ERIN C. HASSETT *v.* SECOR'S AUTO CENTER, INC.
(AC 44804)

Cradle, Clark and Harper, Js.

Syllabus

The plaintiff appealed to this court from the trial court's denial of her motion for additur, following a jury verdict in her favor on, inter alia, a claim of revocation of acceptance of a used motor vehicle that she had purchased from the defendant car dealership. The plaintiff financed the majority of the vehicle's $25,471.79 purchase price through a loan with the defendant, which was later assigned to a third party that was not made a party to the action. The defendant warranted the vehicle under a limited warranty. Approximately three weeks after the purchase, the plaintiff began experiencing issues with the vehicle. The plaintiff brought the vehicle to the defendant several times to rectify the issues, but the issues continued. After the defendant advised the plaintiff to seek further inspection from another dealership, N Co., the defendant declined to make the additional repairs N Co. had recommended. The plaintiff stopped using the vehicle but continued to make monthly payments. Following a trial, the jury returned a verdict in favor of the plaintiff, including on her claim for revocation of acceptance, and awarded her damages in the amount of $11,000. Subsequently, the plaintiff filed a motion for additur, claiming that the full purchase price of the vehicle should be returned to her, which the trial court denied. On the plaintiff's appeal, *held* that the trial court did not abuse its discretion in denying the plaintiff's motion for additur, as the jury's award of damages fell within the limits of fair and reasonable compensation; moreover, the plaintiff's claim that, pursuant to statute (§ 42a-2-711 (1)), the defendant was required, as a matter of law, to return to her the full purchase price of the vehicle because the jury found in her favor as to her claim of revocation of acceptance was without any support in our jurisprudence, as § 42a-2-711 (1) did not require a refund of the total purchase price

when no evidence had been presented showing that such amount actually had been paid, and the plaintiff's claim that financing of the vehicle was equivalent to having paid the defendant in full was also without support; furthermore, the jury determined its damages award on the basis of the evidence presented, which did not establish that the plaintiff had paid the defendant the full purchase price of the vehicle, but, rather, the jury's award reflected that it credited the plaintiff's testimony as to the total amount of payments made on the loan on the vehicle.

Argued May 16—officially released October 4, 2022

Procedural History

Action to recover damages for, inter alia, the plaintiff's revocation of acceptance of an allegedly defective motor vehicle, and for other relief, brought to the Superior Court in the judicial district of New London and tried to the jury before *S. Murphy, J.*; verdict in part for the plaintiff; thereafter, the court, *S. Murphy, J.*, denied the plaintiff's motion for additur and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Affirmed.*

Sergei Lemberg, with whom was *Vlad Hirnyk*, for the appellant (plaintiff).

Sandra R. Stanfield, with whom were *Victoria S. Mueller* and *Matthew H. Greene*, for the appellee (defendant).

Opinion

HARPER, J. In this action arising from the purchase of a used motor vehicle by the plaintiff, Erin C. Hassett, from the defendant, Secor's Auto Center, Inc., a used car dealer, the trial court rendered judgment in accordance with a jury verdict in favor of the plaintiff with respect to four of the five claims set forth in the complaint and awarded the plaintiff $11,000 in damages. On appeal from that judgment, the plaintiff claims that the court

improperly denied her motion for additur.[1] We disagree and affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. On November 4, 2017, the plaintiff purchased a used vehicle, a 2010 BMW X6 XDrive 50i, from the defendant. The purchase price for the vehicle was $25,471.79, including sales tax, a dealer conveyance fee, and license and title fees. The plaintiff made a down payment of $2500 by way of a trade-in and financed the remainder of the purchase price. Her monthly payments were $439.14, to be paid over a total of sixty months beginning on December 19, 2017, and she testified that she continued to make those payments through the time of trial. The dealer warranted the vehicle under a limited warranty for 60 days or 3000 miles, whichever came first.[2]

The record reveals that the plaintiff financed $22,971.79, the majority of the purchase price of the vehicle, by way of a loan with the defendant. The defendant subsequently assigned its interest in that loan to

[1] The plaintiff's motion was titled, "Plaintiff's Motion for Judgment in Accordance with the Verdict or, in Alternative, Motion for Additur." Notwithstanding the plaintiff's characterization of the motion, "[t]he nature of a motion . . . is not determined by its title alone. . . . [W]e are not bound by the characterizations of a motion by the movant or by the trial court." (Citation omitted; internal quotation marks omitted.) *Silver* v. *Silver*, 200 Conn. App. 505, 520, 238 A.3d 823, cert. denied, 335 Conn. 973, 240 A.3d 1055 (2020). "[W]e look to the substance of the relief sought by the motion rather than the form." *In re Haley B.*, 262 Conn. 406, 413, 815 A.2d 113 (2003). Because the court did, in fact, render judgment in accordance with the jury's verdict—that is, in favor of the plaintiff—we discern the substance of the plaintiff's motion, which concerns the amount of damages due the plaintiff, to be a motion for additur. Accordingly, we treat it as such.

[2] Specifically, the warranty covered the following: "The dealer will pay 100 [percent] of the labor and 100 [percent] of the parts for the covered systems that fail during the warranty period." The covered parts include the engine, including "[a]ll internally lubricated parts, fuel pump and water pump, block, heads and manifolds, harmonic balancer, fuel injectors, carburetor, turbo charger and engine mounts."

Volvo Car Financial Services U.S., LLC (Volvo). The loan between the plaintiff and the defendant provides that the assignee of the loan, Volvo, has a security interest, or lien, on the title of the vehicle.[3] Volvo has not been made a party to this action.

The plaintiff began to experience issues with the vehicle beginning approximately three weeks after purchase. On November 22, 2017, the oil level light came on in the vehicle, indicating that the oil level was low. After she added oil to the engine, she brought the vehicle back to the defendant. The defendant tightened the oil drain plug, cleaned off residual oil, and returned the vehicle to the plaintiff. About one week later, the oil level light came on again. On December 8, 2017, the plaintiff again brought the vehicle to the defendant. The defendant found no evidence of an oil leak and referred the plaintiff to seek further inspection at New Country Motor Cars (New Country) in Hartford.

On December 13, 2017, the plaintiff brought her vehicle to New Country for inspection. New Country found no leaks in the engine but discovered that the vehicle "smokes excessively after idling for a couple minutes" and determined that it would need to replace the "valve seals" and "exhaust on both banks" to rectify the plaintiff's oil burning concern. The quoted cost to repair her vehicle was $9200. The plaintiff communicated the quote from New Country to the defendant and requested that the defendant replace the vehicle's engine valve seals. The defendant declined to replace the valve seals on the engine because it claimed that it was not necessary. Subsequently, the plaintiff retained counsel. On December 29, 2017, the plaintiff's counsel sent a letter on her behalf to the defendant seeking to revoke her

[3] The loan document, entered into evidence at trial, makes reference to the "[s]eller's agreement(s) with [a]ssignee." That agreement does not appear to be in the record.

acceptance of the vehicle and demanding "return of all money paid so far, including the down payment, amount of payments thus far, finance charges, other fees, incidental and consequential damages, costs, and attorney's fees."

On January 3, 2018, the plaintiff brought the vehicle back to the defendant for the third time because the check engine light had come on, and the defendant advised her that the oxygen sensors required replacing. The defendant initially agreed to repair the oxygen sensors but stopped work on the vehicle when it received the letter from the plaintiff's counsel seeking revocation of the plaintiff's acceptance of the vehicle. On January 8, 2018, when the plaintiff picked up the vehicle, the low oil level light again had turned on. In March, 2019, the plaintiff stopped using the vehicle, but continued to make monthly payments. She testified at trial that the vehicle has not run since March 22, 2019, and has been parked in her driveway since then.

The plaintiff filed a complaint against the defendant, with a return of service date of March 6, 2018, alleging six counts sounding in (1) breach of implied warranties under General Statutes § 42a-2-314; (2) breach of written warranties under General Statutes §§ 42a-2-313 and 42a-2-318; (3) breach of written and implied warranties under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 2301 et seq.; (4) revocation of acceptance under General Statutes § 42a-2-608;[4] (5) breach of the obligation of good faith

[4] In its charge to the jury, the court instructed the jury that the plaintiff "claims revocation of acceptance pursuant to . . . [§] 42a-2-608." The fourth count of the plaintiff's complaint, however, was titled: "Revocation of acceptance pursuant to [General Statutes] § 42a-2-314." Although the plaintiff cited the incorrect statute in the fourth count of the complaint, we understand her claim to be one of revocation of acceptance of her vehicle under § 42a-2-608. See *McLeod* v. *A Better Way Wholesale Autos, Inc.*, 177 Conn. App. 423, 444–45, 172 A.3d 802 (2017) ("The interpretation of pleadings is always a question of law for the court . . . . [W]e long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he

and fair dealing under General Statutes § 42a-1-304; and (6) violation of General Statutes § 42-110b of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. A jury trial was held in March, 2020, and the jury returned its verdict in favor of the plaintiff on all claims except the CUTPA claim. Relevant to this appeal, the jury made a finding that the plaintiff had met her burden of proof with respect to her claim of revocation of acceptance.

With respect to damages relating to the plaintiff's revocation of acceptance claim, the court charged the jury as follows: "If you find that the plaintiff has met her burden of proof on [her] revocation of acceptance claim, then the plaintiff is entitled to a refund of so much of the purchase price as has been paid as well as damages for incidental and consequential expenses. Incidental damages include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of the vehicle rightfully rejected, and any other reasonable expense incident to the defendant's breach. Consequential damages resulting from the defendant's breach include any loss resulting from general or particular requirements and needs of which the defendant at the time had reason to know and which could not reasonably be prevented by cover or otherwise; and injury to person or property proximately resulting from any breach of warranty. Consequential damages include any loss that may fairly and reasonably be considered as arising naturally, according the usual course of things from such breach." The plaintiff's counsel did not object to the court's charge to the jury.

modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties." (Internal quotation marks omitted.)); see also *Burton* v. *Stamford*, 115 Conn. App. 47, 65–66, 971 A.2d 739, cert. denied, 293 Conn. 912, 978 A.2d 1108 (2009).

The jury awarded the plaintiff a lump sum of $11,000 in total damages. The special verdict form used by the jury did not include a breakdown of damages; the form stated that the lump sum of $11,000 awarded to the plaintiff included "damages . . . compensatory, incidental and/or consequential, as applicable . . . ." No punitive damages were awarded.

On March 17, 2020, the defendant filed a motion to set aside the verdict, which the court denied on December 28, 2020. On March 19, 2020, the plaintiff filed the motion for additur that is the subject of this appeal, asking the court to order that the ownership of the vehicle be transferred back to the defendant and that the full purchase price be returned to the plaintiff. Specifically, the plaintiff argued that, "upon showing that acceptance was revoked, the court must order [the defendant] to repay [the plaintiff] the purchase price paid. . . . Here, the price paid for the vehicle was $25,471.79. . . . Therefore, based on the jury's verdict, the court must find that, by operation of law, the title to the vehicle revests in [the defendant] . . . and the defendant must refund the plaintiff the purchase price paid of $25,471.79."

On January 8, 2021, the defendant filed an objection to the plaintiff's motion, arguing that "a hearing should be [held] regarding the value of the vehicle . . . before the court enters an award on the purchase price, as is requested by the plaintiff. . . . Prior to trial, the defendant filed a motion to compel the plaintiff to have her car inspected, which motion was denied. No testimony was given by the plaintiff regarding the condition of the vehicle with exception of her statement at trial . . . that the vehicle wasn't running. She did not indicate the current mileage of the vehicle, and there is no way of knowing same. These facts should be established before refunding the plaintiff the full purchase price of a vehicle which she still possesses . . . ."

