation of . . . [CUIPA] . . . ." The defendant's alleged unfair and deceptive acts included, but were not limited to, the following: "(a) misrepresenting pertinent facts and policy provisions relating to the coverage at issue, in violation of . . . § 38a-816 (6) (A); (b) failing to acknowledge and act with reasonable promptness upon the plaintiff's initiation of the claim, in violation of . . . § 38a-816 (6) (B); (c) refusing to pay the claim without conducting a reasonable investigation based upon all available information, in violation of . . . § 38a-816 (6) (D); (d) not attempting in good faith to effectuate a prompt, fair and equitable settlement of the claim, where liability is clear, in violation of . . . § 38a-816 (6) (F); and (e) failing to promptly provide a reasonable explanation of the basis in the [title] policy for denial of the claim, in violation of . . . § 38a-816 (6) (N)." The plaintiff further alleges in count two that the defendant "engaged in similar unfair and deceptive conduct on numerous other occasions," in violation of CUIPA, and that such conduct "was committed and performed with

[2] The other counts allege claims for breach of contract (count one), breach of the implied covenant of good faith and fair dealing (count three), and unjust enrichment (count four).

such frequency as to indicate a general business practice of the defendant . . . .''

The matter was tried to the court, which rendered judgment in part[3] in favor of the defendant with respect to counts two, three and four of the third revised complaint. With respect to count two, the court concluded that the plaintiff had failed to demonstrate any unfair claim settlement practices under CUIPA by the defendant. The plaintiff thereafter filed this appeal challenging the judgment only with respect to count two. Additional facts and procedural history will be set forth as necessary.

On appeal, the plaintiff argues that (1) the court applied an incorrect standard in its analysis of whether the defendant violated CUIPA by requiring the plaintiff to prove common-law bad faith by the defendant to establish a violation of CUIPA, (2) when the proper standard is applied, the record sufficiently demonstrates that the defendant violated the relevant provisions of CUIPA, and (3) the evidence submitted by the plaintiff establishes that the defendant's unfair practices were part of a general business practice, as required under § 38a-816 (6). Although the plaintiff has raised three claims on appeal, we address the third claim only, as its resolution is dispositive of this appeal.

Before addressing the merits of this claim, we set forth general principles governing CUIPA claims and our standard of review. ''CUTPA is, on its face, a remedial statute that broadly prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . . To give effect to its provisions, [General Statutes §] 42-110g (a) of [CUTPA] establishes a private cause of action,

[3] The court rendered judgment in favor of the plaintiff with respect to his claim of breach of contract in count one of the third revised complaint, awarding him damages in the amount of $92,000.

available to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by [General Statutes §] 42-110b . . . . CUIPA, which specifically prohibits unfair business practices in the insurance industry and defines what constitutes such practices in that industry; see General Statutes § 38a-816; does not authorize a private right of action but, instead, empowers the [insurance] commissioner to enforce its provisions through administrative action. See General Statutes §§ 38a-817 and 38a-818. . . . [Our Supreme Court, however, has] determined that individuals may bring an action under CUTPA for violations of CUIPA. In order to sustain a CUIPA cause of action under CUTPA, a plaintiff must allege conduct that is proscribed by CUIPA." (Internal quotation marks omitted.) *Dorfman* v. *Smith*, 342 Conn. 582, 614, 271 A.3d 53 (2022). "[I]f a plaintiff brings a claim pursuant to CUIPA alleging an unfair insurance practice, and the plaintiff further claims that the CUIPA violation constituted a CUTPA violation, the failure of the CUIPA violation is fatal to the CUTPA claim." *State* v. *Acordia, Inc.*, 310 Conn. 1, 31, 73 A.3d 711 (2013); see also *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, 317 Conn. 602, 624, 119 A.3d 1139 (2015) ("a plaintiff cannot bring a CUTPA claim alleging an unfair insurance practice unless the practice violates CUIPA").

Section 38a-816 (6) of CUIPA prohibits unfair claim settlement practices, which are defined in relevant part as "[c]ommitting or performing with such frequency as to indicate a general business practice any of the following: (A) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue; (B) failing to acknowledge and act with reasonable promptness upon communications with respect to claims arising under insurance policies . . . (D) refusing to pay claims without conducting a reasonable

investigation based upon all available information . . . (F) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear; [and] . . . (N) failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement . . . .'' The issue of whether the evidence presented demonstrates that the insurer engaged in unfair settlement practices with such frequency as to indicate a general business practice involves a question of law over which we exercise plenary review.[4] See generally *Lees* v. *Middlesex Ins. Co.*, 229 Conn. 842, 847, 643 A.2d 1282 (1994) (affirming trial court's determination on motion for summary judgment, as matter of law, that undisputed evidence did not demonstrate general business practice by defendant); see also *Volpe* v. *Paul Revere Life Ins. Co.*, Docket No. 3:98-CV-972 (CFD), 2001 WL 1011955, *2 (D. Conn. August 29, 2001) (evidence presented was insufficient as matter of law to demonstrate general business practice). We are also mindful that ''[t]he scope of our appellate review depends [on] the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record.'' (Internal quotation marks omitted.) *State* v. *Acordia, Inc.*, supra, 310 Conn. 15–16.

[4] In the present case, the trial court did not reach the issue of whether the evidence established a general business practice by the defendant, as the court resolved the action by concluding that the plaintiff had failed to demonstrate any unfair claims settlement practices by the defendant. We, nevertheless, reach the issue in light of our plenary review of this question of law. See part II of this opinion.

I

In order for this court to reach the merits of whether the evidence establishes a general business practice by the defendant, we first must address two preliminary issues: (1) which provisions of CUIPA are at issue in this appeal, and (2) what evidence was appropriately before the court as to whether a general business practice has been established.

A

With respect to the first issue, we first note that count two of the third revised complaint alleges violations by the defendant of subdivisions (A), (B), (D), (F), and (N) of § 38a-816 (6). The court, after referencing those same allegations in its memorandum of decision,[5] stated: "It must be kept in mind that the issue in this case is not [the defendant's] denial of [the plaintiff's] claim, which is frequently the issue in CUIPA cases. The facts indicate that [the defendant] essentially accepted [the plaintiff's] claim not long after receiving his demand letter. The only issue during the protracted negotiations between the parties in this matter was the value of [the plaintiff's] claim, not its legitimacy, and, as a result, the value of the claim is the only issue before the court. As a result, the court finds, based on the evidence presented at trial, that the only CUIPA violations *cited by the plaintiff* that could potentially apply in this case are the claim[s] that [the defendant] failed

[5] Specifically, the court stated: "[The plaintiff] specifically claims that [the defendant] violated CUIPA in the following ways: (1) By misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue [§ 38a-816 (6) (A)]; (2) by failing to acknowledge and act with reasonable promptness upon communications with respect to his claim [§ 38a-816 (6) (B)]; (3) by refusing to pay his claim without conducting a reasonable investigation based upon all available information [§ 38a-816 (6) (D)]; (4) by not attempting in good faith to effectuate prompt, fair and equitable settlement of his claim [§ 38a-816 (6) (F)]; and (5) by failing to promptly provide a reasonable explanation of the basis in the policy for the denial of his claim [§ 38a-816 (6) (N)]."

to acknowledge and act with reasonable promptness upon communications with respect to [the plaintiff's] claim [in violation of § 38a-816 (6) (B)], and that [the defendant] did not attempt in good faith to effectuate prompt, fair and equitable settlement of [the plaintiff's] claim [in violation of § 38a-816 (6) (F)]." (Emphasis added; footnote omitted.)

On appeal, the defendant argues that the plaintiff has not challenged the court's finding that only subdivisions (B) and (F) of § 38a-816 (6) potentially could apply to this case and that the finding is not clearly erroneous. Although the plaintiff has not specifically challenged the court's finding, such a challenge could be implied from the plaintiff's arguments on appeal that the evidence presented establishes violations of other provisions of CUIPA. Thus, we must examine the record to determine whether it supports the court's finding.

"If the factual basis of a trial court's decision is challenged, the clearly erroneous standard of review applies. . . . While conducting our review, we properly afford the court's findings a great deal of deference because it is in the unique [position] to view the evidence presented in a totality of circumstances . . . . A court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . The legal conclusions of the trial court will stand, however, only if they are legally and logically correct and are consistent with the facts of the case." (Citations omitted; internal quotation marks omitted.) *Li* v. *Yaggi*, 212 Conn. App. 722, 731, A.3d (2022).

At trial, the plaintiff submitted forty-three exhibits into evidence. A large portion of those exhibits consists of copies of email communications between the plaintiff

or his attorney and representatives of the defendant, and their subjects cover many topics, including settlement offers, the date of loss, requests for updates regarding the status of the plaintiff's claim, issues regarding the septic system and appraisals that were performed, and estimates for work relating to the septic, driveway, and landscape. A number of witnesses also testified at the trial, including the plaintiff; Cynthia Baines, a senior claims counsel for the defendant who explained the steps taken in handling the plaintiff's claim and testified regarding the communications in the exhibits; owners of various businesses relating to excavating, driveways, trees, and landscaping; the three appraisers; and Robert P. Pryor, a professional engineer and land surveyor.

On the basis of our careful review of that evidence and testimony, there was no evidence presented that could have supported a finding that the defendant violated subdivision (D) of § 38a-816 (6)—"refusing to pay claims without conducting a reasonable investigation based upon all available information"—or subdivision (N)—"failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement"—as the defendant neither refused to pay nor denied the claim. Indeed, the court specifically found that the primary issue in the case "was the value of [the plaintiff's] claim, not its legitimacy," that at no time did the defendant "indicate any unwillingness to pay the claim," and that the defendant never denied the claim and, in fact, "essentially accepted [the plaintiff's] claim not long after receiving his demand letter."

We similarly conclude that the evidence presented by the plaintiff could not have supported a finding that the defendant violated subdivision (A) of § 38a-816 (6)—"[m]isrepresenting pertinent facts or insurance

policy provisions relating to coverages at issue . . . .'' The evidence presented by the plaintiff, which shows that the parties disagreed about various matters such as the date of loss, the relocation of the septic system, and the value of the plaintiff's claim, simply does not demonstrate any misrepresentations by the defendant, nor did the court find any. In fact, the court specifically found, on the basis of the testimony of Baines, whom the court found to be credible, ''that at no time during the claims settlement process did [the defendant's] personnel act in bad faith or come within close proximity of doing so.'' It is not for this court to second-guess the credibility determinations of the trial court. See *Bayview Loan Servicing, LLC* v. *Gallant*, 209 Conn. App. 185, 193, 268 A.3d 119 (2021).

Moreover, the evidence presented shows numerous communications between the plaintiff and representatives of the defendant concerning the status of the plaintiff's claim and why its resolution had been delayed for more than five years, which could support a finding of a violation of subdivisions (B) and (F) of § 38a-816 (6), both of which relate to delays in communications and settling the claim. We, therefore, conclude that the court's finding ''that the only CUIPA violations *cited by the plaintiff*[6] that could potentially apply in this case''

[6] To the extent that the plaintiff references on appeal other provisions of CUIPA, namely, § 38a-816 (1) and (2), as well as § 38a-816 (6) (C), (G), and (M), we do not address them. First, those provisions were never cited in the plaintiff's operative complaint. ''It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of [his] complaint. . . . The purpose of the complaint is to limit the issues to be decided at the trial of a case and is calculated to prevent surprise. . . . A complaint should fairly put the defendant on notice of the claims against him. . . . In other words, [a] plaintiff may not allege one cause of action and recover upon another. . . . In addition, in the context of a postjudgment appeal, if a review of the record demonstrates that an unpleaded cause of action actually was litigated at trial without objection such that the opposing party cannot claim surprise or prejudice, the judgment will not be disturbed on the basis of a pleading irregularity. . . . In that circumstance, provided the plaintiff has produced sufficient evidence to prove the elements of his unpleaded claim, the defendant will be deemed to have waived any defects

are the claims relating to subdivisions (B) and (F) of § 38a-816 (6) is not clearly erroneous. (Footnote added.)

Furthermore, in light of the court's finding that the defendant did not act in bad faith at any time during the settlement process, which was based on the court's credibility assessment of the testimony of the defendant's claims counsel, Baines, there can be no violation of § 38a-816 (6) (F), which requires a showing that the defendant did not attempt "in good faith to effectuate prompt, fair and equitable settlements" of the plaintiff's

in notice. . . . Put another way, a court may not render a judgment for a plaintiff on a theory that is neither pleaded nor pursued by the plaintiff at trial." (Citations omitted; internal quotation marks omitted.) *Gleason* v. *Durden*, 211 Conn. App. 416, 430–31, 272 A.3d 1129, cert. denied, 343 Conn. 921, 275 A.3d 211 (2022).

Second, the trial court stated in its memorandum of decision that the matter was tried over the course of seven days. The appellate record does not contain transcripts for two of those days—February 27 and March 4, 2020. In our review of the transcripts provided, we have not found any reference to those additional provisions or to arguments or evidence relating to them. To the extent that arguments concerning those additional provisions may have been raised in the transcripts not provided to this court, the record is not adequate for this court to make such a determination. See *Ng* v. *Wal-Mart Stores, Inc.*, 122 Conn. App. 533, 537, 998 A.2d 1214 (2010) (it is appellant's burden to provide this court with adequate record on which to decide issues on appeal, which includes necessary transcripts); see also Practice Book § 61-10.

Moreover, although the plaintiff referenced those additional provisions in his posttrial brief, the court never mentioned them in its memorandum of decision, which expressly referenced the provisions of CUIPA "cited by the plaintiff . . . ." It logically follows from that statement that the court was referring to the provisions cited in the third revised complaint. The plaintiff did file a motion for articulation, which was denied, and the plaintiff filed a motion for review with this court, which granted the motion but denied the relief requested therein. Notably, though, the motion for articulation simply asked the court if it found violations of § 38a-816 (1) and (2), and § 38a-816 (6) (A), (B), (C), (D), (F), (G), (M), and (N); the plaintiff never asked the court to articulate what provisions the court specifically considered when it found that only subdivisions (B) and (F) of § 38a-816 (6) potentially could apply, even though the court's decision, in substance, referenced only the provisions of CUIPA cited in the complaint and not the additional ones raised in the plaintiff's posttrial brief.

claim. The intrinsic component of bad faith in subdivision (F) precludes its applicability given the court's finding of no bad faith, the substance of which the plaintiff has not challenged on appeal.[7]

Accordingly, we conclude that the only provision of CUIPA relevant to this appeal is § 38a-816 (6) (B).

B

The following additional facts are relevant to the second preliminary issue we must address, namely, what evidence was appropriately before the court as to whether a general business practice has been established.

[7] The plaintiff's primary claim on appeal is that the court employed an incorrect standard when it required a showing of bad faith to establish a violation of CUIPA. In making that claim, however, the plaintiff has not challenged the finding itself of no bad faith conduct by the defendant. That is further evidenced by the fact that the plaintiff has not challenged on appeal the judgment rendered in favor of the defendant on count three alleging a breach of the implied covenant of good faith and fair dealing, which necessarily requires a showing of bad faith. Significantly, the court stated in its decision that "[a] finding of bad faith on [the defendant's] part is an essential element of the plaintiff's claim that [the defendant] breached the covenant of good faith and fair dealing, and, as a result, the plaintiff could not recover under that claim . . . ." Thus, its finding of no bad faith on the defendant's part was necessary to its resolution of the plaintiff's claim of breach of the implied covenant of good faith and fair dealing in the third revised complaint, regardless of whether it should have applied to the CUIPA claims.