On January 20, 2021, the plaintiff filed a reply to the defendant's objection to her motion for additur, arguing that "[t]he jury returned a verdict for the plaintiff and against the defendant on the claim for revocation of acceptance. . . . The jury awarded the plaintiff $11,000 in damages. . . . Here, the price paid for the vehicle was $25,471.79 . . . . Therefore, based on the jury's verdict, the court must find that, by operation of law, the title to the vehicle revests in [the defendant] and the defendant must refund the plaintiff the purchase price paid of $25,471.79."

On March 30, 2021, the defendant, with leave from the court, submitted a supplemental objection in response to the plaintiff's reply. The defendant argued that the jury's verdict in this case is well supported by the evidence and should be allowed to stand. Specifically, the defendant argued that, "[i]n the case at hand, it would appear that the jury awarded the plaintiff as damages return of the payments that she had already paid regarding the purchase of her vehicle, which is exactly the law regarding revocation of acceptance. . . . [T]he plaintiff testified and submitted an exhibit, based upon which the jury could have calculated that she made [twenty-five] payments on the vehicle of approximately $440 each, totaling $11,000 in payments made. While the jury was allowed to award incidental and consequential damages, it also did not have to do so. The jury exactly followed the court's instructions and made an award in this case that 'falls somewhere within the necessarily uncertain limits of just damages' and does not indicate that the jury was 'influenced by partiality, prejudice, mistake or corruption,' in which case the verdict must stand. *Wallace* v. *Haddock*, 77 Conn. App. 634, [637, 825 A.2d 148] (2003)." In addition, the defendant asserted that, "[b]ecause the plaintiff has not timely sought that the verdict be set aside, the plaintiff is precluded from seeking an additur." Finally,

the defendant argued that there was no basis for the court to order an additur because "the plaintiff has given no sound reason to disturb the jury's verdict," and that, to the extent the plaintiff was asserting that the verdict was inadequate, "the law is clear: it is not enough to base an additur on a conclusory statement that a jury award was inadequate."

On April 20, 2021, the plaintiff submitted a supplemental reply, arguing that "the jury found for the plaintiff on the revocation claim. The jury need not calculate the amount the plaintiff gets back in a revocation of acceptance claim—the law clearly states [that] the plaintiff gets the purchase price paid and title revests. . . . [T]here is zero dispute as to what the purchase price paid is, because the defendant, in its answer, admitted the purchase price is $25,471.79 . . . . The jury entered [a] verdict for the plaintiff on the revocation of acceptance claim and now, by operation of law, the vehicle title revests in the defendant and the plaintiff takes the purchase price paid, plus incidental and consequential damages as found by the jury." (Emphasis omitted.)

Subsequently, on June 8, 2021, the court denied the plaintiff's March 19, 2020 motion for additur and rendered judgment in accordance with the jury's verdict. On June 21, 2021, the plaintiff filed a motion for clarification of the judgment. On August 12, 2021, the court denied the plaintiff's request for clarification, stating: "The jury's verdict clearly set forth the amount of damages due the plaintiff. Further, title to the subject vehicle is appropriately addressed by way of operation of law, in accordance with the General Statutes. Accordingly, a request for clarification of the court's judgment on the verdict is hereby denied." This appeal followed.

On appeal, the plaintiff argues that the court improperly denied her motion for additur. Specifically, the

plaintiff contends that she is entitled to a refund of the full purchase price of the vehicle, $25,471.79, as a matter of law, because the jury found in her favor on her claim of revocation. The defendant responds that the court properly exercised its discretion in denying the plaintiff's motion for additur and rendering judgment in accordance with the verdict. We agree with the defendant.

We begin by setting forth the applicable standard of review and governing legal principles. "We review the trial court's decision to deny a motion for additur under an abuse of discretion standard. . . . [I]t is the court's duty to set aside the verdict when it finds that it does manifest injustice, and is . . . palpably against the evidence." (Citation omitted; internal quotation marks omitted.) *Bligh* v. *Travelers Home & Marine Ins. Co.*, 154 Conn. App. 564, 572, 109 A.3d 481 (2015). "The trial court's refusal to . . . order an additur is entitled to great weight and every reasonable presumption should be given in favor of its correctness. In reviewing the action of the trial court in denying the [motion] for additur . . . our primary concern is to determine whether the court abused its discretion and we decide only whether, on the evidence presented, the jury could fairly reach the verdict [it] did. The trial court's decision is significant because the trial judge has had the same opportunity as the jury to view the witnesses, to assess their credibility and to determine the weight that should be given to their evidence. Moreover, the trial judge can gauge the tenor of the trial, as we, on the written record, cannot, and can detect those factors, if any, that could improperly have influenced the jury. . . . The only practical test to apply to a verdict is whether the award of damages falls somewhere within the necessarily uncertain limits of fair and reasonable compensation in the particular case, or whether the verdict so shocks the sense of justice as to compel the conclusion

that the jury [was] influenced by partiality, mistake or corruption." (Internal quotation marks omitted.) *DeEsso* v. *Litzie*, 172 Conn. App. 787, 795–96, 163 A.3d 55, cert. denied, 326 Conn. 913, 173 A.3d 389 (2017).

Moreover, "[i]t is axiomatic that [t]he amount of damages awarded is a matter peculiarly within the province of the jury . . . . [I]t is the jury's right to accept some, none or all of the evidence presented. . . . It is the [jury's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [jury] can . . . decide what—all, none, or some—of a witness' testimony to accept or reject." (Internal quotation marks omitted.) *Cusano* v. *Lajoie*, 178 Conn. App. 605, 609–10, 176 A.3d 1228 (2017).

The plaintiff argues that, because the jury found in her favor as to her claim of revocation of acceptance, the defendant is required, as a matter of law, to return to the plaintiff the full purchase price of the vehicle in the amount of $25,471.79. In support of this argument, the plaintiff principally relies on the language set forth in General Statutes § 42a-2-711 (1), which provides in relevant part that "[w]here the . . . buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract . . . the buyer may cancel and whether or not he has done so may *in addition to recovering so much of the price as has been paid*," recover certain other damages. (Emphasis added.) Moreover, the plaintiff asserts that "[t]he refund of the 'purchase price' to be returned to the plaintiff was not tried to the jury—those damages on the revocation claim were already admitted in the pleadings." Finally, she argues that the amount that the jury awarded, $11,000, "must be interpreted as the award or compensation for [her] consequential and incidental damages only."

In her brief, the plaintiff relies on *Barco Auto Leasing Corp.* v. *House*, 202 Conn. 106, 115, 520 A.2d 162 (1987) (*Barco*), for the proposition that a seller is required "to return the buyer's purchase price in toto when he has delivered nonconforming goods under circumstances that afford a buyer a right to reject or to revoke acceptance.' " The plaintiff's reliance on *Barco*, however, is misplaced. The language in *Barco* on which the plaintiff relies concerns a general principal under the Uniform Commercial Code (UCC) and was referenced by the court while analogizing remedies under the UCC to the statute at issue in *Barco*.[5] Id., 114. There is nothing in our Supreme Court's ruling in *Barco* that requires the defendant in the present case to return the full purchase price of the vehicle to the plaintiff when the evidence in the record shows that she paid only a portion of the full purchase price. In fact, in *Barco*, the buyer was refunded only those amounts actually paid under the contract. Id., 110. The court explained that, "[i]n restoring the parties to their respective positions prior to the contract, courts generally order the seller to refund the amounts paid by the buyer for the goods and the buyer to return the goods to the seller. . . . Accordingly, the court ordered the plaintiff to refund the sum of $9596.76, representing the amounts paid by the defendants from

[5] Other cases cited by the plaintiff are similarly unavailing, as they simply state the boiler plate language of the statute. In fact, the plaintiff cites to a case that directly contradicts her argument. In *Alexis* v. *PMM Enterprises, LCC*, Docket No. 3:17-cv-1622 (MPS) (D. Conn. October 29, 2018), the court explicitly did not award the purchaser the full price of a vehicle upon successfully showing revocation. Rather, the court stated: "Even assuming they made every payment from the time they entered the contract until they revoked their acceptance of the vehicle, the total due was only $5487.30. . . . [N]either the complaint nor the affidavits in support of default judgment state that the [plaintiffs] made all payments in accordance with the contract. . . . Here, the actual damages alleged in the complaint exceed the damages supported in the affidavits and documents. The [plaintiffs] do not provide a basis from which [the court] could reasonably infer that they made weekly payments under the contract." (Footnote omitted.).

October 1979, to December, 1981." (Citation omitted.) Id., 113.

In *Conte* v. *Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976), our Supreme Court stated that the UCC, of which § 42a-2-711 is a part, provides a "specific remedy [that] permit[s] a buyer under proper conditions to force the seller to retake nonconforming goods even if the buyer has already accepted them. . . . When a buyer justifiably revokes acceptance, he may cancel *and recover so much of the purchase price as has been paid*." (Citation omitted; emphasis added; footnote omitted.) Id., 119–20. In *Conte*, "[t]he jury could have reasonably concluded that the revocation was timely and justifiable. The plaintiff was, therefore, *entitled to recover the amount of the purchase price which he had already paid*." (Emphasis added.) Id., 123. Unlike in the present case, in *Conte* "[t]here was evidence from which the jury could reasonably have found . . . [that the plaintiff] paid [the defendant] the total purchase price for the automobile." Id., 116.

In the present case, the plaintiff's argument that she is entitled to the full purchase price of the vehicle is without any support in our jurisprudence. The plaintiff's assertion, essentially, is that the phrase "as has been paid" set forth in § 42a-2-711 should apply to the total purchase price of the vehicle, without requiring her to provide *any* evidence in the record that she has paid the total purchase price for the vehicle. The record reveals that the plaintiff financed the majority of the purchase price through a loan with the defendant. The plaintiff presumes that financing of the vehicle is equivalent to having "paid" the defendant in full. We have found no support for this proposition in our decisional law. The defendant subsequently assigned to Volvo its interest in the loan, which provides that the assignee

of the contract, Volvo, has a security interest, or lien, on the title of the vehicle.[6]

In *Micalizzi* v. *Stewart*, 181 Conn. App. 671, 676, 188 A.3d 159 (2018), the plaintiff argued on appeal that the court should have set aside the verdict because the jury's award of damages conflicted with its answers to the interrogatories on a special verdict form. "Only if a court cannot harmonize the verdict and the interrogatories may it refuse to accept such verdict. . . . A verdict is not defective as a matter of law as long as it contains an intelligible finding so that its meaning is clear. . . . A verdict will be deemed intelligible if it clearly manifests the intent of the jury." (Citation omitted; internal quotation marks omitted.) Id., 677. In *Micalizzi*, this court looked to the trial court's jury instructions to contextualize the jury's answers to the interrogatories. Id., 680. In the present case, we similarly must look to the court's charge to the jury to put the damages award in context. In the present case, the jury was instructed that, "[i]f you find that the plaintiff has met her burden of proof on a revocation of acceptance claim then [the] plaintiff is entitled to a refund of so much of the purchase price as has been paid as well as damages for incidental and consequential expenses." The instruction from the court was clear: the jury had to base its award of damages on the portion of the $25,471.79 purchase price paid for by the plaintiff, *as well as* any other incidental or consequential damages it found were warranted.

The plaintiff contends that because the purchase price of the vehicle was admitted to in the pleadings, she is entitled to a refund of that amount as a matter of law, and, as such, the issue of how much of the

[6] "[A]n assignor typically can transfer his contractual right to receive future payments to an assignee." *Rumbin* v. *Utica Mutual Ins. Co.*, 254 Conn. 259, 268, 757 A.2d 526 (2000).

purchase price "has been paid" was not a question before the jury to decide. We disagree. As we already have determined, § 42a-2-711 does not require a refund of the total purchase price as a matter of law, especially when no evidence has been presented showing that such amount actually had been paid. Under the statute, the plaintiff is entitled to "so much of the price as has been paid . . . ." General Statutes § 42a-2-711. The jury had to determine that amount on the basis of the evidence presented, which did not establish that the plaintiff paid the defendant the full purchase price of the vehicle.[7]

[7] We note that, although the plaintiff claims that she continues to make her monthly payments to the defendant, Volvo is the assignee of the loan. The plaintiff, thus, should have made Volvo a party to this action in order to challenge any future payments owed on the loan.

General Statutes § 52-572g (a) provides in relevant part: "Any holder in due course of a promissory note, contract or other instrument, other than an instrument issued in connection with a credit card transaction, evidencing an indebtedness, signed or executed by a buyer in connection with a credit transaction covering consumer goods . . . shall be subject to all of the claims and defenses which the buyer has against the seller arising out of the transaction or against the person or persons providing the services, limited to the amount of indebtedness then outstanding in connection with the credit transaction, provided the buyer shall have made a prior written demand on the seller with respect to the transaction."

Our Supreme Court recently explored the legislative history of § 52-572g (a) in *Hernandez* v. *Apple Auto Wholesalers of Waterbury, LLC*, 338 Conn. 803, 259 A.3d 1157 (2021). In explaining the legislative history, the court stated that the "holder in due course doctrine . . . generally arose when a consumer finances the purchase of goods or services through a retail installment contract or other instrument arranged by the seller, which is later assigned to a bank or other finance company. . . . If the product turns out to be a lemon, is damaged or needs servicing under a warranty and the seller refuses to take whatever action is indicated, the finance company or bank has no responsibility to make good [on the contract]. If the buyer refuses to make payments as they [become] due, the [finance company] may repossess the . . . goods or the buyer may be dunned for the entire balance of the loan, payable immediately." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 816–18.

Section 52-572g (a) rectifies this issue by subjecting an assignee "of consumer credit contracts to all the claims and defenses that the consumer would have against the seller." Id., 818. Our Supreme Court determined that

The jury ultimately awarded the plaintiff $11,000 in total damages. This amount roughly equates to the plaintiff's monthly payment, $439.14, multiplied by the number of payments she made between December 19, 2017, and the time of trial in March, 2020. The jury credited the plaintiff's testimony, as evidenced by its damages award. Accordingly, because the jury's award of damages falls within the limits of fair and reasonable compensation in this particular case; see *Cusano* v. *Lajoie*, supra, 178 Conn. App. 609–10; we cannot say that the trial court abused its discretion in denying the plaintiff's motion for additur.

The judgment is affirmed.

In this opinion the other judges concurred.

LISA BRUNO *v.* REED WHIPPLE ET AL.
(AC 43880)

Alvord, Moll and Vertefeuille, Js.

Syllabus

The plaintiff sought to recover damages from the defendant H Co. for, inter alia, breach of contract, in connection with its construction of a new home. The jury returned a verdict in favor of H Co. on the breach of contract claim, indicating in interrogatories that H Co. had breached its contract with the plaintiff but that the plaintiff had waived that breach. After the trial court denied the plaintiff's motion to set aside the verdict, the plaintiff appealed to this court, which concluded that the trial court improperly denied the motion to set aside the verdict in favor of H Co. on the breach of contract count concerning the jury's verdict as to waiver. This court ordered the case to be remanded for a hearing in damages on the jury's verdict in favor of the plaintiff on her breach of contract claim. Following a hearing in damages on remand, the trial court concluded that the plaintiff failed to prove that she was entitled to actual damages on her claim and rendered judgment in favor of H Co. The plaintiff appealed to this court, which determined that, despite her failure to prove actual damages, the plaintiff was entitled to an award of nominal damages, and, therefore, the trial court erroneously

an assignees' liability is limited to the amount of indebtedness outstanding when the written demand is made on the seller. Id., 821.

directed judgment to enter in favor of H Co. This court nevertheless affirmed the trial court's judgment, concluding that that court's failure to award nominal damages and to render judgment in the plaintiff's favor did not constitute reversible error. Thereafter, H Co. filed a motion for attorney's fees, asserting that, as the prevailing party in the action, it was entitled under the parties' contract to an award of reasonable attorney's fees in the amount of $305,533.75. The relevant provision of the parties' contract provided that the prevailing party in litigation enforcing the contract shall be entitled to recover reasonable attorney's fees. The plaintiff subsequently filed a motion for attorney's fees pursuant to the statute (§ 42-150bb) that allows a consumer to recover attorney's fees from a commercial party when the consumer successfully defends or prosecutes an action based on a contract that provides for attorney's fees for the commercial party, seeking an award in the exact amount as H Co. had requested in its motion for attorney's fees. Alternatively, the plaintiff sought attorney's fees and costs under the parties' contract in the amount of $92,101. In support of her motion, the plaintiff appended her affidavit with accompanying exhibits comprised of a table detailing her attorney's fees and other costs, a copy of the contract, and copies of retainer letters from three law firms and a consultant, whom she averred worked on her case. Following a hearing, the trial court denied the parties motions, and the plaintiff appealed and H Co. cross appealed to this court. *Held*:

1. The trial court properly denied H Co.'s motion for attorney's fees, as H Co. was not the prevailing party for purposes of the attorney's fees provision of the parties' contract; although this court determined that the entry of judgment in favor of H Co. on the plaintiff's breach of contract claim did not constitute reversible error, it remained that the jury found liability on that claim in favor of the plaintiff, that she was entitled to nominal damages, and that the entry of judgment in the defendant's favor was in error, and this court would not countenance such an error yielding an unintended benefit to H Co. by way of an award of reasonable attorney's fees under such circumstances.
2. The plaintiff's claim that the trial court erred in failing to award her attorney's fees pursuant to § 42-150bb in the exact amount of attorney's fees incurred by H Co. was without merit; even if it is assumed that § 42-150bb applied to the parties' contract, the statute does not contain language requiring an automatic or presumptive award of attorney's fees to a successful consumer in the amount incurred by the commercial party, but, rather, a consumer's award pursuant to the statute is limited to the terms of the contract, which, in this case, provided that the prevailing party in litigation enforcing the contract may recover reasonable attorney's fees.
3. The trial court did not abuse its discretion in denying the plaintiff's motion for attorney's fees pursuant to the parties' contract: although the plaintiff provided broad descriptions of the services rendered by her attorneys,

she did not provide itemized invoices or submit any affidavits or other testimony from them to demonstrate with sufficient detail that they had provided particular services, and, therefore, she left the trial court to rely solely on her representations in her affidavit, her brief descriptions of the attorneys' services, and the retainer letters appended as exhibits, which evidentiary showing rendered her motion little more than a bare request for the fees listed; moreover, this court declined to review the plaintiff's claim that the trial court erred in denying her request for costs, which was embedded in her request for attorney's fees, as it was inadequately briefed, the plaintiff having failed to include in her principal appellate brief any analysis as to the costs she was seeking to recover, the authority pursuant to which they are taxable, and how the documentation she submitted to the trial court was sufficient to support the requested award.

Argued January 11—officially released October 4, 2022

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the court, *Maronich*, *J.*, granted in part the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court, which dismissed the appeal in part, reversed the judgment in part and remanded the case for further proceedings; thereafter, the matter was tried to the jury before *Doherty*, *J.*; subsequently, the court, *Doherty*, *J.*, granted the defendants' motion for permission to file an amended answer and special defense; verdict for the defendants; thereafter, the court, *Doherty*, *J.*, denied the plaintiff's motion to set aside the verdict and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court; subsequently, the court, *Doherty*, *J.*, issued an articulation of its decision; thereafter, this court reversed the judgment only as to the jury's verdict on the special defense of waiver and remanded the case for a hearing in damages on the jury's verdict for the plaintiff on her breach of contract claim against the defendant Heritage Homes Construction Company, LLC; subsequently, following a hearing

in damages, the court, *Truglia*, *J.*, rendered judgment for the defendant Heritage Homes Construction Company, LLC, from which the plaintiff appealed to this court, which affirmed the judgment; thereafter, the court, *Brazzel-Massaro*, *J.*, denied the plaintiff's amended motion to vacate and motion for attorney's fees and costs and the motion for attorney's fees filed by the defendant Heritage Homes Construction Company, LLC, and the plaintiff appealed and the defendant Heritage Homes Construction Company, LLC, cross appealed to this court; subsequently, the appeal was dismissed in part. *Affirmed.*

Lisa Bruno, self-represented, the appellant-cross appellee (plaintiff).

Stephen P. Fogerty, for the appellee-cross appellant (defendant Heritage Homes Construction Company, LLC).

Opinion

MOLL, J. The plaintiff, Lisa Bruno, appeals, and the defendant Heritage Homes Construction Company, LLC, cross appeals, from the judgment of the trial court denying their respective motions for attorney's fees.[1]

[1] As stated by this court in a prior related appeal, "Reed Whipple, who at all relevant times was the owner of Heritage Homes Construction Company, LLC, also was named as a defendant in the plaintiff's complaint. Prior to trial, the court rendered summary judgment in favor of Whipple on the breach of contract and breach of the implied covenant of good faith and fair dealing counts of the operative complaint, which judgment this court affirmed. See *Bruno* v. *Whipple*, 138 Conn. App. 496, 504–13, 54 A.3d 184 (2012). A jury thereafter returned a verdict in favor of Whipple on the third and final count against him, which alleged a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. The trial court subsequently denied the plaintiff's posttrial motion to set aside that verdict, and this court affirmed the propriety of that determination on appeal. See *Bruno* v. *Whipple*, [162 Conn. App. 186, 209–12, 130 A.3d 899 (2015), cert. denied, 321 Conn. 901, 138 A.3d 280 (2016)]." *Bruno* v. *Whipple*, 186 Conn. App. 299, 302 n.1, 199 A.3d 604 (2018), cert. denied, 331 Conn. 911, 203 A.3d 1245 (2019). Whipple is not participating in this appeal, and, therefore, we refer in this opinion to Heritage Homes Construction Company, LLC, as the defendant.

On appeal, the plaintiff claims that the court erred by failing to award her (1) attorney's fees pursuant to General Statutes § 42-150bb and/or (2) attorney's fees and other litigation-related costs pursuant to a fee-shifting provision of a construction contract executed by the parties. On cross appeal, the defendant claims that the court improperly denied its motion for attorney's fees because the defendant, not the plaintiff, is the prevailing party in this matter. We conclude that the court did not err in denying both motions for attorney's fees. Accordingly, we affirm the judgment of the trial court.

The following facts, as previously set forth by this court or by the trial court, and complex procedural history are relevant to our resolution of this appeal. "[T]he present case 'arises from dealings between the parties concerning the construction by [the defendant] of a new home in Ridgefield for [the plaintiff] and her former husband . . . .' In her operative complaint, the plaintiff alleged that . . . the defendant breached the construction contract by failing to provide her with (1) invoices on a biweekly basis and (2) written change orders regarding modification to the contract.

"A trial was held in 2013. Following the close of evidence and at the request of the defendant, the court provided the jury with an instruction on the special defense of waiver. The court further instructed the jury to 'separately answer jury interrogatories asking whether it "[found] in favor of [the plaintiff] on her claim of breach of contract against [the defendant]" and, if so, whether "[the plaintiff] waived the breach of contract by the defendant . . . ."' The jury subsequently returned a verdict in favor of the defendant on the breach of contract claim. In so doing, the jury 'expressly' based that verdict 'on its answers to jury interrogatories that (1) [the defendant] had breached its contract with the plaintiff, but (2) the plaintiff had waived that breach.' . . . The trial court denied the

plaintiff's subsequent motion to set aside the verdict. . . .