Moreover, although the plaintiff argues in his brief that the defendant did not attempt in good faith to effectuate prompt, fair and equitable settlement of his claim, his analysis fails to specifically challenge the court's finding of no bad faith by the defendant. Instead, the plaintiff merely gives a few examples of conduct he claims demonstrates that the defendant did not attempt in good faith to settle his claim. Because the plaintiff has failed to provide any analysis or citation to authority demonstrating why the court's finding of no bad faith was improper, the brief is inadequate for this court to review that finding. See *Rosier* v. *Rosier*, 103 Conn. App. 338, 340 n.2, 928 A.2d 1228 ("We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Where the parties cite no law and provide no analysis of their claims, we do not review such claims." (Internal quotation marks omitted.)), cert. denied, 284 Conn. 932, 934 A.2d 247 (2007).

As stated previously in this opinion, in count two of the third revised complaint the plaintiff alleges that the defendant "engaged in similar unfair and deceptive conduct on numerous other occasions," in violation of CUIPA, and that such conduct "was committed and performed with such frequency as to indicate a general business practice of the defendant . . . ." In support of that allegation, the third revised complaint references five complaints filed with the Insurance Department (department) involving the defendant and cites *Davis* v. *Fidelity National Ins. Co.*, 32 Pa. D. & C.5th 179 (2013) (*Davis I*), an adjudicated case from Pennsylvania involving the defendant.

During the trial, the plaintiff sought to admit into evidence exhibit 44, which consisted of the consumer complaints filed with the department alleging unfair insurance practices by the defendant that were referenced in count two. The court denied admission of exhibit 44 on the ground that it did not involve adjudicated matters.[8] Specifically, the court stated: "I have good news and bad news for you. If they are unadjudicated, I'm not letting them in. However, anything that's adjudicated, I . . . *could take* judicial notice of anything that's adjudicated. . . . You can give me a list of cases countrywide where [the defendant] has been . . . adjudicated having committed an unfair insurance practice. And *I could take judicial notice of it*." (Emphasis added.) The court thereafter admitted into evidence exhibits 41, 42, and 43, all of which concerned the *Davis I* case cited in count two.

On March 3, 2020, before trial resumed, the court heard arguments from the parties concerning a motion to dismiss filed by the defendant, in which the defendant sought, inter alia, to dismiss count two on the ground

[8] The plaintiff has not challenged that ruling on appeal.

that, as a matter of law, the plaintiff had failed to establish a general business practice by the defendant, as required by § 38a-816 (6). In his memorandum in opposition to the defendant's motion to dismiss, the plaintiff cited four instances in which the defendant allegedly engaged in bad faith settlement practices similar to its conduct in the present case (additional instances of insurance misconduct). Copies of those materials were attached as an exhibit to the plaintiff's memorandum.[9] At the hearing thereon on March 3, the defendant argued that the only evidence admitted in support of the plaintiff's claim of a general business practice by the defendant was the *Davis I* case, that the court declined to admit the other administrative matters handled by the department, and that any new allegations raised by the plaintiff should be excluded as a matter of law because the plaintiff already had rested his case without making a request for the court to take judicial notice of any matters, and the defendant would be prejudiced if the court considered any new evidence.

During argument, the parties addressed the additional instances of insurance misconduct cited by the plaintiff in his memorandum in opposition to the motion to dismiss, and the following colloquy transpired:

"[The Plaintiff's Counsel]: . . . And the court gave us clear instruction on Thursday, you said if we come back with more cases that demonstrate these—this repetitive conduct, the court will take judicial notice of those cases and they would come in. And that's what

[9] Those additional instances of insurance misconduct include three case citations and an official order from the Texas Commissioner of Insurance: *Fidelity National Title Ins. Co.* v. *Matrix Financial Services Corp.*, 567 S.E.2d 96 (Ga. App. 2002); *Santa Fe Valley Partners* v. *Fidelity National Title Ins. Co.*, Docket No. 638367 (Cal. Super. August 13, 1992); *Davis* v. *Fidelity National Title Ins. Co.*, Docket No. 672 MDA 2014, 2015 WL 7356286 (Pa. Super. March 18, 2015); and Official Order, Tex. Commissioner of Ins. No. 2019-5951, In re Fidelity National Title Ins. Co., (May 3, 2019).

we did, Your Honor, over the weekend . . . [we] found all of these . . . cases, four or five more cases.

"So, we've . . . met [our] burden, it's . . . there. And I'm happy to give the court the citations to take judicial notice. . . .

"The Court: Haven't they been submitted as the exhibit?

"[The Plaintiff's Counsel]: Not yet, Your Honor, we were going to give you . . . our instruction was to give you citations and then the court would take . . . notice. . . .

"The Court: I think there's an exhibit with cases. I didn't . . . look at it, I just—

"[The Plaintiff's Counsel]: No, there's—Your Honor, there's one exhibit with . . . the case from Pennsylvania.

"The Court: Okay. . . . Let me—as a threshold, I agree with you, I think I opened the door and allowed you to do that. [The defendant's counsel] may not agree, but, I think I did. So . . . all right. Continue?

"[The Plaintiff's Counsel]: So, those are there, Your Honor. . . . [The defendant's counsel] . . . is free to argue the relevance and the applicability of each one of those cases. However, they do exist and are there. . . .

"[The Defendant's Counsel]: If I may, Your Honor, prior to resting, I don't believe there was any request by the plaintiff to allow this court to consider post-resting evidence. . . .

"The Court: I—it's my distinct recollection that I invited him to do so . . . ."

The court held off ruling on the motion to dismiss at that time. Thereafter, it rendered judgment in favor

of the defendant with respect to count two, which obviated the need for the court to reach the issue of whether the defendant's actions were part of a general business practice, as raised in the defendant's motion to dismiss.

On appeal, the plaintiff argues that "the record is clear that the trial court took judicial notice of the [additional instances of insurance misconduct]" referenced at the March 3, 2020 hearing and included in the exhibit to the plaintiff's memorandum in opposition to the defendant's motion to dismiss. The plaintiff further asserts that, even if this court finds that the trial court did not take judicial notice of the additional instances of insurance misconduct, "this court may judicially notice anything in the trial court's file, including exhibits to pleadings." The defendant counters that there is no evidence in the record demonstrating that the trial court was asked to take judicial notice of those additional instances of insurance misconduct, that it actually did so, or that it "provided the mandated notice to the parties and [an] opportunity to be heard." The defendant acknowledges the court's statements that it may have "invited" or "opened the door" to the additional evidence but argues that, "[i]n the discussion that followed, no request was made to submit these matters as exhibits, nor for the trial court to take judicial notice thereof. As such, these submissions are not evidence upon which the [plaintiff] can rely and should be afforded no consideration on whether a general business practice has been established."

We conclude that it is unclear from the record whether the court actually did take judicial notice of the additional instances of insurance misconduct. Although the court stated that it had "opened the door" to additional evidence, during that colloquy the plaintiff's counsel never made a request for the court to take judicial notice of the additional instances of insurance misconduct. The fact that the court previously had

stated to the plaintiff's counsel that counsel could bring other adjudicated cases to the court's attention and that the court *could* take judicial notice of them, there is simply nothing in the record aside from the court's vague statements demonstrating that, once the additional instances of insurance misconduct were brought to the court's attention, it actually did take judicial notice of them. Moreover, given that the court did not decide the issue of whether the evidence established a general business practice, it's memorandum of decision provides no guidance on this issue. Nevertheless, we need not decide whether the court took judicial notice of the additional instances of insurance misconduct because, even if we consider them together with the *Davis I* case,[10] for the reasons that follow we conclude, as a matter of law, that the plaintiff has failed to establish a general business practice by the defendant.

II

Having addressed those preliminary issues, we now turn to the issue of whether the evidence presented by the plaintiff establishes the existence of a general business practice by the defendant for purposes of § 38a-816 (6). We conclude that it does not.

We first note that, in their appellate briefs, the parties disagree as to whether the general business practice requirement is a condition precedent that must first be established or whether a plaintiff must first demonstrate a violation of one or more of the enumerated unfair settlement practices set forth in CUIPA. For example, the defendant argues that "the trial court [cannot] consider nor reach the issue of whether a CUIPA violation exists unless [the plaintiff] has proven that

[10] At the March 3, 2020 hearing, the defendant's attorney did address each of the additional instances of insurance misconduct and argued why they were not applicable and failed to demonstrate a general business practice by the defendant.

any alleged conduct of [the defendant] was committed with such frequency to constitute a 'general business practice.' " The plaintiff counters that the initial step a court must take concerning whether a defendant has violated CUIPA "is to first determine whether a . . . violation of CUIPA has been committed, not whether a general business practice has been established." We need not delve into that issue because a necessary element of a CUIPA claim is a finding of a general business practice, without which the CUIPA claim fails. Because § 38a-816 (6) requires the plaintiff to demonstrate that the defendant's alleged unfair claim settlement practices occurred with "such frequency as to indicate a general business practice," a determination by this court that the plaintiff has not met his statutory burden will be fatal to his CUIPA claim and dispositive of this appeal. Accordingly, for purposes of our analysis in this section, we assume that the plaintiff has demonstrated a violation of § 38a-816 (6) (B).

We next set forth general principles governing our resolution of this issue. "In requiring proof that the insurer has engaged in unfair claim settlement practices 'with such frequency as to indicate a general business practice,' the legislature has manifested a clear intent to exempt from coverage under CUIPA isolated instances of insurer misconduct." (Footnote omitted.) *Lees* v. *Middlesex Ins. Co.*, supra, 229 Conn. 849. Thus, our Supreme Court has concluded "that claims of unfair settlement practices under CUIPA require a showing of more than a single act of insurance misconduct." *Mead* v. *Burns*, 199 Conn. 651, 659, 509 A.2d 11 (1986); see also *Dorfman* v. *Smith*, supra, 342 Conn. 615.

Because the term "general business practice" is not defined in § 38a-816 (6), in *Lees* our Supreme Court looked "to the common understanding of the words as expressed in a dictionary. . . . 'General' is defined as 'prevalent, usual [or] widespread'; Webster's Third New

International Dictionary; and 'practice' means '[p]erformance or application habitually engaged in . . . [or] repeated or customary action.' Id." (Citation omitted.) *Lees* v. *Middlesex Ins. Co.*, supra, 229 Conn. 849 n.8. Thus, the court concluded that "the defendant's alleged improper conduct in the handling of a single insurance claim, without any evidence of misconduct by the defendant in the processing of any other claim, does not rise to the level of a 'general business practice' as required by § 38a-816 (6)." Id., 849.

"Where [a] [p]laintiff relies on other lawsuits in which those plaintiffs alleged similar conduct as [the] [p]laintiff alleges here, the [c]ourt may draw an inference that [the] [d]efendant engaged in that conduct with the frequency necessary for a 'business practice' under CUIPA." *Bilyard* v. *American Bankers Ins. Co. of Florida*, Docket No. 3:20CV1059 (JBA), 2021 WL 4291173, *3 (D. Conn. September 21, 2021). "To determine whether instances of insurance misconduct spanning different cases and different parties are sufficiently related to constitute a general business practice, courts . . . have considered the following factors: [T]he degree of similarity between the alleged unfair practices in other instances and the practice allegedly harming the plaintiff; the degree of similarity between the insurance policy held by the plaintiff and the policies held by other alleged victims of the defendant's practices; the degree of similarity between claims made under the plaintiff's policy and those made by other alleged victims under their respective policies; and the degree to which the defendant is related to other entities engaging in similar practices." (Internal quotation marks omitted.) *Preferred Display, Inc.* v. *Great American Ins. Co. of New York*, 288 F. Supp. 3d 515, 528–29 (D. Conn. 2018). Although those factors have been used by courts to determine "whether a plaintiff has made facially plausible factual allegations of a general business practice"

to survive a motion to dismiss under the federal rules of procedure; *Phillips* v. *State Farm Fire & Casualty Co.*, Docket No. 3:19-CV-623 (AWT), 2020 WL 3105485, *5 (D. Conn. February 28, 2020); they are equally applicable to whether the evidence presented, as a matter of law, establishes a general business practice by the defendant. This is particularly true in a case such as the present one, in which the plaintiff relies exclusively on published judicial decisions as evidence of the general business practice. In such a circumstance, we are in as good a position as was the trial court to determine whether, in light of the various factors courts have applied, the prior judicial determinations provide sufficient evidence of a general business practice.

Before we address the case cited in the third revised complaint as evidence of a general business practice of the defendant—*Davis* v. *Fidelity National Ins. Co.*, supra, 32 Pa. D. & C.5th 179—we first address the additional instances of insurance misconduct relied on by the plaintiff at the March 3, 2020 hearing to establish a general business practice by the defendant, which include *Davis* v. *Fidelity National Title Ins. Co.*, Docket No. 672 MDA 2014, 2015 WL 7356286 (Pa. Super. March 18, 2015) (*Davis II*); *Fidelity National Title Ins. Co.* v. *Matrix Financial Services Corp.*, 567 S.E.2d 96 (Ga. App. 2002) (*Matrix Financial*); Official Order, Tex. Commissioner of Ins. No. 2019-5951, In re Fidelity National Title Ins. Co. (May 3, 2019) (Texas order); and *Santa Fe Valley Partners* v. *Fidelity National Title Ins. Co.*, California Superior Court, Docket No. 638367 (August13, 1992) (*Santa Fe*). Although those additional instances of insurance misconduct all involve Fidelity National Title Insurance Company or its affiliates as a party and claims pursuant to title policies issued by Fidelity National Title Insurance Company, they have little, if any, evidentiary value with respect to the issue of a general business practice by the defendant in the

present case, as the claims involved therein are not sufficiently similar to the one in the present case. See *Thomas* v. *Vigilant Ins. Co.*, Docket No. 3:21-CV-00211 (KAD), 2022 WL 844601, *8 (D. Conn. March 22, 2022) ("[p]rior instances of insurance misconduct offered to demonstrate a general business practice must be sufficiently similar to the allegations at issue to support such a conclusion" (internal quotation marks omitted)).

Davis II is an appeal to the Superior Court of Pennsylvania from the decision of the Court of Common Pleas in *Davis I*. *Davis II* involves a challenge to the determination by the Court of Common Pleas of lost profits and its award of punitive damages and addresses the issue of the delays by the insurer only with respect to the damages award. *Davis* v. *Fidelity National Ins. Co.*, supra, 2015 WL 7356286, *1, 4. It, thus, provides no support whatsoever for a finding of a general business practice of the defendant in relation to the facts of the present case.

Likewise, *Matrix Financial* provides little help with respect to this issue. That case involves an action brought against the insurer for breach of a title insurance contract and bad faith refusal to pay an insurance claim. See *Fidelity National Title Ins. Co.* v. *Matrix Financial Services Corp.*, supra, 567 S.E.2d 97. The Georgia Court of Appeals affirmed the summary judgment rendered against the insurer with respect to a claim that it had refused in bad faith to pay the title insurance claim in violation of a Georgia statute, which is not at issue in the present case. Id., 102. The issue in *Matrix Financial*—a bad faith failure to pay an insurance claim—is inapposite to the issue in the present case of whether the defendant engaged in a general business practice of failing to acknowledge and respond to communications regarding an insurance claim with reasonable promptness. Furthermore, unlike in *Matrix Financial*, in the present case the court found that the

defendant did not engage in bad faith, a finding not challenged by the plaintiff on appeal.