"On appeal [in *Bruno* v. *Whipple*, 162 Conn. App. 186, 130 A.3d 899 (2015), cert. denied, 321 Conn. 901, 138 A.3d 280 (2016)], this court concluded that the trial court improperly denied the motion to set aside the verdict in favor of the defendant on the breach of contract count. As the court stated, the trial court 'abused its discretion by permitting [the defendant] to raise the special defense of waiver for the first time after the close of evidence at trial, as it had not been specially pleaded, the pleadings did not allege any facts supporting an inference of waiver, and the claim that the plaintiff knowingly relinquished her contractual rights was not fully litigated at trial without objection by the plaintiff. Accordingly . . . the court should have set aside the jury's verdict as to waiver.' . . .

"In light of that conclusion, this court explained that it 'must now address the scope of the remand of this case to the trial court. Specifically, [it] must determine whether the case should be remanded for a hearing in damages on the plaintiff's breach of contract claim or whether the jury's verdict on her breach of contract claim also must be set aside and remanded for a retrial on that issue.' . . . The court noted that, '[i]n finding in favor of the plaintiff on her breach of contract claim, the jury essentially has determined liability in her favor against [the defendant] and the remaining determination is damages resulting from that breach.' . . . Accordingly, this court concluded that 'because the improper verdict on the special defense of waiver is wholly separable from the verdict in favor of the plaintiff on her breach of contract claim . . . limiting the remand to a hearing in damages on the breach of contract verdict does not work injustice in this case.' . . . The court thus ordered the case to be 'remanded for a hearing in damages on the jury's verdict in favor of the

plaintiff on her breach of contract claim.' " (Citations omitted.) *Bruno* v. *Whipple*, 186 Conn. App. 299, 302–304, 199 A.3d 604 (2018), cert. denied, 331 Conn. 911, 203 A.3d 1245 (2019).

On remand, after holding a hearing in damages on January 26, 2017, the court, *Truglia*, *J.*, issued its memorandum of decision on February 21, 2017. Concluding that the plaintiff had failed to prove by a preponderance of the evidence that she was entitled to compensatory damages on her breach of contract claim, the court rendered judgment in favor of the defendant and against the plaintiff. The court further explained that, in addition to compensatory damages, "[t]he plaintiff . . . claim[ed] attorney's fees and cost[s] incurred in prosecuting this action," as well as statutory fees in accordance with General Statutes §§ 52-245, 52-257, and 52-258 as the prevailing party. The court noted that, although the plaintiff offered her own testimony regarding amounts paid to attorneys and expert witnesses over the course of the litigation,[2] she failed to "introduce into evidence at the hearing in damages affidavits of fees from any of the attorneys or experts (including time records) that she consulted in connection with this case." Ultimately, the court disposed of the plaintiff's claim for attorney's fees and costs in a footnote, stating that, "[i]nsofar as the plaintiff is not the prevailing party in this action, the court makes no award for attorney's fees and costs." The plaintiff then appealed to this court.

On appeal in *Bruno* v. *Whipple*, supra, 186 Conn. App. 299, this court explained: "The plaintiff . . . contends that the court committed reversible error by exceeding the scope of the remand order when it directed judgment to enter in favor of the defendant and against

[2] The court further stated that the plaintiff also submitted "receipts and other records of costs expended in this action," totaling $11,386.

[the] plaintiff on the breach of contract count of the complaint. We agree that the court's directive was improper in light of the prior jury verdict in favor of the plaintiff on that count. Guided by the precedent of our Supreme Court, we nonetheless conclude that the court's directive does not constitute reversible error under the facts of this case. . . .

"In the present case, the jury completed interrogatories indicating that it found that the defendant had breached its contract with the plaintiff. . . . Yet those completed interrogatories also demonstrate that the jury never determined the amount of damages sustained by the plaintiff as a result of that breach. Rather, after finding that the plaintiff had waived her breach of contract claim, the jury proceeded to enter a verdict in favor of the defendant. In light of that procedural history, this court explained that, [i]n finding in favor of the plaintiff on her breach of contract claim, the jury essentially has *determined liability* in her favor against [the defendant] and *the remaining determination is damages resulting from that breach*. . . . Put simply, the plaintiff's damages in this case never were determined by the jury.

"Because the jury's verdict in favor of the plaintiff on the breach of contract count was wholly separable from the jury's improper verdict on the special defense of waiver, the court concluded that limiting the remand to a hearing in damages on the breach of contract verdict does not work injustice in this case. . . . The court thus remanded the case for a hearing in damages on the jury's verdict in favor of the plaintiff on her breach of contract claim." (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.) Id., 312–14.

This court went on to state: "Following a hearing at which the plaintiff was afforded ample opportunity to

present evidence relevant to the issues at hand, the [trial] court . . . found that she had not met her burden in demonstrating that the defendant's conduct, in failing to furnish invoices on a biweekly basis and written change orders, caused the diminution of her marital estate as alleged in the operative complaint. . . . The court, therefore, properly declined to award the actual damages claimed by the plaintiff.

"It nevertheless remains that the jury found that the defendant had breached its contract with the plaintiff . . . thereby establishing the liability of the defendant. . . . When a plaintiff can demonstrate a technical breach of contract, but no pecuniary damages resulting therefrom, the plaintiff is entitled to nominal damages . . . under its breach of contract claim. . . . *Because the defendant's liability was established by the jury verdict in favor of the plaintiff on the breach of contract count, the plaintiff was entitled to an award of nominal damages despite her failure to establish actual damages at the hearing in damages. . . . The trial court, therefore, erroneously directed judgment to enter in favor of the defendant in this case.*" (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) Id., 316–17. This court nonetheless concluded that the failure of the trial court to award nominal damages and to render judgment in favor of the plaintiff on her breach of contract count did not constitute *reversible* error and, accordingly, affirmed the trial court's judgment in favor of the defendant. Id., 319. On March 27, 2019, our Supreme Court denied the plaintiff's petition for certification to appeal from the judgment of this court; *Bruno* v. *Whipple*, 331 Conn. 911, 203 A.3d 1245 (2019); and, on May 22, 2019, the court denied the plaintiff's motion for reconsideration en banc of that denial.

At the time of the Supreme Court's denial of the plaintiff's motion for reconsideration en banc, a motion

for attorney's fees, which had been filed by the defendant on March 21, 2017, remained pending before the trial court.[3] On May 29, 2019, the defendant filed a supplemental motion for attorney's fees pursuant to Practice Book § 11-21 (defendant's motion for attorney's fees). In that motion, the defendant adopted and incorporated its March 21, 2017 motion and contended that, because it was the prevailing party in the litigation, it was entitled under the parties' contract[4] to an award of reasonable attorney's fees in the amount of $305,533.75.

On June 21, 2019, the plaintiff filed a motion for attorney's fees with the trial court. In that motion, the plaintiff sought "an award of attorney's fees pursuant to . . . § 42-150bb in the amount of $305,533.75 [i.e., the amount requested by the defendant] or, in the alternative, pursuant to the terms of the contract between the parties . . . an award of attorney's fees and expenses of $92,101 [i.e., the amount that the plaintiff claimed to have incurred]." In support of her motion, the plaintiff appended her own affidavit with accompanying exhibits, comprised of (1) a table detailing her attorney's fees and other costs, (2) a copy of the executed construction contract dated October 28, 2004, and (3) copies of retainer letters from three law firms and one consultant, whom the plaintiff averred worked on her case. On June 28, 2019, the defendant filed an objection to the plaintiff's motion for attorney's fees, contending that the plaintiff was not entitled to attorney's fees because she was not the prevailing party. On July 17,

[3] On March 31, 2017, the plaintiff filed an appeal from the court's February 21, 2017 judgment. On April 13, 2017, the defendant's March 21, 2017 motion for attorney's fees was marked "off."

[4] The parties' contract contains the following attorney's fees provision: "In the event either party shall bring suit on account of any breach of covenant, agreement, or condition here written or in connection with any work to be completed, the prevailing party in such litigation shall be entitled to reasonable attorney's fees, in addition to the amount of the judgment and costs."

2019, the plaintiff filed a reply to the defendant's objection, as well as an objection to the defendant's motion for attorney's fees.

On July 3, 2019, the plaintiff filed a motion to vacate the trial court's February 21, 2017 judgment, which this court had affirmed. See *Bruno* v. *Whipple*, supra, 186 Conn. App. 319. On July 30, 2019, the plaintiff filed an amended motion to vacate. On September 16, 2019, the court, *Brazzel-Massaro*, *J.*, held a hearing on the parties' respective motions for attorney's fees and the plaintiff's amended motion to vacate.

On January 14, 2020, the court issued a memorandum of decision denying the plaintiff's amended motion to vacate. The court explained that the plaintiff's "amended motion to vacate a decision of another Superior Court trial judge is not within this court's authority [and] would result in this court not only usurping the authority of another trial court but more importantly in this case, the appellate courts."

On January 17, 2020, the court issued a memorandum of decision denying (1) the defendant's motion for attorney's fees, and (2) the plaintiff's motion for attorney's fees, including the plaintiff's embedded request for an award of costs. In denying the defendant's motion for attorney's fees, in which the defendant claimed it was the prevailing party, the court explained that, in *Bruno* v. *Whipple*, supra, 186 Conn. App. 299, this court "clearly [found] that the plaintiff is the successful party on the breach of contract provision but the failure to award at a minimum nominal damages was not clearly erroneous so as to reverse the findings on the damages. *This cannot be interpreted in any other way except that the plaintiff prevailed on the breach of contract claim.* Therefore, in accordance with *Yeager* v. *Alvarez*, [134 Conn. App. 112, 38 A.3d 1224 (2012)], the plaintiff is considered as the prevailing party even though the court

determined she was entitled to no more than nominal damages." (Emphasis added.) In denying the plaintiff's motion for attorney's fees, including her embedded request for costs, the court reasoned: "[T]he court cannot award fees which have absolutely no documentation that could follow the twelve *Johnson*[5] factors such as support for the skill level of the counsel; the work performed and by which counsel, on behalf of the client; the hours devoted; the reputation or experience of the counsel performing the work; and the relationship with the client. The support that the plaintiff has submitted for attorney's fees is so lacking in detail that no award can be made for attorney's fees for the plaintiff." With respect to the plaintiff's embedded request for costs, the court stated: "Once again, the plaintiff has failed to include any supporting documentation for those costs that would be permitted pursuant to either the contract interpretation or the statutory cost. The plaintiff has included the costs as part of the motion for attorney's fees and has not submitted a separate bill of costs. The submission for the costs [is] denied." (Footnote omitted.) This appeal and cross appeal followed.[6] Additional facts will be set forth as necessary.

I

We begin by addressing the defendant's claim in its cross appeal that it is the prevailing party—a claim that, if we were to agree, would be dispositive of both the appeal and the cross appeal. On cross appeal, the defendant claims that, because it is the prevailing party, and

[5] *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974).

[6] The plaintiff appealed from the denials of her motion for attorney's fees and her amended motion to vacate. On February 10, 2020, the defendant filed a motion to dismiss, as frivolous, the portion of the plaintiff's appeal taken from the denial of the amended motion to vacate. On April 30, 2020, this court granted the motion to dismiss. The portion of the plaintiff's appeal taken from the denial of her motion for attorney's fees and costs remains before us.

the plaintiff is not, the trial court improperly denied its motion for attorney's fees under the parties' contract. See footnote 4 of this opinion. We disagree.