With respect to the Texas order, the insurer was found to have violated a number of provisions of the Texas Insurance Code in connection with a title policy it had issued, including failing to close the transaction, failing "to promptly investigate the validity of a title defect not excepted or excluded from the policy," and failing "to accept, deny, or conditionally accept a claim within [thirty] days or notify the insured of its inability to do so . . . ." Official Order, Tex. Commissioner of Ins. No. 2019-5951, supra, p. 4. Again, these findings bear little weight on whether the defendant in the present case, which from the outset accepted the claim, has engaged in a general business practice of delays in communicating regarding an insurance claim.

Finally, in *Santa Fe* the plaintiffs brought an action for breach of contract, breach of the implied covenant of good faith and fair dealing and negligent misrepresentation in connection with a title policy issued by the defendant insurer. *Santa Fe Valley Partners* v. *Fidelity National Title Ins. Co.*, California Superior Court, Docket No. 638367, Complaint (August 16, 1991). As part of their claim that the insurer had breached the implied covenant of good faith and fair dealing, the plaintiffs alleged that the insurer "fail[ed] to acknowledge and act reasonably and promptly upon communications with respect to [the] [p]laintiffs' claims," a claim similar to the one in the present case. Id., p. 11. The matter was tried to a jury, which returned a verdict in favor of the plaintiffs. *Santa Fe Valley Partners* v. *Fidelity National Title Ins. Co.*, supra, California Superior Court, Docket No. 638367. The verdict form reveals that the jury in *Santa Fe* found that the insurer acted unreasonably in handling the claim and that, with respect to the claim for breach of the implied covenant of good faith and fair dealing, it "acted with malice,

fraud, or oppression . . . .'' Id. Those findings fail to address the allegation relevant to the present case, namely, whether the insurer failed to acknowledge or act promptly with respect to communications regarding the claim filed by the plaintiffs. The materials submitted by the plaintiff in the present case include the allegations made against the insurer in *Santa Fe* and a jury verdict form; they do not show any substantive ruling on whether the insurer was found to have committed the particular alleged unfair settlement practice, especially when the count containing that claim included numerous other allegations of misconduct by the insurer. Allegations alone are not sufficient to demonstrate a general business practice. See *Moura* v. *Harleysville Preferred Ins. Co.*, Docket No. 3:18-cv-422 (VAB), 2019 WL 5298242, *9 (D. Conn. October 18, 2019). Accordingly, we conclude that the additional instances of insurance misconduct relied on by the plaintiff do not demonstrate a general business practice of delays by the defendant similar to the defendant's conduct in the present case.

We now address the case cited in the third revised complaint on which the plaintiff also relies to establish a general business practice by the defendant—*Davis* v. *Fidelity National Ins. Co.*, supra, 32 Pa. D. & C.5th 179. In that case, the plaintiff insureds (Davis plaintiffs) brought an action against the defendant insurer for bad faith and breach of contract arising out of a title insurance policy issued by the insurer. Id., 181. The Court of Common Pleas of Pennsylvania concluded that ''there were several known legal duties and fiduciary obligations recklessly disregarded by [the insurer], namely unreasonable delay in adjusting and resolving the claim [and] repeated violations of the Unfair Insurance Practices Act . . . .'' Id., 189. Of significance, the court found that the insurer had violated 40 Pa. Stat. and Cons. Stat. § 1171.5 (a) (10) (ii) (West 2006) by

"failing to acknowledge and act promptly upon written or oral communication with respect to claims arising under insurance policies"; id., 199; the language of which is nearly identical to that of § 38a-816 (6) (B). Although the court in *Davis I* found a similar unfair settlement practice as the one at issue in the present case, when the facts of *Davis I* are closely analyzed, the differences between *Davis I* and the present case become strikingly apparent.

In *Davis I*, the insurer did not deny coverage but, rather, took twenty months to complete its investigation and notify the Davis plaintiffs that the claim was covered under the policy, and subsequently delayed payment for three more years, extending an offer to settle only after the action against it was commenced. Id., 199–201. The court's conclusion that the insurer had violated 40 Pa. Stat. and Cons. Stat. § 1171.5 (a) (10) (ii) (West 2006) was premised on its finding that the insurer had "routinely ignored [the] [p]laintiffs, who initiated repeated communications . . . with [the] insurer over a period of years." Id., 200–201. In fact, the court referenced "a disturbing pattern of chronic delay" by the insurer. Id., 193. Moreover, in finding bad faith by the insurer, the court in *Davis I* found that the insurer acted with a reckless indifference to the rights of its insureds and in failing to resolve the claim during the five year period, which was evidenced by communications in which it recognized that it had no reasonable basis to continue to deny, by delay, the resolution of the claim and that it knowingly had threatened a meritless lawsuit as a way to delay resolution of the claim. Id., 194.

In contrast, in the present case, the court specifically found that the defendant's "actions in this case clearly [did] not represent shining examples of sterling claims management practices," and that "the issues that arose and the delay that resulted in this case were due, in no small part, to [the plaintiff's] unrealistic expectations

colliding with [the defendant's] maddening corporate inefficiency." The court further explained: "[The defendant's] shortcomings in this regard include, but are not limited to, the fact that four different claims counsel handled [the plaintiff's] claim in this matter, which was pending for almost six years before he filed suit. There was probably nothing more emblematic of [the defendant's] failings in this regard than when a report produced on [the defendant's] behalf mistakenly attacked the credibility of its own appraiser rather [than] [the plaintiff's] appraiser."

Furthermore, in the present case, a great deal of the delay was attributable to the issue raised by the plaintiff concerning the septic system, which the court found not to be relevant to the diminution in value figure. Specifically, the court stated: "As relates to the issue of the septic system that occupied so much of the parties' time and energy, both during the prolonged negotiations that culminated in this lawsuit and at trial, the court is of the opinion that it has little to no relevance to the [diminution in] value of the property. As a result, in arriving at a [diminution in] value figure, the court declines to consider [the plaintiff's] claims that the disputed area is the location where a replacement system could be most economically located in the event the current system needs to be replaced. While [the plaintiff's] assertion may, in fact, be accurate, the court finds the issue of the potential location of a new septic system that may or may not be needed sometime in the future to be of tenuous relevance to the [diminution in] value of the property."

The delays in the present case, therefore, were caused by both the plaintiff and the defendant and resulted, in part, from corporate inefficiencies and mismanagement of the defendant, whereas in *Davis I*, the insurer repeatedly *ignored* the Davis plaintiffs and its delays were purposeful and resulted from a reckless indifference to

their claim and a bad faith motive to delay paying in order "to find a cheaper way of escaping their liability to settle [the] claim . . . ." *Davis* v. *Fidelity National Ins. Co.*, supra, 32 Pa. D. & C.5th 195. The evidence in the present case does not support a finding that the defendant ignored communications from the plaintiff. In fact, the record shows numerous communications by agents of the defendant with the plaintiff, who, at times, took a great deal of time to respond. Baines testified to one such communication from Dorr to the plaintiff in February, 2015, in which she rejected a settlement offer of the plaintiff, tendered a new offer to settle from the defendant of $29,000, and requested that the plaintiff respond within thirty days. The plaintiff, however, did not respond until eight months later in October, 2015. The degree of similarity of the facts supporting the finding of an unfair settlement practice in both cases is lacking. *Davis I*, thus, does not provide support in the present case to show a general business practice of the defendant, which, as the court found, had less than stellar management practices that resulted, at times, in delayed communications regarding the plaintiff's claim.

Moreover, even if we construe *Davis I* as providing some support for the plaintiff's claim that the defendant had a general business practice of delaying communications, we conclude that the plaintiff, nevertheless, has not met his burden of demonstrating such a general business practice by the defendant. The plaintiff relies heavily on the statement of our Supreme Court in *Mead* "that claims of unfair settlement practices under CUIPA require a showing of more than a single act of insurance misconduct." *Mead* v. *Burns*, supra, 199 Conn. 659. We do not construe that statement in *Mead* as standing for the proposition that a plaintiff will necessarily meet his or her statutory burden simply by including a citation to at least one other decision in which the insurer has

been adjudicated to have committed a similar unfair insurance settlement practice. Rather, we construe *Mead* as clarifying the statutory requirement that the unfair claim settlement practice be performed or committed "with such frequency as to indicate a general business practice"; General Statutes § 38a-816 (6); that is to say, the words "with such frequency" indicate that more than a single act of misconduct is required, but that does not mean that a single additional act is sufficient.[11] Although no precise number of similar acts has been set by the appellate courts of this state and we decline to do so today,[12] we conclude that such a determination must be made on the basis of the facts of each

[11] The Federal District Court for the District of Connecticut commented on a similar issue in *Hartford Roman Catholic Diocesan Corp.* v. *Interstate Fire & Casualty Co.*, Docket No. 3:12cv1641 (JBA), 2017 WL 3172536 (D. Conn. July 26, 2017), aff'd, 905 F.3d 84 (2d Cir. 2018), stating: "It is undisputed that violation of [§] 38a-816 (6) 'requires proof that the unfair settlement practices were "with such frequency as to indicate a general business practice."' *Lees* [v. *Middlesex Ins. Co.*, supra, 229 Conn. 847–48 (quoting *Mead* v. *Burns*, [supra, 199 Conn. 651]). Still, the [plaintiff, Hartford Roman Catholic Diocesan Corporation (Archdiocese)], relying on *Lees* and quoting *Quimby* v. *Kimberly Clark* [*Corp.*], 28 Conn. App. 660, 671–72 [613 A.2d 838] (1992), argues that 'more than a singular failure' involving only the policyholder-plaintiff suffices to establish a general business practice. . . . [The defendant, Interstate Fire & Casualty Company (Interstate)] counters that although 'many cases have held that more than one act of misconduct is necessary . . . the Archdiocese is twisting those holdings to mean that anything more than one instance is sufficient to prove a CUIPA violation.' . . . This [c]ourt agrees with [Interstate]. While both *Quimby* (reviewing [S]uperior [C]ourt's grant of defendant's motion to strike) and *Lees* (reviewing [S]uperior [C]ourt's grant of summary judgment) found that 'isolated' or 'singular' instances of insurer misconduct were not sufficient to satisfy the 'general business practice' requirement where the respective plaintiffs failed to either allege facts or present evidence of misconduct by the defendant in processing any other claims, both cases noted the necessity for a plaintiff to show the practice was engaged in with some 'frequency.' " (Citations omitted; emphasis omitted.) *Hartford Roman Catholic Diocesan Corp.* v. *Interstate Fire & Casualty Co.*, supra, *3.

[12] See *Hartford Roman Catholic Diocesan Corp.* v. *Interstate Fire & Casualty Co.*, 905 F.3d 84, 96 (2d Cir. 2018) ("While a single instance of misconduct is insufficient to demonstrate a 'general business' practice under CUIPA; see *Mead* v. *Burns*, [supra, 199 Conn. 659], no Connecticut appellate court has said how many acts of misconduct would suffice, nor is 'general business practice' defined in . . . § 38a-816 (6). Acknowledging this, the

case and an examination of the evidence presented. See *Belz* v. *Peerless Ins. Co.*, 46 F. Supp. 3d 157, 165–66 (D. Conn. 2014) ("It is clear that a plaintiff must show more than a single act of insurance misconduct . . . [or] isolated instances of unfair settlement practices in order to successfully claim that the defendant has a general business practice of unfairly resolving disputes. . . . However, what constitutes a general business practice and the frequency with which the plaintiff needs to prove that the defendant has unfairly resolved claims are far less clear." (Citations omitted; internal quotation marks omitted.)).

In the present case, the cases relied on by the plaintiff to show a general business practice are factually distinguishable and have questionable evidentiary value in light of their differences, and the plaintiff has failed to present any testimony or other documentary evidence relating to the alleged business practice of the defendant. Also, the plaintiff is claiming a general business practice of delays by the defendant, when a fair portion of the delays in the present case were due, in part, to other causes, including the plaintiff's own delayed responses to communications and his insistence on receiving compensation for the potential relocation of a replacement septic system, an issue that prolonged the negotiations and that the court ultimately found to be of tenuous relevance to the diminution in value of the property. Under these circumstances, we cannot find that the plaintiff has met his statutory burden under § 38a-816 (6) of demonstrating a general business practice by the defendant as required under the statute. See *Gabriel* v. *Liberty Mutual Fire Ins. Co.*, Docket No. 3:14-cv-01435 (VAB), 2017 WL 6731713, *10 (D. Conn. December 29, 2017) (granting motion for summary judgment and concluding as matter of law that there was

Connecticut Supreme Court in *Lees* [v. *Middlesex Ins. Co.*, supra, 229 Conn. 849], advised that a court 'may look to the common understanding of the words as expressed in a dictionary.' ").

insufficient information in record to permit jury to conclude that defendant insurer violated CUTPA/CUIPA when plaintiffs offered evidence of lawsuits involving insurer but did not support CUTPA/CUIPA claim with other evidence such as "depositions with insurance company employees or other relevant individuals").

The plaintiff, having failed to establish a general business practice of the defendant, has failed to set forth a valid CUIPA claim, which is fatal to his CUTPA claim in count two. The court, therefore, properly rendered judgment in favor of the defendant with respect to the CUTPA claim in count two.[13]

The judgment is affirmed.

In this opinion the other judges concurred.

K. D. *v.* D. D.*
(AC 44842)

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

Syllabus

The defendant appealed to this court from the judgment of the trial court granting the plaintiff's application for a civil restraining order pursuant to statute (§ 46b-15). At an evidentiary hearing, the plaintiff testified that there was a pending action for a dissolution of marriage between the parties and that she had been increasingly afraid of the defendant. The plaintiff testified that one evening, when she went to a restaurant with a group of people, she saw the defendant approach the hostess

[13] "We may affirm a judgment of the trial court albeit on different grounds." *Seminole Realty, LLC* v. *Sekretaev*, 192 Conn. App. 405, 416 n.16, 218 A.3d 198, cert. denied, 334 Conn. 905, 220 A.3d 35 (2019).

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

stand, he stared at her with a furrowed brow, locked eye contact with her, and that he seemed very agitated in his physical movements. After the defendant left the restaurant, he sent various text messages and emails to the plaintiff regarding the encounter. The trial court granted the application for a civil restraining order against the defendant, finding that the defendant's conduct created a pattern of threatening. On the defendant's appeal to this court, *held* that the trial court erred in failing to apply an objective standard to its determination when it issued the civil restraining order based on the pattern of threatening provision of § 46b-15 (a): the court viewed the evidence through the lens of the plaintiff's subjective reaction to the defendant's conduct, namely, her resulting fear, and stated that the plaintiff's testimony indicated a tone of hostility that she felt frightened her, and, although the reaction of an applicant can help provide context, subjective fear of an applicant is not a statutory requirement under § 46b-15, and, instead, what is required is the occurrence of conduct that constitutes a pattern of threatening; moreover, § 46b-15 does not contain any statutory language requiring a subjective-objective analysis, and there is nothing in the statutory language indicating that the legislature intended for courts to issue civil restraining orders under the pattern of threatening portion of § 46b-15 in situations other than where it is objectively reasonable to conclude, based on context, that the defendant had subjected the alleged victim to a pattern of threatening.

Argued April 6—officially released September 6, 2022

Procedural History

Application for a civil restraining order, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Edward R. Karazin, Jr.*, judge trial referee, granted the application and issued an order of protection, from which the defendant appealed to this court. *Reversed*; *order vacated.*

Reuben S. Midler, for the appellant (defendant).