By way of brief review, in *Bruno* v. *Whipple*, supra, 186 Conn. App. 299, this court concluded that, despite the plaintiff's failure to prove actual damages resulting from the defendant's breach of the parties' contract, it nevertheless remained that the plaintiff had proven a technical breach of contract, which entitled her to nominal damages. Id., 316–17. We then determined that "[t]he trial court, therefore, erroneously directed judgment to enter in favor of the defendant in this case." Id., 317. Adhering to Supreme Court precedent and its progeny in this court, however, and not directly presented with the prevailing party question, we applied the general rule that our appellate courts will not reverse a judgment and grant a new trial for a mere failure to award nominal damages. Id., 318; see, e.g., *Hi-Ho Tower, Inc.* v. *Com-Tronics, Inc.*, 255 Conn. 20, 37, 761 A.2d 1268 (2000); *Riccio* v. *Abate*, 176 Conn. 415, 418–19, 407 A.2d 1005 (1979); *Sessa* v. *Gigliotti*, 165 Conn. 620, 622, 345 A.2d 45 (1973); *Went* v. *Schmidt*, 117 Conn. 257, 259–60, 167 A. 721 (1933). Whereupon we determined that the trial court's failure to award nominal damages and to render judgment in favor of the plaintiff did not constitute *reversible* error. See *Bruno* v. *Whipple*, supra, 319.

Notwithstanding that the judgment entered in its favor *in error*, the defendant maintains that it is the prevailing party for fee-shifting purposes under the parties' contract. It relies on *Yeager* v. *Alvarez*, supra, 134 Conn. App. 123, for the proposition that "[a] prevailing party is one in whose favor a judgment is rendered, regardless of the amount of damages awarded"; (internal quotation marks omitted); as well as *Wallerstein* v. *Stew Leonard's Dairy*, 258 Conn. 299, 303, 780 A.2d 916 (2001), for the following language: "[I]t is difficult to see why one who has secured a judgment of the

court in his favor should not be viewed as a party who has prevailed in the action in question, irrespective of the route by which he received that judgment."

Although these cases stand for the general principle that a prevailing party is one in whose favor judgment is rendered, we conclude that, under the narrow circumstances of this case, the defendant is not the prevailing party for purposes of contractual fee-shifting and an award of costs. "To be a prevailing party does not depend upon the degree of success at different stages of the suit; but upon whether at the end of the suit or other proceeding, the party, who has made a claim against the other, has successfully maintained it. If he has, he is the prevailing party. Ballentine's Law Dictionary (3d Ed. 1969)." (Internal quotation marks omitted.) *Premier Capital, Inc.* v. *Grossman*, 92 Conn. App. 652, 661, 887 A.2d 887 (2005). Although this court determined that the entry of judgment in favor of the defendant on the plaintiff's breach of contract count did not constitute *reversible* error, it remains that the jury found liability on that count in favor of the plaintiff, she was entitled to nominal damages, and entry of judgment in the defendant's favor was in error. See *Russell* v. *Russell*, 91 Conn. App. 619, 631, 882 A.2d 98 ("[a] party need not prevail on all issues to justify a full award of costs, and it has been held that if the prevailing party obtains judgment on even a fraction of the claims advanced, *or is awarded only nominal damages*, the party may nevertheless be regarded as the prevailing party and thus entitled to an award of costs" (emphasis added; internal quotation marks omitted)), cert. denied, 276 Conn. 924, 888 A.2d 92 (2005), and cert. denied, 276 Conn. 925, 888 A.2d 92 (2005).[7] We will not countenance

[7] We also note that, in *Simms* v. *Chaisson*, 277 Conn. 319, 890 A.2d 548 (2006), the plaintiffs were awarded nominal damages and statutory attorney's fees on the plaintiffs' claim of intimidation based on bigotry and bias under General Statutes § 52-571c. Id., 320–21. Our Supreme Court indicated that the defendants had conceded that the plaintiffs had prevailed in the action and that the "concession was appropriate because we previously have

such an error yielding an unintended benefit to the defendant by way of an award of reasonable attorney's fees under these circumstances. Accordingly, we conclude that the court properly denied the defendant's motion for attorney's fees on the ground that the defendant was not the prevailing party.[8]

II

We next turn to the plaintiff's claims in her direct appeal. The plaintiff claims that the trial court erred by failing to award her (1) attorney's fees pursuant to § 42-150bb, and (2) attorney's fees and costs pursuant to the parties' contract. We address each claim in turn.

A

We first address the plaintiff's claim that the court erred by failing to award her attorney's fees pursuant to § 42-150bb in the exact amount of attorney's fees incurred by the defendant, as set forth in the defendant's May 29, 2019 motion for attorney's fees. This claim is without merit.

We begin by setting forth the following relevant principles of law. "The general rule of law known as the

defined a prevailing party as [a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded . . . ." (Emphasis omitted; internal quotation marks omitted.) Id., 325; see also id., 325–26 (citing United States Supreme Court case indicating that party recovering nominal damages nonetheless is prevailing party under 42 U.S.C. § 1988).

[8] In light of the ultimately problematic posture that existed after *Bruno* v. *Whipple*, supra, 186 Conn. App. 299, and to avoid creating confusion for our trial courts, it appears that the better practice would be for our appellate courts to reverse a judgment that erroneously entered in favor of the defending party when the prosecuting party (1) established liability entitling it to, at a minimum, nominal damages but (2) failed to prove actual damages. See, e.g., *McManus* v. *Roggi*, 78 Conn. App. 288, 304, 826 A.2d 1275 (2003) (reversing judgment in part and remanding case with direction to render judgment in favor of defendant and to award nominal damages with respect to trespass claim); id. ("[a]lthough appellate courts ordinarily will not remand a case for the failure to award nominal damages, they have not hesitated in such circumstances simply to direct the trial court to render judgment for the prevailing party for $1 in nominal damages").

American rule is that attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception. . . . This rule is generally followed throughout the country. . . . Connecticut adheres to the American rule. . . . There are few exceptions. For example, a specific contractual term may provide for the recovery of attorney's fees and costs . . . or a statute may confer such rights." (Citations omitted; internal quotation marks omitted.) *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 72–73, 689 A.2d 1097 (1997).

Here, the plaintiff primarily claims that she is entitled to attorney's fees pursuant to § 42-150bb, which we must construe by virtue of the nature of her claim. Because statutory interpretation involves a question of law, our review is plenary.[9] *Bell Atlantic NYNEX Mobile, Inc.* v. *Commissioner of Revenue Services*, 273 Conn. 240, 249, 869 A.2d 611 (2005).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Dish Network, LLC* v. *Commissioner of Revenue Services*, 330 Conn. 280, 291, 193 A.3d 538 (2018).

[9] Because our review is plenary, the fact that the trial court did not squarely address the plaintiff's claim under § 42-150bb is of no moment.

Section 42-150bb provides in relevant part: "Whenever any contract or lease entered into on or after October 1, 1979, to which a consumer is a party, provides for the attorney's fee of the commercial party to be paid by the consumer, an attorney's fee shall be awarded as a matter of law to the consumer who successfully prosecutes or defends an action or a counterclaim based upon the contract or lease. Except as hereinafter provided, the size of the attorney's fee awarded to the consumer shall be based as far as practicable upon the terms governing the size of the fee for the commercial party. . . . For the purposes of this section, 'commercial party' means the seller, creditor, lessor or assignee of any of them, and 'consumer' means the buyer, debtor, lessee or personal representative of any of them. The provisions of this section shall apply only to contracts or leases in which the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes."

To support her claim that the court erred in denying her motion for attorney's fees pursuant to § 42-150bb, the plaintiff exclusively relies on the proposition that the statute entitles her, as the prevailing party, to an award of attorney's fees in the amount of attorney's fees incurred by the *defendant*, as set forth in its motion for attorney's fees, i.e., $305,533.75. She posits that the defendant's request for such an amount constitutes a judicial admission as to the reasonableness of the attorney's fees to which *she* is entitled. The plaintiff takes this position notwithstanding the fact that, in her motion for attorney's fees, she represented that she had incurred attorney's fees and costs in the amount of $92,101. We reject the plaintiff's claim.

As a matter of statutory interpretation, the plaintiff's claim is untenable. Assuming arguendo that § 42-150bb applies to the parties' contract, the statute does not contain language requiring an automatic or presumptive

award of attorney's fees to a successful consumer *in the amount of attorney's fees incurred by the commercial party*. Rather, § 42-150bb provides that "the size of the attorney's fee awarded to the consumer shall be based as far as practicable upon the terms governing the size of the fee for the commercial party." Although § 42-150bb contains language that "an attorney's fee shall be awarded as a matter of law to the consumer who successfully prosecutes or defends an action or a counterclaim based upon the contract or lease," our Supreme Court previously has construed § 42-150bb and held that, by operation of the phrase "the terms governing the size of the fee for the commercial party," a consumer's award of attorney's fees pursuant thereto is limited "by the terms of the consumer contract." *Rizzo Pool Co.* v. *Del Grosso*, supra, 240 Conn. 73. In *Rizzo Pool Co.*, having reached that conclusion, the court turned to the parties' contract, noted that it contained a clause providing for reasonable attorney's fees, and recited the following principles that are relevant to the present appeal: "Where a contract expressly provides for the recovery of attorney's fees, an award under such a clause requires an evidentiary showing of reasonableness. . . . [T]he amount of attorney's fees to be awarded rests in the sound discretion of the trial court and will not be disturbed on appeal unless the trial court has abused its discretion." (Citations omitted; internal quotation marks omitted.) Id., 77–78. Thus, in *Rizzo Pool Co.*, the court made clear that the requirement of an evidentiary showing to support a reasonableness finding applies equally to a party's claim for attorney's fees pursuant to § 42-150bb.[10] See id.

[10] We emphasize that the burden to demonstrate reasonableness that *Rizzo Pool Co.* places on the party seeking attorney's fees under § 42-150bb is not obviated by the following language that appears earlier in the decision: "Under § 42-150bb, the court has no latitude to deny [an award of attorney's fees] to a consumer who successfully defends an action brought against him by a commercial party." *Rizzo Pool Co.* v. *Del Grosso*, supra, 240 Conn. 66. Thus, even though attorney's fees under § 42-150bb, when applicable, are "available . . . by operation of law"; *Meadowbrook Center, Inc.* v. *Buch-*

Here, as stated previously, the parties' contract contains the following attorney's fees provision: "In the event either party shall bring suit on account of any breach of covenant, agreement, or condition here written or in connection with any work to be completed, the prevailing party in such litigation shall be entitled to reasonable attorney's fees, in addition to the amount of the judgment and costs." By its express language, the provision contains the reciprocity that § 42-150bb was designed to achieve. *Rizzo Pool Co.* v. *Del Grosso*, supra, 240 Conn. 74–76. That is, the provision expressly provides that the prevailing party may recover "reasonable attorney's fees"; it does not provide for an automatic or presumptive award of attorney's fees to the plaintiff *in the amount incurred by the defendant* in the event the plaintiff became the prevailing party.

On the basis of the foregoing, the plaintiff's claim that she was entitled to an award of attorney's fees pursuant to § 42-150bb in the amount of attorney's fees incurred by the defendant fails.

B

1

We next address the plaintiff's alternative claim that the court erred by failing to award her attorney's fees pursuant to the parties' contract.[11] Specifically, the plaintiff contends that she satisfied her burden of proof for an award of attorney's fees because she "provided competent evidence [on] which the trial court could have relied . . . to establish an independent basis to

man, 169 Conn. App. 527, 532, 151 A.3d 404 (2016), aff'd, 328 Conn. 586, 181 A.3d 550 (2018); the movant must still satisfy her burden to demonstrate reasonableness. See *Smith* v. *Snyder*, 267 Conn. 456, 471, 839 A.2d 589 (2004) ("although [one of the plaintiffs] was entitled to a discretionary award of reasonable attorney's fees in light of the defendants' liability, it was incumbent upon [that plaintiff] to prove the amount of fees to which it was entitled").

[11] See footnote 4 of this opinion.

determine the reasonableness of the amount of fees ($92,101)" that she claims to have incurred.[12] (Footnote omitted.) We disagree.