Opinion

LAVINE, J. The defendant, D. D., appeals from the judgment of the trial court granting the application for a civil restraining order pursuant to General Statutes

§ 46b-15[1] filed by the plaintiff, K. D. On appeal, the defendant claims that the court improperly issued the civil restraining order because it applied an incorrect legal standard when it determined that he had subjected the plaintiff to a pattern of threatening. We agree and, accordingly, reverse the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. On June 29, 2021, the plaintiff filed an application for relief from abuse pursuant to § 46b-15, seeking a civil restraining order against the defendant. On that same day, the court issued an ex parte restraining order against the defendant, which was to expire July 6, 2021, and scheduled a hearing for July 6, 2021. At the July 6, 2021 evidentiary hearing, the self-represented plaintiff testified that there was a pending action for a dissolution of marriage between the parties and that she had been "increasingly afraid" of the defendant. She testified that on the evening of June 24, 2021, she went to a restaurant with a group of others, including friends of the defendant.[2] The plaintiff "felt [the defendant] behind [her] shoulder," and noticed that "the hairs on the back of [her] neck stood up." In her testimony, the plaintiff described her encounter with the defendant at the restaurant as follows: "I saw him approaching the hostess stand very physically tense. He stared at me with his furrowed brow twitching and

[1] We note that § 46b-15 has been amended by the legislature since the events underlying this appeal. See Public Acts 2021, No. 21-78; see also General Statutes (Supp. 2022) § 46b-15. Hereinafter, unless otherwise indicated, all references to § 46b-15 in this opinion are to the current revision of the statute.

[2] The defendant testified that he had been paying for the plaintiff to stay at the hotel where the restaurant was located, but that prior to June 24, 2021, he had been notified by the hotel that his hotel reservation for the plaintiff had been cancelled and that she no longer was staying there. The plaintiff testified that she cancelled the defendant's hotel reservation for her at the hotel and put the reservation under a different name.

locked eye contact for, what, I mean, twenty-five seconds and I was frozen. He seemed very agitated in his physical movements." She further testified that during the incident the defendant's shoulders were "very high" and that he was "leaning in aggressively with his hands clenched and tight and it seemed like he was breathing very heavy." She explained that the defendant then moved away from the hostess desk "in a wide circle behind [her] slowly." She stated that she was "in shock." The defendant testified that he went to the restaurant in response to an invitation from a friend, but when the plaintiff arrived he became "very uncomfortable" and did not "feel safe" and, therefore, walked from the hostess stand area to the lobby where he waited for an Uber.

Subsequent electronic communications from the defendant to the plaintiff were admitted as a full exhibit at the hearing (exhibit 1). The plaintiff testified that, after the defendant left the restaurant, he communicated with her electronically and she detailed that while she was still at the restaurant, she received a text message from the defendant at 8:33 p.m., stating: "Enjoy your date!"[3] She further testified that the defendant sent her a series of emails on the night of June 25 and in the early morning of June 26, 2021. The first email stated: "You have 'fucked' all these 'dinner guests' while making me watch and abusing me. I will show you. Is that (unsafe) for those you have violated? Let me know when I should divulge your penchant for underage people." In a subsequent email, the defendant stated, "by underage, I meant legally permissible but young." In another email, the defendant explained that it was "unexpected" that the plaintiff would be at the restaurant and that, "upon seeing you, I left immediately. I

[3] The plaintiff received the same text message twice.

hope to never accidentally run into you again." The final email in exhibit 1 concerned childcare issues.

In an oral ruling issued at the conclusion of the July 6, 2021 hearing, the court granted the plaintiff's application for a civil restraining order. The court stated that the plaintiff's testimony "indicated a tone of hostility which the plaintiff felt frightened her. The defendant, the husband, says no hostility, he left and took an Uber. He did indicate he left because he did not feel comfortable to be in the same space as she was. He did not let it end there, however, as he sent the messages in exhibit 1. The wife, the applicant, testified at the restaurant that he stared at her, made eye contact for twenty-five seconds, leaned in aggressively making eye contact, and furrowing his brow, and he was breathing heavily and he was fussing as he walked behind her. The court finds that the plaintiff['s] exhibit 1, substantiates the conditions at the restaurant. If all he wanted to do was leave, he could have done so, but he extended the evening with the [plaintiff] in exhibit 1. In exhibit 1 it says, [enjoy] your date and the use of the F word and the reference to others involved leads this court to the conclusion that the testimony of the wife, the applicant, is more credible. The court finds the conduct of the [defendant] creates a pattern of threatening."[4] The court issued a restraining order, which expired on July 5, 2022.[5] This appeal followed.[6]

"[T]he standard of review in family matters is well settled.[7] An appellate court will not disturb a trial court's

[4] In its decision, the court inadvertently stated that the defendant texted "find" your date.

[5] Although the restraining order expired on July 5, 2022, the defendant's appeal is not moot due to adverse collateral consequences. See *L. D.* v. *G. T.*, 210 Conn. App. 864, 869 n.4, 271 A.3d 674 (2022).

[6] The plaintiff did not file a brief in this appeal. We, therefore, ordered that this appeal shall be considered on the basis of the record, the defendant's brief and appendix, and oral argument.

[7] "Section 46b-15 is part of title 46b, 'Family Law,' and chapter 815a, 'Family Matters,' and, as such, is specifically included as a court proceeding

orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Our deferential standard of review, however, does not extend to the court's interpretation of and application of the law to the facts. It is axiomatic that a matter of law is entitled to plenary review on appeal. . . .

"[I]ssues of statutory construction raise questions of law, over which we exercise plenary review. . . . 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. . . . General Statutes § 1-2z directs this court to first consider the text of the statute and its relationship to other statutes to determine its meaning. If, after such consideration, the meaning is plain and unambiguous and does not yield absurd or unworkable results, we shall not consider extratextual evidence of the meaning of the statute." (Citations omitted; footnote in original; internal quotation marks omitted.) *Princess Q. H.* v. *Robert H.*, 150 Conn. App. 105, 111–12, 89 A.3d 896 (2014). Consequently, our standard of review depends on the nature of the defendant's claim on appeal.

The defendant claims that the court erred in failing to apply an objective standard to its determination when

in a family relations matter. See General Statutes § 46b-1 (5)." *Princess Q. H.* v. *Robert H.*, 150 Conn. App. 105, 111 n.3, 89 A.3d 896 (2014).

it issued a civil restraining order based on the "pattern of threatening" provision in § 46b-15.[8] We agree.[9]

The defendant's claim requires us to determine the appropriate standard for assessing a pattern of threatening under § 46b-15 (a) and whether the trial court applied the required standard. Our standard of review is plenary. See *Putman* v. *Kennedy*, 104 Conn. App. 26, 31, 932 A.2d 434 (2007), cert. denied, 285 Conn. 909, 940 A.2d 809 (2008).

Section 46b-15 (a) provides in relevant part: "Any family or household member . . . who has been subjected to a continuous threat of present physical pain

[8] The defendant also argues that the trial court lacked subject matter jurisdiction to entertain the plaintiff's application for a civil restraining order because the plaintiff's attached affidavit was not made under oath. "We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . [S]ubject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it . . . and a judgment rendered without subject matter jurisdiction is void." (Citation omitted; internal quotation marks omitted.) *Labissoniere* v. *Gaylord Hospital, Inc.*, 199 Conn. App. 265, 275–76, 235 A.3d 589, cert. denied, 335 Conn. 968, 240 A.3d 284 (2020), and cert. denied, 335 Conn. 968, 240 A.3d 285 (2020). Governor Ned Lamont's Executive Order 7Q, dated March 30, 2020, which was extended through June 30, 2021, by Executive Order 12B, and was in place at the time of the plaintiff's June 28, 2021 affidavit, allowed for remote notarization. There is no indication in the record that the plaintiff's affidavit was notarized remotely or otherwise. The restraining order specifically referenced statements made by the plaintiff in her unsworn affidavit, which affidavit was not admitted as an exhibit at the hearing, despite that, during the hearing, the court struck from the record portions of the plaintiff's argument that were based on statements she had made in her unsworn affidavit that were not also testified to at the hearing. Although it is axiomatic that allegations not in evidence cannot properly be relied upon to support a judgment, we need not address the issue further as it does not impact the subject matter jurisdiction of the trial court. The defendant has not directed us to any case law, nor are we aware of any, stating that the attachment of an unsworn affidavit to an application for a restraining order somehow deprives a court of subject matter jurisdiction over that application. We, therefore, reject the defendant's argument that the trial court lacked subject matter jurisdiction.

[9] The defendant raises additional arguments in support of his claim, which we do not address in light of our resolution of his principal argument.

or physical injury, stalking or a pattern of threatening, including, but not limited to, a pattern of threatening, as described in section 53a-62, by another family or household member may make an application to the Superior Court for relief under this section. . . .'' In § 46b-15 (a), the legislature incorporated, by reference, the definition of threatening in the second degree under General Statutes § 53a-62 of the Penal Code. Section 53a-62 provides in relevant part: ''(a) A person is guilty of threatening in the second degree when: (1) By physical threat, such person intentionally places or attempts to place another person in fear of imminent serious physical injury, (2) (A) such person threatens to commit any crime of violence with the intent to terrorize another person, or (B) such person threatens to commit such crime of violence in reckless disregard of the risk of causing such terror . . . .'' In interpreting § 53a-62, this court has stated that ''[t]rue threats are among the limited areas of speech which properly may be restricted without violating the protections of the first amendment.'' (Internal quotation marks omitted.) *State* v. *Carter*, 141 Conn. App. 377, 399, 61 A.3d 1103 (2013), aff'd, 317 Conn. 845, 120 A.3d 1229 (2015); see also *State* v. *Krijger*, 313 Conn. 434, 450, 97 A.3d 946 (2014).

The definition of ''pattern of threatening'' in § 46b-15 is not limited to, but, rather, is broader than the definition of threatening provided in § 53a-62. Section 46b-15 does not define the ambit of this broader definition and, therefore, we look to commonly approved usage as expressed in dictionaries. See *Princess Q. H.* v. *Robert H.*, supra, 150 Conn. App. 113 (''[i]f a statute or regulation does not sufficiently define a term, it is appropriate to look to the common understanding of the term as expressed in a dictionary'' (internal quotation marks omitted)). According to common usage, the term ''threat'' is defined in Merriam-Webster's Collegiate Dictionary (11th Ed. 2014), as ''an expression of intention

to inflict evil, injury, or damage,"; id., p. 1302; and is defined in Webster's Third New International Dictionary (1993), as "an expression of an intention to inflict evil, injury, or damage on another usu[ally] as retribution or punishment for something done or left undone . . . ." Id., p. 2382. These definitions are not particularly useful in determining the proper standard to be applied. Significantly, however, in § 46b-15 (a), the legislature specifically referenced the threatening in the second degree statute, pursuant to which threats are assessed using an objective standard. See, e.g., *State* v. *Taveras*, 342 Conn. 563, 572, 271 A.3d 123 (2022) (true threats governed by objective standard); see also *State* v. *Meadows*, 185 Conn. App. 287, 302–308, 197 A.3d 464 (2018) (rejecting argument of defendant, who was convicted of violating § 53a-62, that true threats doctrine requires defendant to possess subjective intent to threaten victim), aff'd sub nom. *State* v. *Cody M.*, 337 Conn. 92, 259 A.3d 576 (2020). By so doing, the legislature indicated an intent that an objective standard should be used when assessing patterns of threatening under § 46b-15.

In the present case, the court viewed the evidence through the lens of the plaintiff's subjective reaction to the defendant's conduct, namely, her resulting fear, and stated that the plaintiff's testimony "indicated a tone of hostility which the plaintiff felt frightened her." Although the reaction of an applicant can help provide context, subjective fear of an applicant is not a statutory requirement under § 46b-15. In interpreting a provision similar for our purposes, in *Putman* v. *Kennedy*, supra, 104 Conn. App. 34–35, this court determined, when interpreting the phrase "continuous threat" under § 46b-15, that, although it is appropriate for a trial court to consider an applicant's subjective fear, it is not statutorily required for a finding of a "continuous threat" under § 46b-15. This reasoning in *Putman* applies with equal weight to the provision of § 46b-15 at issue in the

present case. It is not a requirement of § 46b-15 that an alleged threat causes an applicant any fear. What is required is the occurrence of conduct that constitutes a pattern of threatening. The legislature knows how to require a subjective-objective analysis, as it expressly did so when defining "fear" in the context of the issuance of protective orders for victims of stalking under General Statutes § 46b-16a. See *L. H.-S.* v. *N. B.*, 341 Conn. 483, 489–95, 267 A.3d 178 (2021) (fear under § 46b-16a requires subjective-objective analysis); see also *McCoy* v. *Commissioner of Public Safety*, 300 Conn. 144, 155, 12 A.3d 948 (2011) ("when the legislature chooses to act, it is presumed to know how to draft legislation consistent with its intent and to know of all other existing statutes and the effect that its action or nonaction will have upon any one of them" (internal quotation marks omitted)). Section 46b-15, unlike § 46b-16a, does not contain any statutory language requiring a subjective-objective analysis. There is nothing in the statutory language indicating that the legislature intended for courts to issue civil restraining orders under the pattern of threatening portion of § 46b-15 in situations other than where it is objectively reasonable to conclude, based on context, that the defendant had subjected the alleged victim to a pattern of threatening. We, therefore, conclude that, although a court may consider the subjective reaction of an alleged victim, the court must apply an objective standard. See *State* v. *Krijger*, supra, 313 Conn. 450 ("In the context of a threat of physical violence, [w]hether a particular statement may properly be considered to be a [true] threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. . . . [A]lleged threats should be considered in light of their entire factual context,

including the surrounding events and reaction of the listeners." (Internal quotation marks omitted.)). Accordingly, we conclude that the court misconstrued the statute and applied an incorrect legal standard by limiting its analysis to a subjective standard rather than applying an objective standard in granting a restraining order on the basis that the defendant had subjected the plaintiff to a pattern of threatening under § 46b-15.

The judgment is reversed and the case is remanded with direction to vacate the civil restraining order.

In this opinion the other judges concurred.

VICTOR VELASCO *v.* COMMISSIONER OF CORRECTION (AC 44505)

Moll, Clark and DiPentima, Js.

Syllabus

The petitioner, who had been convicted of the crimes of felony murder and conspiracy to commit robbery in the first degree, sought a writ of habeas corpus, claiming, inter alia, that his prior trial, habeas, and appellate counsel had provided ineffective assistance. The respondent Commissioner of Correction filed a motion to dismiss the habeas petition, arguing that the petitioner had released the state from all the claims set forth therein pursuant to a settlement agreement that the petitioner had entered into with the state after he filed the habeas petition. The settlement agreement related to an action filed by the petitioner in federal court against employees of the Department of Correction, in which he alleged that the conditions of confinement during his incarceration violated his constitutional rights. The settlement agreement contained a general release provision that released the state from all actions arising out of any matter that had occurred as of the date of the settlement agreement. The habeas court determined that the release encompassed the habeas petition and granted the respondent's motion to dismiss. Thereafter, the habeas court granted the petition for certification to appeal, and the petitioner appealed to this court, claiming that the settlement agreement was unenforceable because the terms of the release provision in the agreement were unconscionable. *Held* that the habeas court did not err when it dismissed the habeas petition: our Supreme Court in *Nelson* v. *Commissioner of Correction* (326 Conn.

772) rejected the argument that habeas rights should never be subject to waiver, stating that constitutional and appellate rights could be waived as long as the waiver was intentional; moreover, the settlement agreement between the state and the petitioner was not procedurally unconscionable, as the petitioner's counsel conceded that the petitioner entered into it knowingly and voluntarily, the petitioner was represented by attorneys who negotiated the settlement agreement on his behalf, and the petitioner failed to introduce any evidence to support his claims of procedural unconscionability; furthermore, although its release provision was broad, the settlement agreement was not substantively unconscionable with respect to the habeas petition because it was not limitless, barring only the petitioner's claims against the state that arose before the date of the settlement agreement, which included those raised in the habeas petition, by the time the parties executed the settlement agreement, the petitioner already had numerous opportunities to challenge his convictions, through appeals and collateral attacks spanning decades, and it was not so unreasonable or oppressive as to render it unenforceable, as, in exchange for the release, the petitioner received funds in his inmate trust account and the state agreed to forgo the collection of any amounts owed by the petitioner to the state for the cost of his incarceration from the proceeds of the settlement and to vacate a finding of guilty against the petitioner on a disciplinary report.

Argued April 4—officially released September 6, 2022

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Oliver*, *J.*, granted the respondent's motion to dismiss and rendered judgment thereon; thereafter, the court granted the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

J. Christopher Llinas, assigned counsel, for the appellant (petitioner).

Susan M. Campbell, assistant state's attorney, with whom, on the brief, was *Joseph T. Corradino*, state's attorney, for the appellee (respondent).

Opinion

CLARK, J. Following the granting of his petition for certification to appeal, the petitioner, Victor Velasco,

appeals from the judgment of the habeas court dismissing his amended petition for a writ of habeas corpus pursuant to Practice Book § 23-29. The court concluded that a certain "Settlement Agreement and Release" the petitioner had entered into with the state of Connecticut in 2018 (settlement agreement) barred the petitioner's habeas petition. On appeal, the petitioner argues that the settlement agreement is unenforceable because the terms of the release provision are unconscionable. We affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our resolution of the petitioner's appeal. The petitioner was charged with the crimes of felony murder in violation of General Statutes (Rev. to 1995) § 53a-54c and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (3). See *State* v. *Velasco*, 253 Conn. 210, 212–13, 751 A.2d 800 (2000). He also was charged under General Statutes § 53-202k with committing robbery in the first degree with a firearm. See id., 213. In 1998, following a jury trial, the defendant was found guilty on the first two counts. Id. "The trial court rendered judgment and sentenced the defendant to a term of imprisonment of sixty years on the felony murder conviction, execution suspended after fifty years, and a twenty year concurrent term of imprisonment on the conspiracy conviction. The trial court then determined, from the evidence presented at trial, that the defendant had used a firearm in violation of § 53-202k. Accordingly, the trial court also imposed a five year sentence to run consecutively with the other sentences for the conviction under § 53-202k." Id. On direct appeal, our Supreme Court vacated the § 53-202k sentence enhancement but affirmed the court's judgment in all other respects; id., 249; resulting in a sentence of sixty years' imprisonment, execution suspended after fifty years, and five years of probation. See id., 217.

Since the petitioner's conviction, he has filed numerous petitions for a writ of habeas corpus.[1] In addition, he has filed numerous lawsuits against the state of Connecticut alleging violations of his constitutional rights. See, e.g., *Velasco* v. *Hall*, Superior Court, judicial district of Hartford, Docket No. CV-15-5040120-S; *Velasco* v. *Bennett*, Superior Court, judicial district of Hartford, Docket No. CV-15-5040121-S. Pertinent to this appeal, the petitioner filed a 42 U.S.C. § 1983 action in the United States District Court for the District of Connecticut against prison officials at Corrigan Correctional Center alleging violations of his constitutional rights based, inter alia, on his conditions of confinement during his incarceration stemming from his designation as a gang member (federal case). See *Velasco* v. *Halpin*, United States District Court, Docket No. 3:11CV463 (JCH) (D. Conn. November 20, 2017).[2] The parties ultimately settled that case via the settlement agreement executed on April 4, 2018. The settlement agreement,

[1] The petitioner filed his first habeas petition on December 28, 1998, and withdrew it on November 8, 2002. *Velasco* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-98-0002825-S. He filed his second habeas petition on January 10, 2003, and the habeas court dismissed that petition without prejudice before reaching the merits. *Velasco* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-03-0473010-S (February 27, 2004). He filed his third habeas petition on January 25, 2005, and the habeas court denied that petition on the merits. *Velasco* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-05-4000321-S (August 13, 2008), aff'd sub nom. *Velasco* v. *Commissioner of Correction*, 119 Conn. App. 164, 987 A.2d 1031 (2010), cert. denied, 297 Conn. 901, 994 A.2d 1289 (2010). He filed his fourth habeas petition on November 6, 2009, and the habeas court denied that petition on the merits. *Velasco* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-09-4003267-S (May 1, 2013), appeal dismissed sub. nom. *Velasco* v. *Commissioner of Correction*, 156 Conn. App. 901, 110 A.3d 547 (2015), cert. denied, 317 Conn. 903, 114 A.3d 1219 (2015).

[2] Although not provided in the parties' appendices, this court has taken judicial notice of the operative complaint in the federal case for background purposes. See, e.g., *Stuart* v. *Freiberg*, 316 Conn. 809, 812 n.4, 116 A.3d 1195 (2015); *St. Paul's Flax Hill Co-operative* v. *Johnson*, 124 Conn. App. 728, 739 n.10, 6 A.3d 1168 (2010), cert. denied, 300 Conn. 906, 12 A.3d 1002 (2011).

which the petitioner entered into while the instant petition for a writ of habeas corpus was pending in the Superior Court, includes a general release that provides in relevant part: "The [petitioner] . . . for and in consideration of the fulfillment of the obligation of the State of Connecticut described above, and other valuable consideration, the receipt of which is hereby acknowledged, does herewith forever discharge and release . . . the State of Connecticut and each of its current or former officers, agents, servants, employees, successors, legal representatives and assigns, from any and all actions, causes of action, suits, claims, controversies, damages and demands of every nature and kind, including attorneys fees and costs, monetary and equitable relief, whether known or unknown, which he had or now has or may hereafter can, shall or may have, for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of this agreement, including any acts arising out of, or in any way related to the incidents or circumstances which formed the basis for the [federal case], including such actions as may have been or may in the future have been brought in the federal courts, courts of the State of Connecticut or any other state or forum, any state or federal administrative agency, or before the Claims Commissioner pursuant to [General Statutes] § 4-141, et. seq. This release shall include but is not limited to causes of action alleging violations of [the petitioner's] state and/or federal constitutional rights, his rights arising under the statutes and laws of the United States, the State of Connecticut or any other state, any other source of rights that may exist, and such causes of action as may be available under the common law."

Prior to commencing his federal case and entering into the settlement agreement, the petitioner had filed the instant habeas petition on November 17, 2014. He

subsequently amended the petition on November 9, 2017; February 27, 2019; and October 4, 2019. The operative petition contains four counts, alleging (1) ineffective assistance of his trial counsel and prior habeas counsel, (2) ineffective assistance of his appellate counsel for his direct appeal, (3) a violation of the petitioner's constitutional rights arising from the state charging him with felony murder after he waived his right to a probable cause hearing, and (4) a lack of subject matter jurisdiction in the petitioner's criminal trial due to the petitioner's procedurally defective waiver of his right to a probable cause hearing.

On March 19, 2020, the respondent, the Commissioner of Correction, filed a motion to dismiss the petitioner's habeas petition on the basis that the settlement agreement from the federal case released "the state of Connecticut from all constitutional claims from the beginning of the world until the writing of the settlement agreement, April 4, 2018."[3] In response, the petitioner argued, inter alia, that the settlement agreement was intended to settle only the federal case and that the agreement's terms were ambiguous.

The petitioner filed a supplemental objection dated June 26, 2020, in which he reiterated some of his contract interpretation arguments and further argued that interpreting the settlement agreement to bar his instant habeas petition would be unconscionable.[4] On September 9, 2020, the court, *Oliver*, *J.*, held remote arguments

[3] The respondent also noted that two of the petitioner's other actions against the state's representatives had been dismissed based on the settlement agreement. See *Velasco* v. *Hall*, Superior Court, judicial district of Hartford, Docket No. CV-15-5040120-S (March 7, 2019); *Velasco* v. *Bennett*, Superior Court, judicial district of Hartford, Docket No. CV-15-5040121-S (September 25, 2018).

[4] The supplemental objection stated in relevant part: "Such interpretation of the settlement agreement by the respondent is unconscionable where: A.) the respondent implies that the petitioner agreed to terminate his habeas matter before this court; B.) the respondent implies that the petitioner agreed to terminate his rights under the federal constitution; C.) the respondent implies that the petitioner agreed to terminate his rights under the state

on the motion to dismiss.[5] During that proceeding, it came to the court's attention that the respondent never received a copy of the petitioner's supplemental objection. At the conclusion of the hearing, the respondent was permitted to file a reply to the petitioner's supplemental objection. The respondent filed his reply brief on October 1, 2020, arguing that the terms of the settlement agreement are clear and unambiguous and encompass the petitioner's habeas petition.

On December 2, 2020, the habeas court granted the respondent's motion to dismiss, concluding that "[t]he terms of the settlement agreement and release are clear and unambiguous and unquestionably encompass the instant matter." The habeas court subsequently granted the petitioner's petition for certification to appeal. This appeal followed.

In his principal brief on appeal, the petitioner argues that the habeas court erred when it dismissed his habeas petition. He contends that the settlement agreement on which the court based its decision is unconscionable due to the unequal bargaining positions of the parties and because the general release contained within the settlement agreement is unreasonable in its breadth and scope. The respondent counters that the settlement agreement is not unconscionable as it relates to the instant habeas petition because the petitioner was represented by counsel at the time he negotiated and

constitution; D.) the respondent implies that the petitioner agreed to terminate his state civil cases in which the petitioner, as the plaintiff, had already won by default; and E.) . . . that the respondent implies that the petitioner agreed to these terms from the beginning of time to the end of the world, in exchange for $2000 and the dismissal of a prison disciplinary report, which had no [e]ffect [on] his conditions. Your Honor, it is clear that the [respondent relies] on the ambiguous language of this settlement agreement as the respondent interprets it one way while the petitioner's attorneys advised the petitioner, rightly, that the settlement would not affect any of the petitioner's other cases, especially this habeas matter."

[5] Neither party sought an evidentiary hearing in connection with the motion to dismiss.

entered into the agreement and was well aware of the implication of the release. The respondent also argues that the settlement agreement is not in any way one-sided, as the petitioner received significant benefits. We agree with the respondent.

We begin by setting forth our standard of review. "[W]hen a habeas court considers a motion to dismiss a petition for a writ of habeas corpus, [t]he evidence offered by the [petitioner] is to be taken as true and interpreted in the light most favorable to [the petitioner], and every reasonable inference is to be drawn in [the petitioner's] favor. . . . It is equally well settled that [t]he petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action . . . [and it] is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint." (Citations omitted; internal quotation marks omitted.) *Nelson* v. *Commissioner of Correction*, 326 Conn. 772, 780–81, 167 A.3d 952 (2017). "The conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record." (Internal quotation marks omitted.) *Woods* v. *Commissioner of Correction*, 197 Conn. App. 597, 607, 232 A.3d 63 (2020), appeal dismissed, 341 Conn. 506, 267 A.3d 193 (2021).

"A trial court has the inherent power to enforce summarily a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous." *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 811, 626 A.2d 729 (1993). With regard to our interpretation of a settlement agreement, we note that, "[a]lthough ordinarily the

question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary]." (Internal quotation marks omitted.) *Bristol* v. *Ocean State Job Lot Stores of Connecticut, Inc.*, 284 Conn. 1, 7, 931 A.2d 837 (2007).

As for the doctrine of unconscionability, our courts have explained that "[t]he classic definition of an unconscionable contract is one which no [individual] in his senses, not under delusion, would make, on the one hand, and which no fair and honest [individual] would accept, on the other." (Internal quotation marks omitted.) *Grabe* v. *Hokin*, 341 Conn. 360, 371, 267 A.3d 145 (2021). "Substantive unconscionability focuses on the content of the contract, as distinguished from procedural unconscionability, which focuses on the process by which the allegedly offensive terms found their way into the agreement." (Internal quotation marks omitted.) *Cheshire Mortgage Service, Inc.* v. *Montes*, 223 Conn. 80, 87 n.14, 612 A.2d 1130 (1992). "Procedural unconscionability is intended to prevent unfair surprise and substantive unconscionability is intended to prevent oppression. *Smith* v. *Mitsubishi Motors Credit of America, Inc.*, 247 Conn. 342, 349, 721 A.2d 1187 (1998)." *Rockstone Capital, LLC* v. *Caldwell*, 206 Conn. App. 801, 809, 261 A.3d 1171, cert. denied, 339 Conn. 914, 262 A.3d 136 (2021). "Unconscionability is determined on a case-by-case basis, taking into account all of the relevant facts and circumstances." (Internal quotation marks omitted.) Id.

"[T]he question of unconscionability is a matter of law to be decided by the court based on all the facts and circumstances of the case. . . . [O]ur review on appeal is unlimited by the clearly erroneous standard.

. . . [T]he ultimate determination of whether a transaction is unconscionable is a question of law, not a question of fact, and . . . the trial court's determination on that issue is subject to a plenary review on appeal. It also means, however, that the factual findings of the trial court that underlie that determination are entitled to the same deference on appeal that other factual findings command. Thus, those findings must stand unless they are clearly erroneous." (Citations omitted; internal quotation marks omitted.) Id., 809–10.

With the foregoing principles in mind, we turn to the petitioner's claim on appeal. It is helpful to begin with what the petitioner is *not* arguing. First, the petitioner is no longer arguing (as he did before the habeas court) that the settlement agreement is ambiguous and that the release did not cover his habeas petition. The petitioner's counsel conceded at oral argument before this court that the settlement agreement is clear and unambiguous, thereby acknowledging that the petitioner's petition for a writ of habeas corpus falls within the release provision in the settlement agreement.[6] Second, the petitioner's counsel also conceded that the petitioner knowingly and voluntarily entered into the settlement agreement. To that end, the petitioner's counsel expressly conceded at oral argument that the petitioner is not arguing procedural unconscionability. Rather, the petitioner argues that the settlement agreement is substantively unconscionable and, therefore, unenforceable.

Citing to *Smith* v. *Mitsubishi Motors Credit of America, Inc.*, supra, 247 Conn. 353, he argues that, even in the absence of procedural unconscionability, a party can avoid being subject to a contractual provision

[6] We note that the petitioner's appellate brief also does not contain any arguments concerning whether the release provision of the settlement agreement applies to his petition.

if he can establish that the provision is substantively unconscionable. In his view, the unequal bargaining position of the parties and the "almost limitless breadth and scope of [the release provision], in the specific context of a prisoner's rights action, is substantively unconscionable." We are not persuaded.

As an initial matter, it does not appear that our appellate courts have fully and clearly resolved whether a contract must be both procedurally and substantively unconscionable for it to be unenforceable. Our appellate authority suggests that both must be present. See, e.g., *Bender* v. *Bender*, 292 Conn. 696, 732, 975 A.2d 636 (2009); *Rockstone Capital, LLC* v. *Caldwell*, supra, 206 Conn. App. 809. Each of those cases, however, cites to a quote from an opinion of our Supreme Court, stating that a determination of unconscionability "generally requires a showing that the contract was both procedurally and substantively unconscionable when made—i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party . . . ." (Internal quotation marks omitted.) *Bender* v. *Bender*, supra, 732; *Rockstone Capital, LLC* v. *Caldwell*, supra, 809; see also *Hirsch* v. *Woermer*, 184 Conn. App. 583, 589–90, 195 A.3d 1182, cert. denied, 330 Conn. 938, 195 A.3d 384 (2018); *Emeritus Senior Living* v. *Lepore*, 183 Conn. App. 23, 29, 191 A.3d 212 (2018). That quote, however, originated in *Hottle* v. *BDO Seidman, LLP*, 268 Conn. 694, 719, 846 A.2d 862 (2004), in which our Supreme Court was citing, interpreting, and applying *New York law*. Indeed, the unconscionability quote widely cited from *Hottle* came from a New York decision, *Gillman* v. *Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10, 534 N.E.2d 824, 537 N.Y.S.2d 787 (1988). *Hottle* v. *BDO Seidman, LLP*, supra, 719–20.