We begin by setting forth the relevant standard of review. "It is well established that we review the trial court's decision to award attorney's fees for abuse of discretion. . . . This standard applies to the amount of fees awarded . . . and also to the trial court's determination of the factual predicate justifying the award. . . . Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Citations omitted; internal quotation marks omitted.) *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 252–53, 828 A.2d 64 (2003).

It is well settled that, "[e]ven when a party is entitled to [attorney's fees] by contract or under statute . . .

[12] In her principal appellate brief, the plaintiff also contends that the trial court erred by applying an incorrect legal standard to her motion for attorney's fees, namely, the twelve factors set forth in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974). Arguing that this court "has only ever applied [these factors] to cases involving [the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq.] and this was not such a case," the plaintiff cites our 2012 decision in *Electrical Wholesalers, Inc.* v. *V.P. Electric, Inc.*, 132 Conn. App. 843, 33 A.3d 828, cert. denied, 303 Conn. 939, 37 A.3d 155 (2012), in which we made a statement to that effect and concluded that the trial court did not abuse its discretion by declining to apply the *Johnson* factors to the plaintiff's motion for contractual attorney's fees. Id., 849–50. The plaintiff ignores, however, subsequent cases of this court permitting the application of such factors in contract cases. See, e.g., *Francini* v. *Riggione*, 193 Conn. App. 321, 331, 219 A.3d 452 (2019). In any event, the trial court in the present case never actually applied the *Johnson* factors to the facts of this case. We need not address further this aspect of the plaintiff's claim because we conclude that the court did not err in rejecting the sufficiency of the plaintiff's threshold evidentiary showing.

the party seeking the award of fees must first satisfy a threshold evidentiary showing." *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 327, 63 A.3d 896 (2013). As stated by our Supreme Court in *Smith* v. *Snyder*, 267 Conn. 456, 839 A.2d 589 (2004): "We long have held that there is an undisputed requirement that the reasonableness of attorney's fees and costs must be proven by an *appropriate evidentiary showing*. . . . We also have noted that courts have a general knowledge of what would be reasonable compensation for services which are *fairly stated and described* . . . and that [c]ourts may rely on their general knowledge of what has occurred at the proceedings before them to supply evidence in support of an award of attorney's fees. . . . Even though a court may employ its own general knowledge in assessing the reasonableness of a claim for attorney's fees, we also have emphasized that no award for an attorney's fee may be made when the evidence is insufficient." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 471–72. "[T]o support an award of attorney's fees, there must be a clearly stated and described factual predicate for the fees sought, apart from the trial court's general knowledge of what constitutes a reasonable fee. Although we have been careful not to limit the contours of what particular factual showing may suffice, our case law demonstrates that a threshold evidentiary showing is a prerequisite to an award of attorney's fees." Id., 477. "Accordingly, when a court is presented with a claim for attorney's fees, the proponent must present to the court . . . a statement of the fees requested and a description of the services rendered." Id., 479. "Parties must supply the court with a description of the nature and extent of the fees sought, to which the court may apply its knowledge and experience in determining the reasonableness of the fees requested." Id., 480; see also

Danbury v. *Dana Investment Corp.*, 257 Conn. 48, 57, 776 A.2d 438 (2001) ("no award for [attorney's fees] may be made when the evidence is insufficient" (internal quotation marks omitted)); *Appliances, Inc.* v. *Yost*, 186 Conn. 673, 680, 443 A.2d 486 (1982) ("[o]ur cases require an evidentiary showing of reasonableness where recovery is sought under a contract clause which provides for payment of reasonable attorney's fees" (internal quotation marks omitted)).

In the present case, in denying the plaintiff's motion for attorney's fees, the trial court explained: "In the instant application for fees, the plaintiff has not provided the general information that would permit the court to exercise even the initial calculation of the fees based upon hours and fees per hour. For instance, the plaintiff indicates in exhibit 1 [a self-prepared table appended to her affidavit accompanying her motion for attorney's fees] that the fees for Attorney [John] Williams[13] are $40,000 with the calculation based upon a fee of $400 per hour for the services of Attorney Williams. The only supporting documentation from Attorney Williams is a letter dated July 24, 2008, in which the plaintiff agrees to retain counsel for a fee of $400 per hour for Attorney Williams and $250 per hour for work by any associate. . . . The original retainer is $10,000. . . . There are no records supporting payment by the plaintiff, no records of work performed by Attorney Williams or his associates and no evidence in support of the claim of 100 hours of work at $400 per

[13] In the plaintiff's affidavit, she averred: "Attorney Williams of John Williams and Associates, LLC represented me from October 2008 to May 2010 (1.5 years). I paid an initial retainer of $10,000. The retainer agreement (a true and accurate copy of which is attached as [e]xhibit 3) quotes an hourly rate of $400 per hour. Attorney Williams was involved in writing and filing the complaint (including filing fees) which included reviewing voluminous documents from my divorce action. Attorney Williams was also involved in handling the pleading process, objections to request to revise, motions to strike, etc. I paid Attorney Williams a total of $40,000."

hour. Additionally, the fees noted in the table of fees for Attorney [Christopher G.] Winans[14] and Attorney [James P.] Sexton[15] contain the same difficulties for approval. Neither of the amounts claimed are supported with billing information, and the plaintiff submits retention letters that provide no supporting information of the work completed or background to support the fees requested. . . . This total lack of supporting documentation prohibits this court from determining if the fees should be awarded based upon the [twelve factors set forth in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974)] . . . .

"The plaintiff has argued that the fees are reasonable in comparison to the fees requested by the defendant for this action. However, the court cannot award fees which have absolutely no documentation that could follow the twelve *Johnson* factors . . . . The support that the plaintiff has submitted for attorney's fees is so lacking in detail that no award can be made for attorney's fees for the plaintiff. Thus, the court denies the motion for attorney's fees by the plaintiff." (Citations omitted; footnotes added.)

Upon our careful review of the record, we conclude that the court did not abuse its discretion in denying the plaintiff's motion for attorney's fees. Although the plaintiff provided broad descriptions of the services

[14] In the plaintiff's affidavit, she averred: "Attorney Winans of Christopher G. Winans, P.C. represented me in this matter from May 2010 to March 2011 (approx 1 year). I paid an initial retainer of $2,500. The retainer agreement (a true and accurate copy of which is attached as [e]xhibit 4) quotes an hourly rate of $250. Attorney Winans was heavily involved in the pursuit of discovery in this matter and assisted me with trial preparation. I paid Attorney Winans a total of $20,000."

[15] In the plaintiff's affidavit, she averred: "Attorney Jay Sexton represented me in filing a [p]etition for [c]ertification to the Supreme Court in 2019. I paid Attorney Sexton an initial retainer of $5000. A true and accurate [copy] of the retainer agreement is attached as [e]xhibit 6. I paid Attorney Sexton a total of $11,719."

rendered by each attorney, she did not, for example, provide itemized invoices or submit any affidavits or other testimony from the attorneys to demonstrate with sufficient detail that they had provided particular services. She thus left the trial court to rely solely on her representations in her affidavit, her brief descriptions of the attorney's services, and the retainer letters appended as exhibits. This evidentiary showing renders her motion for attorney's fees little more than "a bare request" for the fees listed. See *Smith* v. *Snyder*, supra, 267 Conn. 480. In sum, we conclude that the court did not abuse its discretion in denying the plaintiff's motion for attorney's fees.

2

We next address the plaintiff's claim that the court erred in denying her request for costs, which was embedded in her motion for attorney's fees. Specifically, the plaintiff argues that the court erred in (1) finding that she provided insufficient supporting documentation to substantiate her request and (2) favoring "form over function" by denying her request on the basis that she did not submit it as a bill of costs. We discern no error.

First, the plaintiff incorrectly argues that the award of "costs" to the prevailing party under the parties' contract is, in her words, "unconditional and unlimited." At the outset, the plaintiff appears to include litigation expenses in her use of the term "costs." Although the parties' contract entitled the prevailing party to the recovery of "costs"; see footnote 4 of this opinion; "costs" and "litigation expenses" are not the same. "The law expects parties to bear their own litigation expenses, except where the legislature has dictated otherwise by way of statute. . . . Costs are the creature of statute . . . and unless the statute clearly provides for them courts cannot tax them." (Internal quotation marks omitted.) *Boczer* v. *Sella*, 113 Conn. App. 339,

343, 966 A.2d 326 (2009); see also *Levesque* v. *Bristol Hospital, Inc.*, 286 Conn. 234, 262, 943 A.2d 430 (2008) ("costs are a creature of statute, and, therefore, a court may not tax a cost unless it is clearly empowered to do so"). "[T]he term 'costs' is a term of art having a limited, well-defined legal meaning as statutory allowances to a prevailing party in a judicial action in order to reimburse him or her for expenses incurred in prosecuting or defending the proceeding. . . . Costs are not synonymous with expenses. Because 'costs' are limited to necessary expenses, they may not include everything that a party spends to achieve victory; rather, the term 'expenses' refers to those expenditures made by a litigant in connection with an action that are normally not recoverable from the opponent but must be borne by the litigant absent a special statute or the exercise of judicial discretion." (Emphasis omitted.) *Yeager* v. *Alvarez*, supra, 134 Conn. App. 121. Relatedly, contrary to the plaintiff's position, the fact that the contract is silent as to what evidentiary burden a prevailing party bears in seeking the recovery of costs does not mean that no such burden exists as a matter of law.

Second, to the extent that the plaintiff relies on Practice Book § 18-5,[16] which establishes the general procedure in connection with a prevailing party's filing of a bill of costs in civil cases, the plaintiff's reliance is misplaced. See *Triangle Contractors, Inc.* v. *Young*, 20 Conn. App. 218, 221, 565 A.2d 262, cert. denied, 213

[16] Practice Book § 18-5 provides in relevant part: "(a) Except as otherwise provided in this section, costs may be taxed by the clerk in civil cases fourteen days after the filing of a written bill of costs provided that no objection is filed. If a written objection is filed within the fourteen day period, notice shall be given to the clerk to all appearing parties of record of the date and time of the clerk's taxation. The parties may appear at such taxation and have the right to be heard by the clerk.

"(b) Either party may move the judicial authority for a review of the taxation by the clerk by filing a motion for review of taxation of costs within twenty days of the issuance of the notice of taxation by the clerk. . . ."

Conn. 810, 568 A.2d 795 (1989) (construing Practice Book § 412 (now § 18-5)). Simply stated, the plaintiff did not file a bill of costs with the court, which would have set into motion the procedure applicable to such a filing. Having failed to file a bill of costs, the plaintiff cannot now complain that the court failed to follow the procedure relating thereto.

Finally, in her principal appellate brief, the plaintiff does not include any analysis as to the costs she was seeking to recover, the authority pursuant to which they are taxable, and how the documentation she submitted to the court was sufficient to support the requested award. See *Boczer* v. *Sella*, supra, 113 Conn. App. 343 ("[c]osts are the creature of statute . . . and unless the statute clearly provides for them courts cannot tax them" (internal quotation marks omitted)). " 'Both this court and our Supreme Court "repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." . . . *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016); see also *Parnoff* v. *Mooney*, 132 Conn. App. 512, 518, 35 A.3d 283 (2011) ("[i]t is not the role of this court to undertake the legal research and analyze the facts in support of a claim or argument when it has not been briefed adequately . . . ."). ' *Seaport Capital Partners, LLC* v. *Speer*, 202 Conn. App. 487, 489–90, 246 A.3d 77, cert. denied, 336 Conn. 942, 250 A.3d 40 (2021); see also Practice Book § 67-4." *Onofrio* v. *Mineri*, 207 Conn.

App. 630, 637, 263 A.3d 857 (2021). As a result, we conclude that this claim is inadequately briefed, and we decline to address it further.