Earlier Connecticut cases, on the other hand, one of which the petitioner points to, held that both prongs

of unconscionability are not necessary. See *Smith* v. *Mitsubishi Motors Credit of America, Inc.*, supra, 247 Conn. 353 ("[e]ven in the absence of procedural unconscionability, [the defendant] might avoid liability . . . if he could establish that the clause was substantively unconscionable"). Whether our Supreme Court in *Bender* implicitly overruled its earlier decision in *Smith* (and others) is not a question we need to grapple with today, however, because, as we discuss herein, we reject the petitioner's sole claim that the settlement agreement is substantively unconscionable.

As noted, "[s]ubstantive unconscionability focuses on the 'content of the contract'. . . ." *Cheshire Mortgage Service, Inc.* v. *Montes*, supra, 223 Conn. 87 n.14. That is, whether the "contract terms . . . are unreasonably favorable to the other party . . . ." *R. F. Daddario & Sons, Inc.* v. *Shelansky*, 123 Conn. App. 725, 741, 3 A.3d 957 (2010). In general, the basic test is "whether, in the light of the general . . . background and the . . . needs of the particular . . . case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." (Internal quotation marks omitted.) *Hirsch* v. *Woermer*, supra, 184 Conn. App. 589. Substantive unconscionability is "intended to prevent oppression." *Smith* v. *Mitsubishi Motors Credit of America, Inc.*, supra, 247 Conn. 349.

At oral argument in this appeal, the petitioner argued that this court should hold that any settlement agreement that waives or releases a prisoner's habeas rights is per se unconscionable. Our Supreme Court, however, expressly rejected a similar argument in *Nelson* v. *Commissioner of Correction*, supra, 326 Conn. 772. In *Nelson*, the petitioner had filed a habeas action alleging that "he had received ineffective assistance of counsel at two criminal jury trials, both of which resulted in convictions and lengthy prison sentences." Id., 774. The

respondent moved to dismiss the action on the basis of "the terms of a stipulated judgment, filed by the petitioner and the respondent in connection with a previous habeas action concerning the same two trials, that barred the petitioner from filing any further such actions pertaining to those trials." Id.

The petitioner in that case argued, inter alia, that habeas rights should not be subject to waiver at all. Id., 785. Our Supreme Court flatly rejected that argument, holding that "[t]his court has concluded that both constitutional rights . . . and appellate rights . . . may be waived, if the waiver represents the intentional relinquishment of a known right. . . . The undisputed importance of the writ of habeas corpus notwithstanding . . . the petitioner has not persuaded us that a different rule should apply to such writs in this state." (Citations omitted.) Id., 785–86.

In the present case, the petitioner's counsel conceded that the petitioner entered into the settlement agreement knowingly and voluntarily. What is more, § 5 of the settlement agreement states that "[t]he parties hereto represent, warrant, and agree that each has been represented by or had opportunity to confer with his or her own counsel, that they have each thoroughly read and understood the terms of this Settlement Agreement and Release, have conferred with or had opportunity to confer with their respective attorneys to the extent they have any questions in regard to [the] same, and have voluntarily entered into [the] same to resolve all differences as stated herein."

The petitioner nevertheless contends in his appellate brief that the settlement agreement is substantively unconscionable because the bargaining positions of the parties were unequal. In his view, this case "involves parties who are, given the inherent structural nature of their relationship, incapable of dealing at arm's length,

with relatively equal bargaining positions." He argues that "[the Department of Correction (department)] is fully dominant" and "has all the power," and that "the inmate has none." That argument, however, goes to the question of procedural unconscionability, which the petitioner's counsel abandoned at oral argument in this appeal. See *Bender* v. *Bender*, supra, 292 Conn. 733 ("[w]ith respect to the procedural prong, the court found that 'the parties were in relatively equal positions as to their ability to bargain' "). Moreover, even if we were to consider the petitioner's procedural unconscionability argument, we would conclude that the record does not support his claim. First, it is undisputed that the petitioner was represented by two attorneys in the federal case, who negotiated the settlement agreement on his behalf. Second, the petitioner failed to introduce any evidence whatsoever in support of this claim.

With respect to the substance of the settlement agreement, the petitioner contends that the settlement agreement is substantively unconscionable because the release provision is "almost limitless" and applies "to any cause of action whatsoever that the inmate may have in the past, present, or future, whether known or unknown, whether related to the incident at issue or not." We disagree with the petitioner's characterization of the release provision. First, the release provision, although broad, is not limitless and does not bar the petitioner from bringing claims against the state in the future. The release provision bars all causes of action against the state arising from anything "from the beginning of the world to the date of [the settlement] agreement," which was executed on April 4, 2018. Nothing in the settlement agreement bars the petitioner from bringing claims against the state based on conduct occurring after the date the parties executed the agreement. This type of provision is commonly found in settlement agreements. Second, we need not decide

whether the release provision in this case is overly broad or unconscionable with respect to every conceivable claim to which it may apply. The narrow question before us is whether the settlement agreement is unconscionable and, therefore, unenforceable with respect to the instant habeas petition, which was pending when the parties entered into the settlement agreement. We conclude that it is not.

In return for the petitioner's agreement to release the state, the state agreed to pay the petitioner $2000 to be deposited in his inmate trust account and to forgo the collection of any sum owed by the petitioner to the state for the cost of his incarceration from the proceeds of the settlement. Additionally, the state agreed to vacate a guilty finding in a disciplinary report and to allow the petitioner possession of his hard covered legal resource books in his cell so long as the hard covers were removed.

On our review of the settlement agreement and the circumstances surrounding it, we cannot conclude that the settlement agreement is unreasonably favorable to the state or so oppressive as to render the settlement agreement unenforceable. By the time the parties executed the settlement agreement, the petitioner already had numerous opportunities to challenge his convictions, through appeals and collateral attacks spanning decades. None of those challenges was successful. Given the circumstances, it is reasonable to conclude that the petitioner might see the settlement offer of thousands of dollars in his inmate trust account, coupled with the state's agreement to forgo the collection of any sums owed by the petitioner to the state for the cost of his incarceration from the proceeds of the settlement and the vacatur of a guilty finding on a disciplinary report, in exchange for the aforementioned release, as favorable. Indeed, the petitioner's instant habeas petition, which was pending when he entered

into the settlement agreement and primarily claims ineffective assistance of his various counsel, is similar to habeas claims that he previously brought unsuccessfully. The only obvious benefit the state received in exchange for the consideration it provided was the release.

In support of his arguments, the petitioner directs this court to *Barfield* v. *Quiros*, United States District Court, Docket No. 3:18CV01198 (MPS) (D. Conn. May 17, 2021). He argues that in *Barfield*, the District Court denied a joint motion to approve a settlement on the ground that the release provision in that proposed agreement, which the petitioner argues was "virtually identical" to the release provision in the present case, was "overly broad and not fair, adequate, or reasonable." In his view, the same is true with the settlement agreement in the present case. We again are not persuaded.

The settlement agreement at issue in the *Barfield* case arose in a very different context. In *Barfield*, a plaintiff filed a class action on behalf of himself and all similarly situated inmates confined in a department facility, challenging the adequacy of medical screening, staging, and treatment for individuals in such custody, who have chronic hepatitis C infection. The parties in the case eventually entered into a settlement agreement, subject to final approval by the court. See Fed. R. Civ. P. 23 (e). Following a fairness hearing, the court denied the state's motion to approve the settlement agreement. A document contained in the petitioner's appendix indicates that the court determined that it would not "be a fair, adequate and reasonable settlement for *all* of the inmates at the [department] to release all of their claims from the beginning of the world to April 1 2020 . . . ." (Emphasis added; internal quotation marks omitted.)

Although the language of the proposed release in *Barfield* is similar to the release the petitioner challenges in the present case, the court in *Barfield* was required to answer a different legal question about an agreement that would apply to an entire class of individuals who had not negotiated the provision at arm's length. A court's determination that a general release in a particular class action settlement was not "fair, reasonable, and adequate" under the standard set forth in rule 23 (e) (2) of the Federal Rules of Civil Procedure, however, does not mean that the same release provision is substantively unconscionable for all purposes in every instance and as applied to all claims, including claims that were pending at the time the parties entered into a settlement agreement.[7]

For this reason, and the reasons previously discussed, we conclude that the settlement agreement is enforceable with respect to the instant habeas petition. We therefore conclude that the habeas court did not err in dismissing the petitioner's amended petition for a writ of habeas corpus.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE POLICE CASE NUMBERS: MERIDEN PD 20-003903, 20-005055 AND BERLIN PD 2020-11662 (AC 44472)

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

Syllabus

An individual, L, sought to quash a search and seizure warrant in connection with a police matter in Meriden. The trial court dismissed L's motions

[7] We note that, although a federal District Court decision is persuasive authority, it is not binding on this court. See *Szewczyk* v. *Dept. of Social Services*, 275 Conn. 464, 475 n.11, 881 A.2d 259 (2005).

on the ground that it lacked subject matter jurisdiction because there was no pending criminal action against L, and L appealed to this court. Subsequently, L was arrested via an arrest warrant with the same police case number as was on the search and seizure warrant. Because L was charged with a class A felony, the matter was transferred from the part B docket in Meriden to the part A docket in New Haven. On L's appeal, *held*: the appeal was dismissed as moot as the relief sought on appeal, a hearing on the merits of the motions, is available to L in the pending criminal action, which stemmed from the same investigation that prompted the search warrant at issue in the appeal; moreover, no practical relief would follow from a determination as to the trial court's jurisdiction to consider those claims in the absence of a pending criminal action; furthermore, although L claimed that the appeal involved the Meriden court that issued the search warrant and not the New Haven court where the criminal action is pending, the search warrant L sought to quash and the arrest warrant in the criminal action both have the same Meriden police case number and were issued in connection with the same investigation.

Argued May 18—officially released September 6, 2022

Procedural History

Motions to quash a search and seizure warrant, brought to the Superior Court in the judicial district of New Haven at Meriden, geographical area number seven, where the court, *Rosen, J.*, dismissed the motions, and the movant appealed to this court. *Appeal dismissed.*

Anthony Lazzari, self-represented, the appellant (movant).

Kathryn W. Bare, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, chief state's attorney, *Jennifer F. Miller*, assistant state's attorney, and *James Dinnan*, former supervisory assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, C. J. Anthony Lazzari appeals from the judgment of the trial court dismissing his emergency motions seeking, inter alia, to quash a search and seizure warrant. The court determined that, because there

was no pending criminal action against Lazzari, it lacked subject matter jurisdiction over the motions. On appeal, Lazzari claims that the court had jurisdiction over the motions despite the absence of a pending criminal action. Since Lazzari filed this appeal, however, events have rendered the appeal moot. Accordingly, we dismiss the appeal for lack of subject matter jurisdiction.

The record reveals the following facts and procedural history. On October 21, 2020, the Meriden Police Department obtained a search and seizure warrant directed to Google Legal Investigations (Google), seeking records for Lazzari's Google account between September 17 and September 23, 2020. In an October 27, 2020 email, Google notified Lazzari that it had received a search warrant for his account records and explained that, "[u]nless we promptly receive a copy of a filed motion to quash that is file-stamped by a court of competent jurisdiction, Google may provide responsive documents pursuant to applicable law . . . ." The message informed Lazzari that Google received the warrant from the Meriden Police Department and that the "case number" is 20-005055. Subsequently, Lazzari filed " 'emergency' " motions, dated November 2, 2020, (1) "to quash unreasonable and unlawful search and seizure warrant fraudulently issued on October 21, 2020," (2) "for full protective order" as to Lazzari, "his property, and any/all information related to and associated with him," and (3) "for a full evidentiary hearing on the merits." When he filed his motions, there was no pending criminal action against him.

The trial court, *Rosen*, *J.*, held a hearing on the motions on November 19, 2020. At the hearing, the state argued that the court lacked subject matter jurisdiction to consider the motions because there was no criminal action pending before it. The court agreed with the state and issued an oral ruling dismissing the motions. On November 27, 2020, Lazzari filed " 'emergency'"

motions "for reconsideration and [to] quash [Google] warrant" and "for clarification (re: improper dismissal of emergency pleading(s) and nonruling of oral request for stay)."

On December 9, 2020, the court dismissed both motions for lack of jurisdiction. On December 15, 2020, Lazzari filed in this court a motion for review of the court's order dismissing his motions for reconsideration and clarification. He subsequently filed the present appeal on December 29, 2020, and this court dismissed his preappeal motion for review on December 31, 2020.

On January 19, 2021, Lazzari filed a motion for articulation, asking the trial court to articulate the factual and legal bases for its decision, and a motion for rectification, seeking to correct minor typographical errors in the transcript.[1] On January 26, 2021, the state filed a motion to dismiss the appeal for lack of a final judgment, which this court granted on March 3, 2021. On March 12, 2021, Lazzari filed a motion for reconsideration en banc. The panel granted the motion for reconsideration, denied the state's motion to dismiss, and restored the case to the docket on April 21, 2021.[2]

On May 10, 2021, the trial court granted the motions for articulation and rectification. In its articulation, the court stated: "The Superior Court's authority in a criminal case is established by the proper presentment of the information . . . which is essential to initiate a criminal proceeding. . . . Thus, there must be a presentment of the information, and a pending cause of action, in order to invoke the Superior Court's subject matter jurisdiction in criminal proceedings. . . .

[1] At two points in the transcript, the word "phishing" was used instead of "fishing" in the phrase "fishing expedition."

[2] Because the panel granted the motion for reconsideration, no action was necessary as to Lazzari's request for en banc reconsideration.

"[Lazzari] failed to establish, either at argument or in his motions, that the court in fact had subject matter jurisdiction to hear the motions, and he conceded that there was no pending criminal court action. In the absence of a presentment of the information and a pending criminal court action, the court lacked subject matter jurisdiction to hear the motions, and they were properly dismissed." (Citation omitted; internal quotation marks omitted.)

On November 16, 2021, after the appeal was ready for argument, Lazzari was arrested in Meriden pursuant to an arrest warrant issued in "Police Case Number" 20-005055, and the state charged him with, inter alia, three counts of trafficking in persons in violation of General Statutes (Rev. to 2019) § 53a-192a. See *State* v. *Lazzari*, Superior Court, judicial district of New Haven, Docket No. CR-21-0348534-T.[3] Because a violation of § 53a-192a is a class A felony, the matter was ordered transferred from the part B docket in the geographical area number seven in Meriden to the part A docket in the judicial district of New Haven. See Practice Book § 1-6. In light of the pending criminal matter involving the same investigation that prompted the search warrant at issue in this appeal, this court notified the parties to be prepared to address at oral argument whether this appeal is moot because the state has filed a criminal information and initiated a criminal proceeding against Lazzari.

"Mootness is a threshold issue that implicates subject matter jurisdiction, which imposes a duty on the court

[3] We take judicial notice of the file in the pending criminal matter. See *Jewett* v. *Jewett*, 265 Conn. 669, 678 n.7, 830 A.2d 193 (2003) ("[t]here is no question that the [court] may take judicial notice of the file in another case" (internal quotation marks omitted)); see also *Moore* v. *Moore*, 173 Conn. 120, 122, 376 A.2d 1085 (1977) (court may judicially notice court files without affording hearing).

to dismiss a case if the court can no longer grant practical relief to the parties. . . . Mootness presents a circumstance wherein the issue before the court has been resolved or ha[s] lost its significance because of a change in the condition of affairs between the parties. . . . [T]he existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow." (Internal quotation marks omitted.) *State* v. *Begley*, 122 Conn. App. 546, 550–51, 2 A.3d 1 (2010).

During oral argument, Lazzari argued that the appeal is not moot. He claimed, "what I'm challenging is what came out of Meriden, not out of New Haven . . . ." He further argued that he should "not have to wait for another case that is pending in another court. They're two different courts, they're not the same court." For its part, the state argued that the appeal is moot and noted that both the search warrant and the arrest warrant are part of the same Meriden police case, as evidenced by the police case number recorded on each document. We agree with the state.

In the present case, the court determined that it lacked jurisdiction over Lazzari's motions challenging the search warrant because there was no pending criminal action against him. On appeal, Lazzari claims that the court had jurisdiction to consider the merits of his motions notwithstanding that there was no pending criminal action and requests that this court reverse the judgment and remand the matter for a "full evidentiary hearing which would be challenging, attacking and contesting the unreasonable and unlawful search and seizure warrant . . . ." Now, however, there is a pending criminal matter against Lazzari stemming from the same investigation that prompted the search warrant at issue in this appeal. Thus, whether the court had subject matter jurisdiction over Lazzari's motions in the

absence of a pending criminal action has "lost its significance because of a change in the condition of affairs between the parties." (Internal quotation marks omitted.) *State* v. *Begley*, supra, 122 Conn. App. 550–51.

Furthermore, the relief sought by Lazzari on appeal—a hearing on the merits of his motions—already is available to him in the pending criminal action. Although Lazzari claims that this appeal involves the Meriden court that issued the search warrant and not the New Haven court where the criminal action is pending,[4] as noted by the state, the search warrant Lazzari seeks to quash and the arrest warrant in the criminal action both have the same Meriden police case number and were issued in connection with the same investigation. Accordingly, Lazzari has the opportunity to present his claims regarding the validity of the search warrant in the pending criminal action and, therefore, no practical relief would follow from a determination as to the trial court's jurisdiction to consider those claims in the absence of a pending criminal action. Consequently, the appeal is moot.[5]

The appeal is dismissed.

In this opinion the other judges concurred.

[4] Meriden is in the New Haven judicial district. See General Statutes § 51-344 (8).

[5] We note that Lazzari emphasized at oral argument that the issue in this appeal is of public importance, which is one of the three requirements for the capable of repetition, yet evading review exception to the mootness doctrine. See *Taber* v. *Taber*, 210 Conn. App. 331, 336 n.3, 269 A.3d 963 (2022) ("[F]or an otherwise moot question to qualify for review under the capable of repetition, yet evading review exception, it must meet three requirements. First, the challenged action, or the effect of the challenged action, by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance. Unless all three requirements are met,

PETER REK ET AL. *v.* KIRK PETTIT ET AL. (AC 45210)

Bright, C. J., and Suarez and Seeley, Js.

Syllabus

The plaintiffs, legal guardians of the minor child C, appealed from the orders of the trial court requiring C to suspend contact with his long-term personal counselor, L, and engage with a new therapist with the goal of working toward the resumption of visitation with the defendants, C's maternal grandparents. Thereafter, the defendants filed a motion with the trial court, seeking an order that, notwithstanding the plaintiffs' appeal, there was no automatic appellate stay in effect. Subsequently, the trial court issued an order that there was no automatic stay of the custody and visitation orders and that the plaintiffs were to comply with the trial court's orders. Thereafter, the trial court denied the plaintiffs' motion for a discretionary stay. Subsequently, the plaintiffs filed motions for review of the trial court's orders determining that there was no automatic appellate stay and denying their motion for a discretionary stay. *Held*:

1. This court granted the plaintiffs' motion for review of the trial court's order determining that there was no automatic appellate stay in effect but concluded that the plaintiffs could not prevail on their claim that the trial court incorrectly determined that there was no automatic appellate stay; the trial court's orders pertained to the manner and extent of visitation, as well as contact with the defendants, and visitation orders expressly were exempt from the automatic appellate stay under the relevant rule of practice (§ 61-11 (c)).
2. This court granted the plaintiffs' motion for review of the trial court's order denying their motion for a discretionary stay and concluded that the trial court did not abuse its broad discretion only insofar as the court ordered the parties to engage with a new therapist for the purpose of facilitating visitation, but it concluded that the trial court did abuse its discretion in suspending contact between C and L, as that court did not have before it any evidence regarding the impact of the suspension of therapy on C's best interest, L was not engaged at the behest of the trial court, the suspension of therapy was only a suggestion made by the defendants' counsel at closing arguments, the guardian ad litem indicated that suspension of therapy with L would not be in C's best

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the appeal must be dismissed as moot." (Internal quotation marks omitted.)). Nevertheless, Lazzari did not argue that the challenged action in the present case satisfied the first two requirements under this exception. Accordingly, he has not demonstrated that the exception applies to save this appeal from being moot.

interest and, therefore, the court did not adequately account for the potential harm to C that could follow from the disruption of his relationship with L; accordingly, relief was granted in part, in that the court's order that the therapy sessions between C and L were suspended until further order of the court was stayed pending the final resolution of this appeal, and the remainder of the relief requested was denied.

Considered May 11—officially released September 6, 2022

Procedural History

Action seeking to modify the terms of a visitation agreement, brought to the Superior Court in the judicial district of Waterbury, Juvenile Matters, where the court, *Coleman, J.*, granted the plaintiffs' motion to modify custody and issued certain orders; thereafter, following an evidentiary hearing, the court, *Hon. Eric D. Coleman*, judge trial referee, reversed its previous orders and issued new orders, from which the plaintiffs appealed to this court; subsequently, the court, *Hon. Eric D. Coleman*, judge trial referee, granted the defendants' motion for order for a determination as to whether an automatic stay was in effect; thereafter, the court, *Hon. Eric D. Coleman*, judge trial referee, denied the plaintiffs' motion for a mistrial, and the plaintiffs filed an amended appeal; subsequently, the court, *Hon. Eric D. Coleman*, judge trial referee, denied the plaintiffs' motion for an order of discretionary stay; thereafter, the plaintiffs filed motions for review with this court. *Motion for review of order of no automatic appellate stay granted; relief denied. Motion for review of denial of discretionary stay granted; relief granted in part.*

Megan L. Wade and *James P. Sexton*, in support of the plaintiffs' motions for review.

Opinion

SUAREZ, J. The plaintiffs, Peter Rek and Carisa Rek, the legal guardians of a minor child named Caleb,[1] have

[1] The plaintiffs are very close friends of Caleb's biological mother.

appealed from the December 15, 2021 orders of the trial court requiring Caleb to suspend contact with his long-term personal counselor and engage with a new therapist with the goal of working toward the resumption of visitation with Caleb's maternal grandparents, the defendants, Kirk Pettit and Charlotte Pettit. On January 7, 2022, the defendants filed a motion with the trial court seeking an order that, notwithstanding the plaintiffs' appeal, there is no automatic stay of the court's December 15, 2021 orders. On March 8, 2022, the court issued a written order indicating that there is no automatic stay of custody and visitation orders and that the plaintiffs are to comply immediately with its December 15, 2021 orders. On March 17, 2022, the plaintiffs filed a motion for discretionary stay, which the court denied on March 22, 2022.

Before this court are two motions for review filed by the plaintiffs.[2] The first motion, filed on April 4, 2022, asks this court to review and reverse the court's March 8, 2022 order determining that there is no automatic appellate stay in effect. The second motion, filed on April 21, 2022, asks this court to review and reverse the court's March 22, 2022 order denying their request for a discretionary stay. On the first motion for review, we conclude that the underlying orders are visitation orders that are not automatically stayed pursuant to Practice Book § 61-11 (c). On the second motion for review, we conclude that the court did not abuse its broad discretion in denying the plaintiffs' request for a discretionary stay only insofar as the court ordered the

[2] The plaintiffs filed several other motions seeking relief from this court. On March 25, 2022, this court ordered a temporary stay of the trial court's orders pending the resolution of these motions for review. See Practice Book §§ 60-1 and 61-14. This court also directed the court to comply with Practice Book § 64-1 (b) and issue a decision setting forth the factual and legal basis of its March 22, 2022 order denying the plaintiffs' motion for a discretionary stay. The court issued its memorandum of decision on April 11, 2022.

parties to engage with a new therapist for the purposes of facilitating visitation; we reach a different conclusion with respect to the court's order suspending Caleb's contact with his long-term personal counselor. We therefore grant the plaintiffs' April 4, 2022 motion for review, but deny the relief requested therein, and grant the April 21, 2022 motion for review, and grant, in part, the relief requested therein.

The following undisputed facts and procedural history are pertinent to the resolution of these motions. Caleb was born in 2010. When Caleb's biological parents became unavailable to care for him, the plaintiffs and the defendants filed petitions for custody of Caleb with the Superior Court for Juvenile Matters in Waterbury. On August 8, 2016, the Superior Court for Juvenile Matters, *Dooley*, *J.*, appointed the plaintiffs as legal guardians of Caleb, and approved a visitation agreement between the plaintiffs and the defendants and entered it as an order of the court. The order further provided that enforcement or modification thereof would be in family court. On November 29, 2016, the plaintiffs filed the underlying action seeking to modify the terms of the visitation agreement. The defendants objected and filed a motion for contempt. This protracted litigation followed. Notwithstanding court orders to the contrary, visitation actually ceased in August, 2017, allegedly due to Caleb's anxiety in the presence of the defendants. Attorney Rosa C. Rebimbas was appointed as guardian ad litem (GAL) for Caleb on September 10, 2018.

The court, *Coleman*, *J.*, conducted an evidentiary hearing from September 3 through 6, 2019, on the plaintiffs' November 29, 2016 motion. Among the witnesses who testified at the 2019 trial were the GAL; Patricia Levesque, Caleb's personal counselor since 2016; Constance Mindell, who, the court found, had been involved to "assist the parties in working together for the best

interests of the child" since September, 2017; and Kristan McClean, who, the court found, has "been involved since January 14, 2019, to help the parties foster a better relationship" between Caleb and the defendants. On January 3, 2020, the court, in a memorandum of decision, granted the plaintiffs' motion to modify and issued orders requiring progressively increased contact (letters, phone calls, and "fun time" outings with Peter Rek, Kirk Pettit, and Caleb). It specifically required the parties to "continue to work together in a therapeutic setting with Kristan McClean or some other mutually agreed upon duly licensed and qualified therapist to arrive at a schedule of visitation . . . ." The court gave the parties a one year report back date. Neither party appealed from the January 3, 2020 orders.

On February 26, 2020, the defendants filed a motion for order claiming that the plaintiffs would not cooperate in finding a different "mutually agreed upon" therapist to work toward visitation, to which the plaintiffs objected. Court operations were curtailed shortly thereafter due to the COVID-19 pandemic.

On January 5, 2021, the parties appeared before Judge Coleman for their report back date. On January 26, 2021, the plaintiffs filed a motion for order, asking the court to preclude the defendants from rearguing issues that predated the January 3, 2020 decision. The defendants objected. The parties and their counsel appeared before the court on various dates in early 2021. On February 16, 2021, the plaintiffs filed a request for an evidentiary hearing because there was a disagreement as to whether the parties had complied with the court's January 3, 2020 orders. Thereafter, the court requested that each side provide the name of a family therapy professional acceptable to that side. On April 7, 2021, the defendants filed a notice of compliance, giving the name of Philip J. Mays. On April 8, 2021, the plaintiffs filed their notice of compliance, giving the names of

three professionals at Connecticut Behavioral Health. In that notice, they also requested "an evidentiary hearing on the issue of whether . . . engag[ing] with another therapist for the purpose of determining whether visitation between [the defendants and Caleb] is in the best interest of the minor child."

The court heard testimony on June 1, June 28, and August 16, 2021, on the plaintiffs' April 8, 2021 request for a hearing. At that hearing, McClean testified that, beginning in January, 2019, her role was to work with the parties to establish a safe and healthy visitation relationship. In alternating weeks, she met with Caleb and then the defendants, to work through Caleb's concerns with "past interactions" with the defendants in order to "work toward" a joint session. There was one joint session in the summer of 2019, which she described as "uncomfortable" for Caleb. McClean testified that she had not met with the defendants since September, 2019. She testified that she believed they were unwilling to work with her, although she had "made herself available." She continued to meet remotely with Caleb and the plaintiffs approximately once per month through September, 2020. The court also heard testimony from Kirk Pettit, Carisa Rek, Levesque, and the GAL, and then heard closing arguments.

On December 15, 2021, the court issued a memorandum of decision in which it reversed its January 3, 2020 orders and issued a series of new orders. The court, inter alia, (1) ordered the parties to discontinue working with McClean altogether, (2) "suspended until further order of the court" any contact between Caleb and Levesque, and (3) ordered the parties to engage the services of Mays, the defendants' chosen family therapist, to "conduct one therapeutic/reunification visit per month" with Caleb, and "as appropriate including with [the defendants] and any other parties deemed necessary." Those orders also required progressively

increased contact (letters, phone calls, and "fun time" outings with Peter Rek, Kirk Pettit, and Caleb) and monthly in-person visits between Caleb and the defendants, supervised by one or both of the plaintiffs, beginning as soon as March, 2022, "[i]f and when deemed appropriate" by Mays.

On January 3, 2022, the plaintiffs filed this appeal. On January 4, 2022, the plaintiffs' appellate counsel notified Mays, by way of email, that he had filed an appeal of the court's January 3, 2022 orders and, as a result of the automatic stay stemming from the appeal, he advised the plaintiffs not to meet with him. On January 10, 2022, the defendants filed a motion for order in the trial court, asking the court to terminate the appellate stay, if one existed. The plaintiffs objected on substantive and procedural grounds.[3] The plaintiffs also filed a motion for a mistrial, which the court denied. On January 28, 2022, the plaintiffs filed an amended appeal challenging the denial of their motion for a mistrial.

I

In their first motion for review, filed on April 4, 2022, the plaintiffs challenge the court's determination that an automatic appellate stay was not in effect and argue that the December 15, 2021 orders are not "orders of . . . visitation" that are exempt from the automatic appellate stay. We are not persuaded.

Our review of the plaintiffs' claim requires us to construe Practice Book § 61-11, particularly subsections (a) and (c). The interpretation and application of provisions of the rules of practice involves a question of law over which our review is plenary. See *Bouffard* v. *Lewis*, 203 Conn. App. 116, 120, 247 A.3d 667 (2021).

[3] After an appeal is filed, Practice Book § 61-11 (e) requires that a motion to terminate an appellate stay be filed with the appellate clerk.

Practice Book § 61-11 governs stays of execution. Section 61-11 (a) provides in relevant part: "Except where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment or order shall be automatically stayed until the time to file an appeal has expired. If an appeal is filed, such proceedings shall be stayed until the final determination of the cause. . . ." Pursuant to § 61-11 (c), certain orders in family matters are exempt from the automatic stay provision: "Unless otherwise ordered, no automatic stay shall apply . . . to orders of . . . custody or visitation in family matters brought pursuant to chapter 25 . . . ."