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN DOE ET AL. *v.* BRUCE BEMER ET AL.
(AC 44555)

Moll, Suarez and Vertefeuille, Js.

Syllabus

The plaintiffs, who were allegedly victims of sexual contact with and exploitation by the defendant while they were minors, sought to recover damages from the defendant for, inter alia, assault and battery. Prior to trial, the parties entered into confidential settlement agreements, which included waiver provisions that provided that, in the event of a default by the defendant, the parties consented to the reinstatement of the action to the docket to enforce the agreements and waived any objection to the trial court's continuing jurisdiction beyond four months otherwise proscribed by statute (§ 52-212a). In accordance with the settlement agreements, the plaintiffs withdrew the action in November, 2019. In April, 2020, the defendant failed to make a payment pursuant to the agreements, and the plaintiffs filed a motion to restore the action to the docket. The defendant objected, claiming that his performance was excused due to breaches of the settlement agreements by the plaintiffs and their counsel. The court denied the plaintiffs' motion to restore and, thereafter, denied the plaintiffs' motions for reargument/reconsideration, and the plaintiffs appealed to this court. The trial court thereafter marked off the plaintiffs' motion to enforce the settlement agreements, stayed the proceedings, and denied their motion to reconsider, and the plaintiffs filed an amended appeal. *Held*:

1. The trial court did not abuse its discretion in denying the plaintiffs' motion to restore the case to the docket: although the basis for the court's ruling was ambiguous, as it was not clear whether the court found that it did not have the power to grant the plaintiffs' untimely motion to restore because the plaintiffs failed to demonstrate fraud or whether it exercised its discretion in denying the motion because it determined the matter was not amenable to summary disposition and should be adjudicated in a breach of contract action, the plaintiffs did not seek an articulation of the court's decision and, thus, this court assumed the court acted properly; moreover, contrary to the plaintiffs' claim that the

court ignored the settlement agreements' four month waiver provisions in denying the motion to restore, the court specifically referenced that provision and never found as a predicate to the application of the waiver provisions that the defendant was in default; furthermore, the parties remained free to bring a separate action for breach of contract to address their claims.

2. The trial court did not abuse its discretion in denying the plaintiffs' amended motion to reargue and reconsider its denial of their motion to restore the case to the docket, this court having determination that the trial court properly denied the plaintiffs' motion to restore; the court reasonably could have rejected the plaintiffs' argument that the waiver provisions applied, as both the plaintiffs and the defendant claimed a breach of the agreements by the other and the court had been presented with conflicting evidence and arguments on that issue.

3. The plaintiffs could not prevail on their claim that the trial court improperly failed to hold a hearing in accordance with *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.* (225 Conn. 804), as that case was inapplicable to the facts of this case: as the court did not abuse its discretion in denying the plaintiffs' motion to restore the matter to the docket, its failure to conduct a hearing to make findings as to the enforceability of the settlement agreements was not improper, as the court could not have conducted a hearing on a matter that had been erased from the docket.

4. The plaintiffs could not prevail on their claim that the trial court lacked the authority to refuse to rule on their motion to enforce the settlement agreements; the case had not been restored to the docket and, thus, there was no pending matter in which the plaintiffs properly could file a motion to enforce the settlement agreements.

5. This court declined to review the plaintiffs' claim that the trial court improperly denied their motion to set aside the appellate stay and to order enforcement of the settlement agreements, as this court had denied the relief requested in the plaintiffs' motion for review of the denial of their motion to terminate the appellate stay.

Argued May 16—officially released October 4, 2022

Procedural History

Action to recover damages for, inter alia, assault and battery, and for other relief, brought to the Superior Court in the judicial district of Hartford and transferred to the judicial district of Fairfield, where the action was withdrawn as to the defendant William Trefzger; thereafter, the plaintiffs withdrew the action in accordance with the parties' settlement agreements; subsequently, the court, *Welch, J.*, denied the plaintiffs'

motions to restore the action to the docket and for reargument and reconsideration and their amended motion for reargument and reconsideration, and the named plaintiff et al. appealed to this court; thereafter, the trial court failed to adjudicate the motion of the named plaintiff et al. to enforce the settlement agreements, denied their motion for reconsideration relating to the disposition of their motion to enforce the settlement agreements, and denied their motion to terminate the appellate stay, and the named plaintiff et al. filed an amended appeal. *Affirmed*.

Kevin C. Ferry, with whom, on the brief, was *Monique Foley*, for the appellants (named plaintiff et al.).

Wesley W. Horton, with whom were *Brendon P. Levesque*, and, on the brief, *Ryan P. Barry*, for the appellee (named defendant).

Opinion

SUAREZ, J. The plaintiffs John Doe and Bob Doe,[1] who had brought an action against the defendant Bruce Bemer[2] that had been withdrawn in accordance with settlement agreements of the parties, appeal from the judgment of the trial court denying their motion for an order restoring the action to the docket (motion to restore) and from the court's denials of their motion for reargument and reconsideration and amended motion for reargument and reconsideration. The plaintiffs also filed an amended appeal challenging the court's failure to adjudicate and marking off their motion to enforce the settlement agreements, its denial

[1] Adam Doe also was a plaintiff at trial but is not involved in this appeal. In this opinion, we refer to John Doe and Bob Doe collectively as the plaintiffs or individually by the pseudonyms designated in the amended complaint and as ordered by the court. See Practice Book § 11-20A (h).

[2] William Trefzger also was named as a defendant, but the action subsequently was withdrawn as against him. Therefore, our references in this opinion to the defendant are to Bemer.

of their motion for reconsideration relating to the disposition of their motion to enforce the settlement agreements, and the denial of their motion to terminate an appellate stay. On appeal, the plaintiffs claim that (1) the denial of their motion to restore constituted harmful error, (2) the denial of their motion to reconsider the denial of their motion to restore was clearly erroneous, (3) the hearing on their motion to restore was inadequate and the court improperly failed to hold a hearing "with testimony from witnesses regarding the enforceability of the agreements" in accordance with *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 626 A.2d 729 (1993) (*Audubon*), (4) the court did not have the authority to refuse to rule on the plaintiffs' motion to enforce the settlement agreements, and (5) the court improperly refused to grant their motion to terminate an appellate stay and to order enforcement of the settlement agreements. We disagree with the plaintiffs and affirm the judgment of the court.

The following facts and procedural history are relevant to our resolution of the plaintiffs' claims on appeal. On April 27, 2017, the plaintiffs commenced an action against the defendant in connection with the defendant's alleged sexual contact with and exploitation of the plaintiffs while they were minors. In an amended complaint, the plaintiffs alleged claims against the defendant for assault and battery, reckless and wanton conduct, and intentional infliction of emotional distress. Their case was one of nine cases against the defendant that had been consolidated.

The parties subsequently entered into confidential settlement agreements. Those agreements contained similar confidentiality clauses that required the parties not to "disclose or cause to be disclosed any of the terms of [the] [s]ettlement [a]greement, directly or indirectly . . . ." Each agreement also contained a clause

titled "Consent to Reinstate Action to the Docket" (waiver provisions). The waiver provisions provided in relevant part: "In the event of a default by [the defendant] the parties hereto consent to the reinstatement of the civil action to the [c]ourt's [d]ocket solely for purposes of enforcing this [s]ettlement [a]greement against the defaulting party and the entry of the [j]udgment under the terms indicated above. The parties hereby waive any and all objection to the [c]ourt's continuing jurisdiction pursuant to [Practice Book] § 17-4 and [General Statutes (Rev. to 2019)] § 52-212a[3] and otherwise waive any objection based upon the four month limitation otherwise prescribed by the [r]ules of [p]ractice and the . . . [s]tatutes, solely for the purposes of entry of the stipulated judgment." (Footnote added.)

In light of the settlement agreements, on November 15, 2019, the plaintiffs filed a withdrawal of the action, which indicated that they were withdrawing the action "as to all defendants without costs to any party." Thereafter, on November 20, 2019, the defendant filed a motion to file documents under seal, which was granted by the court in an order dated December 9, 2019. That same day, the court issued the following order: "As this case has been reported settled, case flow is directed to place this case on the settled but not withdrawn list for May 1, 2020."

On April 27, 2020, after the defendant failed to make a second payment pursuant to the settlement agreements, the plaintiffs filed the motion to restore that is the subject of this appeal, asking the court to restore the matter to the docket. According to the plaintiffs, the December 9, 2019 order of the court placing the "case on the settled but not withdrawn list" rescinded their

[3] Our references in this opinion to § 52-212a are to the 2019 revision of the statute.

prior withdrawal of the action and "ordered this matter as still pending, with the matter currently scheduled to be withdrawn on or about May 1, 2020." (Emphasis omitted.) The plaintiffs, thus, argued, on the one hand, that the matter was still pending and, on the other hand, that it should be restored to the docket.

The defendant filed an objection to the motion to restore in which he explained that the second payment was not made as a result of breaches of the settlement agreements. Specifically, the defendant claimed that the plaintiffs' counsel breached the settlement agreement pertaining to John Doe by publicizing certain information about the agreement on counsel's website and that Bob Doe breached his settlement agreement with the defendant by disclosing the settlement to his real estate attorney. For that reason, the defendant claimed, his performance under the settlement agreements was excused and, thus, he was not in default. The defendant also argued that, pursuant to § 52-212a, the court lacked jurisdiction to restore the case to the docket because the motion to restore was filed more than four months after the case was withdrawn, and that the court could not have placed the case on the settled but not withdrawn docket in December, 2019, when the case already had been withdrawn in November, 2019. In response to the defendant's jurisdictional argument, the plaintiffs argued that, pursuant to the waiver provisions in the agreements, the parties expressly had waived the four month requirement of § 52-212a in the case of a default by the defendant.

A remote hearing on the motion to restore and the objection thereto was held on October 5, 2020. The court commenced the hearing by asking counsel for the parties whether, based on the exhibits[4] that were

[4] The settlement agreements entered into by the parties were admitted as exhibits at the hearing.

filed, they agreed that there were settlement agreements filed and signed by all parties, to which each counsel responded in the affirmative. At the hearing and in their subsequent posttrial motions, the parties accused each other of having breached the settlement agreements. The plaintiffs allegedly breached due to the online publication of information concerning the settlement of John Doe's case by his attorney in January, 2020, and because of a disclosure made by Bob Doe to his real estate attorney. The defendant allegedly breached as a result of certain documents filed by his attorney with the court after the settlements had become effective, including a case flow request filed on November 9, 2019, which indicated that the matter had settled.

In an order dated December 30, 2020, the court rendered judgment denying the plaintiffs' motion to restore. After citing case law concerning the finality of withdrawals, the four month time limitation for filing motions to restore a case to the docket under § 52-212a, and the power of a court to vacate or open a judgment beyond the four month period when the judgment is obtained by fraud, duress, or mutual mistake, the court stated: "The court has carefully reviewed the pleadings, memoranda, exhibits, and the transcript of the remote hearing. The court finds that the parties entered into private mediation and, as a result of the mediation, agreed to resolve all issues [that] were the subject of this litigation. The parties executed thorough and extensive agreements outlining the parties' rights and obligations. As a result of the private mediation and the execution of the agreements, the plaintiffs filed a withdrawal of the action. The court finds that the defendant's motion to seal [the] file shortly after the withdrawal or the court's order dated December 9, 2019, did not restore the case to the court's docket. '"[T]he motion to restore a case to the docket is the vehicle to open a withdrawal

. . . .'" *Law Offices of Frank N. Peluso, P.C.* v. *Cotrone*, 178 Conn. App. 415, 421, 175 A.3d 613 (2017). As to the plaintiffs' motion to restore, the parties have argued extensively that the parties entered into certain agreements. The plaintiffs and the defendant each claim that the other has materially breached the agreement[s] in various ways. Each party claims a breach of contract." The court concluded that it had not been provided with a legal basis on which it could restore the case to the docket.