The plaintiffs maintain that the December 15, 2021 orders change "Caleb's medical providers with the intent of potentially leading to future visitation. To be clear, not a single [December 15, 2021] order actually orders any visitation between Caleb and the [defendants] on a date certain. As a result, they are not visitation orders . . . ." In support of their position, the plaintiffs rely on the "plain meaning" of the term "visitation order." The plaintiffs argue that most of the orders do not "[establish] a visiting time between Caleb" and the defendants, but rather "detail progressive potential contact that is explicitly contingent on" whether Mays deems such contact to be appropriate. And because, according to the plaintiffs, an order requiring them to change therapists *is* automatically stayed, so too is any "progressive potential contact."[4] We are not persuaded.

[4] The plaintiffs also argue that the court's consideration of the issue of whether there was an appellate stay of the December 15, 2021 orders "violated the automatic stay that was created by the plaintiffs appealing the trial court's denial of their motion for mistrial." This argument merits little discussion. See *Ahneman* v. *Ahneman*, 243 Conn. 471, 482–83, 706 A.2d 960 (1998) ("It is well established that a trial court maintains jurisdiction over an action subsequent to the filing of an appeal. . . . Moreover, a trial court's postappeal jurisdiction persists regardless of any degree of substantive connection between the postappeal motion and the issue on appeal." (Citations omitted; internal quotation marks omitted.)).

The court's authority to adjudicate the dispute between these parties arises under General Statutes § 46b-56, which allows the court to issue "[o]rders [regarding] custody, care, education, visitation and support of children." General Statutes § 46b-56 (i) clearly states that "[a]s part of a decision concerning custody or visitation, the court may order either parent or both of the parents and any child of such parent to participate in counseling . . . provided such participation is in the best interest of the child." Our Supreme Court, in *DiGiovanna* v. *St. George*, 300 Conn. 59, 75, 12 A.3d 900 (2011), described the "tools in [the trial court's] arsenal to effectuate visitation" as including "prescrib[ing] specific conditions under which visitation would take place to address legitimate concerns of either party."[5] The court can order "appropriate counseling sessions geared toward the cessation of the animosity between the parties or, at the least, minimizing the possibility that such animosity will have a negative impact upon the child." Id., 76. The court also may use its contempt powers to coerce a recalcitrant party's compliance. See id. "[T]he best interest of the child guides the court in determining how best to foster [the] relationship. Those considerations may indicate . . . counseling, as well as restrictions on the time, place, manner and extent of visitation." Id., 78.

In the present case, in its January 3, 2020 memorandum of decision, the court suspended the August 8,

[5] In *DiGiovanna* v. *St. George*, supra, 300 Conn. 73–79, our Supreme Court considered whether a trial court may deny a nonparent's application for visitation when the applicant has met the stringent burden of proof established in *Roth* v. *Weston*, 259 Conn. 202, 234–35, 789 A.2d 431 (2002). In *DiGiovanna*, our Supreme Court treated, as uncontested, that the applicant had proven by clear and convincing evidence that the requisite relationship existed between the applicant and the child pursuant to *Roth*, and that the child would suffer the requisite level of harm if the relationship was not permitted to continue. *DiGiovanna* v. *St. George*, supra, 61. In resolving that appeal, our Supreme Court primarily addressed the *implementation* of visitation under a best interest of the child standard. See id., 73–79. Implementation of visitation orders is also the issue in this matter.

2016 orders of visitation, finding that those orders were not in Caleb's best interest at that time. The court, however, expressly and clearly ordered, inter alia, the parties to "continue to work together in a therapeutic setting with . . . McLean *or some other* mutually agreed upon duly licensed and qualified therapist to arrive at a schedule of visitation between [the defendants] and Caleb." (Emphasis added.) The court went on to issue further orders to reinstate visitation between the defendants and Caleb, as deemed appropriate by the therapist. Neither party appealed from these orders.

In its December 15, 2021 memorandum of decision, the court explicitly found that its January 3, 2020 orders were not complied with and little effort had been made to achieve contact between Caleb and the defendants. The court issued new orders that pertain to the "manner and extent of visitation" and contemplate progressively increased contact, with Mays' approval, geared toward the possibility of resuming regular monthly visits between Caleb and the defendants. Visitation orders expressly are exempted from the automatic appellate stay by Practice Book § 61-11 (c). Because we conclude that the orders at issue are "orders of . . . visitation" within the meaning of § 61-11 (c), they are not automatically stayed. Accordingly, the relief requested in the first motion for review is denied.

II

In their second motion for review, filed on April 21, 2022, the plaintiffs challenge the court's decision denying their request for a discretionary stay pursuant to Practice Book §§ 61-11 (c) and 61-12 pending the resolution of this appeal. They maintain that: (1) "the trial court failed to weigh properly the factors set forth in Practice Book § 61-11 (c) in support of its denial of a discretionary stay; and (2) the findings upon which the

trial court based its decision are clearly erroneous, finding no support in the record . . . .'' We conclude that the court did not abuse its broad discretion in determining that staying those orders would not be in the child's best interest. We further conclude, however, that the court abused its discretion in suspending the ''psychotherapy sessions and any other contacts between [Caleb] and Patricia Levesque,'' his personal therapist since 2016, pending the resolution of this appeal.

This court reviews trial court orders concerning discretionary stays under an abuse of discretion standard. See *Griffin Hospital* v. *Commission on Hospitals & Health Care*, 196 Conn. 451, 459, 493 A.2d 229 (1985). ''In determining whether a trial court has abused its broad discretion . . . we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'' (Internal quotation marks omitted.) *Kyle S.* v. *Jayne K.*, 182 Conn. App. 353, 362, 190 A.3d 68 (2018).

Practice Book § 61-11 (c) provides that a trial court may terminate or impose a stay in family matters following a hearing, provided the court considers the following factors relevant to this case: ''(1) the needs and interests of the parties, their children and any other persons affected by such order; (2) the potential prejudice that may be caused to the parties, their children and any other persons affected, if a stay is entered, not entered or is terminated . . . (4) the need to preserve

the rights of the party taking the appeal to obtain effective relief if the appeal is successful . . . and (6) any other factors affecting the equity of the parties."[6]

The court denied the plaintiffs' motion for a discretionary stay on March 22, 2022, and issued a memorandum of decision on April 11, 2022. In that decision, the court found that "absolutely nothing had been done in furtherance of the progressive steps set forth" in the court's initial January 3, 2020 decision. It determined that further delay of an opportunity for "another therapist to attempt to facilitate a functional relationship between Caleb and the defendants merely allows the assessment of the current therapists to go unchallenged and to become a self-fulfilling prophecy." The court was highly critical of Levesque, who testified that she "never discussed" the visitation issue with Caleb, yet repeatedly testified in various proceedings that the "slightest contact" with the defendants "might be incredibly damaging to Caleb." The court characterized her testimony as "speculat[ive]" no fewer than three times. The court found that the other providers *and* Caleb had "been influenced by Levesque."

The plaintiffs maintain that the court based its decision on a series of "core factual findings [that] are clearly erroneous." Among these are that McClean "never" held a joint session with the defendants and Caleb; and that Levesque had "influenced" McClean. Other challenged findings include the court's characterization of the efforts by the various professionals to facilitate visitation as "pitifully feeble" and the suggestion that, if anything, Caleb's anxiety regarding the defendants has "gotten progressively worse."

The record before the court, however, supports a finding that Caleb has not visited with the defendants

[6] Practice Book § 61-11 (c) (3) and (5) are factors specific to financial issues in a marital dissolution action that are not relevant to the resolution of this matter.

since the summer of 2019—months before the court's January 3, 2020 orders, and not at all since the court issued those orders. The court in its April 11, 2022 memorandum of decision, found that none of the court's January 3, 2020 orders had resulted in "progressively increased contact," nor had the parties "work[ed] together in a therapeutic setting . . . to arrive at a schedule of visitation." On this record, and for the limited purpose of determining whether the court abused its discretion in declining to stay its December 15, 2021 orders that the parties engage with a new therapist, Mays, to facilitate visitation, we are not left with a definite and firm conviction that the challenged findings were clearly erroneous.

In determining whether to enter a discretionary appellate stay of its orders in a family matter, the court must consider the "needs and interests" of the parties and weigh the "potential prejudice" that may be caused if a stay is not entered. See Practice Book § 61-11 (c) (1) and (2). In weighing those factors here, the court determined that Caleb's needs and interests were "paramount" and "[t]hose needs and interests are protected by the oversight of Mr. Mays, whose involvement is an essential part of the [court's] December 15, 2021 [decision]." The court found that, if Mays "determines that visitation between [Caleb and the defendants] should proceed, that visitation will occur under his professional and responsible guidance and direction." The court further found that the plaintiffs will not be prejudiced by allowing Caleb to begin therapy with Mays because it is possible that Mays could agree with the plaintiffs and recommend against visitation.

Pursuant to Practice Book § 61-11 (c) (6), the trial court was free to consider "any other factors affecting the equity of the parties." Here, the court found: (1) the parties had entered into the negotiated visitation

agreement with the juvenile court in 2016, and the plaintiffs almost immediately moved to modify it; (2) the plaintiffs have "never . . . attempted to offer or produce any evidence" that the defendants "failed to protect [Caleb] from inappropriate adult situation and behavior," despite the representation in their 2016 motion to modify; (3) the plaintiffs unilaterally terminated visitation in 2017; and (4) the plaintiffs have not done "all they could" to alleviate Caleb's anxiety regarding visitation. The court apparently weighed these findings heavily in determining that immediately engaging with a new family therapist to facilitate visitation was in Caleb's best interest.

In arguing that the court abused its broad discretion in refusing to stay that order pending the resolution of their appeal, the plaintiffs emphasize contrary evidence that was before the court. McClean testified that the defendants were unwilling to follow through with therapeutic recommendations. The GAL recommended reengaging with McClean because, in her opinion, engaging yet another professional to facilitate visitation would *not* be in Caleb's best interest. The court had before it a three page document handwritten by Caleb and introduced through Levesque, in which Caleb stated that he was eleven and one-half years old and just wished that the defendants would "leave [him] alone" because they make him "uncomfortable" and "all the therapy is thanks to them . . . and I think I have [post-traumatic stress disorder]. . . ." Levesque testified that Caleb's response to visitation with the defendants was that of someone who experienced "trauma" and who had been diagnosed with "post-traumatic stress disorder." In their motion for review, the plaintiffs acknowledge that the court was free to discredit all of this evidence. They emphasize, however, that, in order for the court to have reached the conclusions that it did, there must be some affirmative evidence that engaging

with Mays is in Caleb's best interest, and they argue that no such evidence was presented because Mays was not called to testify.

We are troubled by the court's heavy reliance on the professional judgment of Mays in fashioning its orders when Mays was not presented as a witness at trial nor were his credentials presented as evidence. However, because contact between the defendants and Caleb has been minimal since August, 2017 (and apparently nonexistent since August, 2019, notwithstanding court orders to the contrary), the court determined that an "assessment concerning whether . . . [a visitation relationship] is feasible should be done *without any further delay*." (Emphasis added.) The defendants' position at trial was that McClean had "failed" to facilitate a visitation relationship between the defendants and Caleb and that, instead, Mays should be engaged to conduct at least one "therapeutic reunification" visit per month with them and Caleb. The court's various orders clearly indicate that it was dissatisfied with McClean's efforts at facilitating visitation. The court weighed the Practice Book § 61-11 (c) factors in a manner that furthered Caleb's interests in a relationship with the defendants, and declined to stay its December 15, 2021 orders requiring the parties to engage with Mays for the purpose of assessing whether visitation is feasible. On this record, we cannot say that the court abused its broad discretion in declining to stay those orders pending the resolution of the plaintiffs' appeal.

Nevertheless, we conclude that the court abused its broad discretion when it did not stay its December 15, 2021 order that Caleb suspend all contact with Levesque, his personal therapist since August, 2016, pending the final resolution of this appeal. The evidence before the court was that, unlike McClean, the GAL, and other professionals tasked with facilitating a visitation

relationship between Caleb and the defendants, Levesque was *not* engaged at the behest of the court. Moreover, it appears that the defendants' request for relief with respect to Levesque was raised, for the first time, during their counsel's closing argument when counsel asked the court to "remove Patty Levesque from this boy's life."[7] When counsel concluded argument, the GAL asked for permission to "speak up" in response to the defendants' late "modification of the proposed orders," which the court permitted. The GAL indicated that Levesque is Caleb's "personal counselor," not a "court-ordered" professional, and that Caleb "does have a bond [with Levesque and] . . . that any action by this court to [affect] that bond would be detrimental to the child

[7] Relevant portions of the closing argument by the defendants' counsel are as follows:

"It's really perplexing on how we have five years of intensive therapy with Patty Levesque and we've got no amelioration of his anxiety. His anxiety, as you pointed out, I don't know if you were saying his anxiety is regressing but there's regression not progression. Why? It really makes no sense. . . .

"Our proposed orders are to utilize Mr. Philip Mays . . . conduct one therapeutic reunification visit at minimum per month between Caleb and his grandparents. And that's without the presence of Peter and [Carisa] Rek. . . . [For reasons stated, Ms. McClean] is not the right person for this job. I do believe Mr. Mays is. . . .

"I think Ms. McClean had the opportunity to get a breakthrough going and she failed. It's too bad that so much time has passed and I think our postorders appreciate that. . . . [We] are very measured in our request. Once a month therapeutic visitation, reunification visitation, supervised by Mr. Mays. Is that so much to ask? Under the circumstances, Your Honor, it's the best interest for Caleb. . . . His best interest is to deal with this irrational perspective of his grandparents in a therapeutic setting with a competent professional.

"I don't know if Your Honor would take the steps that it would take to remove Patty Levesque from this boy's life. I know you have the authority to do that. I think she's testified, I think three times now and I've never been more certain that that should happen. So, I would, I think, modify my proposed orders just slightly and ask Your Honor to at least consider that. Is she the source? I don't think so. But is she helpful? I don't think so. Will you order it? I'm not so sure you will. But I could see, Your Honor, if you tie it together. If we remove her and we add one person one time per month I think it's actually going to benefit Caleb quite a bit."

and not in the child's best interest." There was no evidence presented to support a contrary opinion.

To be clear, we make no determination, at this juncture, that the court erred in its assessment of Levesque's credibility or the progress that Caleb had made in his treatment with her. However, the court did not have before it any evidence as to the impact the suspension of therapy between Caleb and Levesque would have on Caleb's best interest. The court only heard a suggestion by the defendants' counsel at closing arguments that the court should suspend the therapy. Moreover, we find it compelling that the GAL's response to the defendants' eleventh hour request to remove Levesque from Caleb's life was to seek permission to address the court to make known her professional assessment that such an order would not be in Caleb's best interest. We conclude that, in declining to stay this order, the court did not adequately account for the potential harm to Caleb that could follow from the disruption of his relationship with his long-term personal counselor. We agree with the plaintiffs insofar as they ask this court to stay that portion of the trial court's December 15, 2021 orders pending the final resolution of this appeal. We therefore grant the second motion for review and grant relief limited to this order.

The motion for review filed on April 4, 2022, is granted, but the relief requested therein is denied. The motion for review filed on April 21, 2022, is granted, and the relief requested therein is granted, in part, in that the court's December 15, 2021 order that "[t]he psycho-therapy sessions and any other contacts between the minor child and Patricia Levesque shall be suspended until further order of the court" is stayed pending the final resolution of this appeal; the remainder of the relief requested is denied.

In this opinion the other judges concurred.