On January 19, 2021, the plaintiffs filed a motion for reargument and reconsideration of the denial of their motion to restore, claiming that the court misapprehended the pertinent facts and overlooked principles of law in denying the motion to restore. On that same day, the plaintiffs also filed a motion to enforce the settlement agreements and for the court to render judgment in accordance with the terms of those agreements.

The plaintiffs' January 19, 2021 motion for reargument and reconsideration of the denial of the motion to restore was denied by the court without explanation by an order dated February 16, 2021. Prior to that ruling, the plaintiffs had filed an amended motion for reargument and reconsideration to correct a scrivener's error in their first motion for reargument and reconsideration. In an order dated February 22, 2021, the court addressed the second motion, stating: "The motion for reargument/reconsideration was denied on [February 16, 2021]. See [prior] order . . . ." Thereafter, on February 25, 2021, the plaintiffs filed an appeal with this court challenging the denial of their motion to restore, as well as the denials of their motions for reargument and reconsideration.

The trial court subsequently issued two orders related to the plaintiffs' motion to enforce the settlement agreements. In an order dated March 2, 2021, the court stated:

"The court has been advised that an appeal has been filed in this matter. . . . Accordingly, the motion which was marked take the papers on [February 1, 2021] is marked off." In an order dated March 15, 2021, the court stated: "The plaintiff[s] marked the motion for [an] order [to enforce the settlement agreements] . . . 'take papers' on the March 12, 2021 short calendar. . . . Pursuant to Practice Book § 61-11, '[i]f an appeal is filed, such proceedings shall be stayed until the final determination of the cause.' " On March 5, 2021, the plaintiffs also filed a motion for reconsideration of the court's order marking off their motion to enforce the settlement agreements and failing to adjudicate the motion, which the court denied in a similar order explaining that the proceedings had been stayed in light of the pending appeal. Thereafter, on March 23, 2021, the plaintiffs filed a motion for termination of the appellate stay, which the court denied. On April 5, 2021, they filed an amended appeal challenging the court's failure to adjudicate their motion for an order to enforce the settlement agreements, their motion for reconsideration thereof, and the court's denial of their motion to terminate the appellate stay. Additional facts and procedural history will be set forth as necessary.

I

The plaintiffs' first claim on appeal concerns the court's denial of their motion to restore the case to the docket. Specifically, the plaintiffs claim that the denial of their motion to restore constituted harmful error, and they raise a number of arguments in support of that claim. Before we reach the merits of those arguments, we first set forth our standard of review of the trial court's denial of the motion to restore and general principles governing such motions.

"This court has stated previously that [t]he question of whether a case should be restored to the docket is

one of judicial discretion[5] . . . therefore, we review a court's denial of a motion to restore a case to the docket for abuse of that discretion. . . . Discretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . Inherent in the concept of judicial discretion is the idea of choice and a determination between competing considerations. . . . A court's discretion must be informed by the policies that the relevant statute is intended to advance. . . . When reviewing claims under an abuse of discretion standard, the unquestioned rule is that great weight is due to the action of the trial court. . . . Under that standard, we must make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Citations omitted; footnote added; internal quotation marks omitted.) *Palumbo* v. *Barbadimos*, 163 Conn. App. 100, 110–11, 134 A.3d 696 (2016).

"The right of a plaintiff to withdraw his action before a hearing on the merits, as allowed by [General Statutes] § 52-80, is absolute and unconditional. Under [the] law, the effect of a withdrawal, so far as the pendency of

[5] In their brief, the plaintiffs cite this principle—that the question of restoring a case to the docket is one of judicial discretion—but then cite the clearly erroneous and plenary standards of review and argue that, because no findings of fact were made by the trial court, our review of the court's denial of their motion to restore is plenary. The plaintiffs are incorrect in this assertion, as it is well established that an abuse of discretion standard applies to a trial court's decision granting or denying a motion to restore. See *Palumbo* v. *Barbadimos*, 163 Conn. App. 100, 110, 134 A.3d 696 (2016); *Banziruk* v. *Banziruk*, 154 Conn. App. 605, 611, 109 A.3d 494 (2015); *Travelers Property Casualty Co. of America* v. *Twine*, 120 Conn. App. 823, 826, 993 A.2d 470 (2010); *Chartouni* v. *DeJesus*, 107 Conn. App. 127, 128, 944 A.2d 393, cert. denied, 288 Conn. 902, 952 A.2d 809 (2008).

the action is concerned, is strictly analogous to that presented after the rendition of a final judgment or the erasure of the case from the docket. . . . The court unless [the action] is restored to the docket cannot proceed with it further . . . . [I]f the parties should stipulate that despite the withdrawal the case should continue on the docket, or if it should be restored on motion of the plaintiff and the defendant should thereafter expressly or by implication waive any claim of lack of jurisdiction, the court could properly proceed with it." (Citation omitted; internal quotation marks omitted.) *Daigneault* v. *Consolidated Controls Corp./Eaton Corp.*, 89 Conn. App. 712, 714–15, 875 A.2d 46, cert. denied, 276 Conn. 913, 888 A.2d 83 (2005), cert. denied, 546 U.S. 1217, 126 S. Ct. 1434, 164 L. Ed. 2d 137 (2006).

A "motion to restore a case to the docket is the vehicle to open a withdrawal, while the motion to open is the vehicle to open judgments." (Internal quotation marks omitted.) *Law Offices of Frank N. Peluso, P.C.* v. *Cotrone*, supra, 178 Conn. App. 421. Pursuant to § 52-212a, a civil judgment may be opened or set aside only within four months of the date of the judgment, unless the parties waive the four month provision. That statute "is applicable not only to the opening of a case that has proceeded to judgment but also to the restoration of a withdrawn case. . . . Accordingly, a motion to restore a withdrawn case is seasonable only if it is filed within four months of the withdrawal." (Citation omitted; internal quotation marks omitted.) Id., 422. "It is [also] well established that [a] judgment rendered may be opened after the four month limitation . . . if it is shown that the judgment was obtained by fraud, in the absence of actual consent, or because of mutual mistake. . . . [Because] [t]his court has concluded that withdrawals are analogous to final judgments . . . § 52-212a and its exceptions for fraud, lack of actual

consent and mutual mistake apply to restoring cases to the docket as well as to opening final judgments." (Citations omitted; internal quotation marks omitted.) *Davis* v. *Hebert*, 105 Conn. App. 736, 740, 939 A.2d 625 (2008).

With these principles in mind, we turn to the court's decision denying the plaintiffs' motion to restore. In its decision, the court thoroughly outlined the arguments raised by the parties in relation to the motion to restore, including the plaintiffs' claim that the parties explicitly had "agreed to reserve the court's jurisdiction past the usual four month period in case of a default by the defendant." The court stated that it "carefully reviewed the pleadings, memoranda, exhibits, and the transcript of the remote hearing," at which the plaintiffs also argued that the defendant had engaged in fraudulent conduct following the settlements. After explaining the procedural posture of the case, including the private mediation entered into by the parties, the thorough and extensive settlement agreements executed by them, and the plaintiffs' withdrawal of the action, the court found that, with respect to the motion to restore, "[t]he plaintiffs and the defendant each claim[ed] that the other [had] materially breached the agreement[s] in numerous ways." It concluded that it had not been provided with a legal basis on which to restore the case to the docket and denied the motion to restore.

Affording every reasonable presumption in favor of upholding the court's ruling, we cannot conclude that the court abused its discretion in denying the plaintiffs' motion to restore. We first note that the basis for the court's ruling is ambiguous. The court set forth the relevant law concerning withdrawals and motions to restore, including the four month period under § 52-212a in which a motion to restore must be filed to be seasonable, the fact that restoring a case to the docket is a matter of judicial discretion, and the court's power

to open any judgment after the four month period that has been obtained by fraud, duress, or mutual mistake. Thereafter, the court concluded that it had not been provided with a basis on which to open the judgment. It is not entirely clear from that statement whether the court found that it did not have the power to grant the untimely motion to restore because the plaintiffs had failed to demonstrate fraud[6] by the defendant or whether the court simply exercised its discretion in denying the motion because it determined that the matter was not amenable to summary disposition and should be adjudicated in a breach of contract action.

[6] In their appellate brief, the plaintiffs argue that "[t]he defendant's fraudulent tactics . . . afforded the trial court the ability to restore the case to the docket." In their motion to restore, the plaintiffs did not seek to restore the case to the docket on the basis of fraud, nor did they raise the issue of fraud in their posthearing memorandum. At the October 5, 2020 hearing, the plaintiffs' counsel made one reference to fraud, arguing, in a conclusory fashion, that the conduct of the defendant in asking the plaintiffs to consent to the release of a prejudgment remedy "securing . . . payment [to the plaintiffs] knowing that they weren't going to pay [the plaintiffs]" constituted fraud. In its decision denying the motion to restore, the court did not address the issue of fraud beyond noting the general rule that a judgment may be opened beyond the four month period when it is obtained by fraud, duress, or mutual mistake.

One of the grounds raised by the plaintiffs in their motion for reargument and reconsideration was that the court had failed to address the issue of fraud in its decision. On the basis of the limited record before us, it is not clear that the plaintiffs placed the issue of fraud squarely before the court. Inasmuch as the plaintiffs raised the issue distinctly in the motion for reargument and reconsideration, we observe that the purpose of such a motion is not to assert newly raised claims. "Motions for reargument and motions for reconsideration are nearly identical in purpose. [T]he purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . A reconsideration implies reexamination and possibly a different decision by the [court] which initially decided it. . . . [A] reconsideration hearing involves consideration of the trial evidence in light of outside factors such as new law, a miscalculation or a misapplication of the law. . . . [Reargument] also may be used to address alleged inconsistencies in the trial court's memorandum of decision as well as claims of law that the [movant] claimed were not addressed by the court. . . . [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple or to present additional cases or briefs which could have been presented at the time of the original argument." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Antonio A.* v. *Commissioner of Correction*, 205 Conn. App. 46, 74–75, 256 A.3d 684, cert. denied, 339 Conn. 909, 261 A.3d 744 (2021). In light of the foregoing, we cannot say that the court abused

"As a general matter, it is incumbent on the appellant to provide an adequate record for review. See Practice Book § 61-10; *Gladstone, Schwartz, Baroff & Blum* v. *Hovhannissian*, 53 Conn. App. 122, 127, 728 A.2d 1140 (1999). To the extent that the court's decision is ambiguous . . . it was [the appellant's] responsibility to seek to have it clarified." (Internal quotation marks omitted.) *DiRienzo Mechanical Contractors, Inc.* v. *Salce Contracting Associates, Inc.*, 122 Conn. App. 163, 169, 998 A.2d 820, cert. denied, 298 Conn. 910, 4 A.3d 831 (2010). "[O]ur appellate courts often have recited, in a variety of contexts, that, in the face of an ambiguous or incomplete record, we will presume, *in the absence of an articulation*, a trial court acted correctly, meaning that it undertook a proper analysis of the law and made whatever findings of the facts were necessary. See, e.g., *Bell Food Services, Inc.* v. *Sherbacow*, 217 Conn. 476, 482, 586 A.2d 1157 (1991) ([if] an appellant has failed to avail himself of the full panoply of articulation and review procedures, and absent some indication to the contrary, we ordinarily read a record to support, rather than to contradict, a trial court's judgment)." (Emphasis in original; internal quotation marks omitted.) *Zaniewski* v. *Zaniewski*, 190 Conn. App. 386, 396–97, 210 A.3d 620 (2019). In the present case, the plaintiffs did not seek an articulation of the court's decision. Thus, in the absence of a motion for articulation, we assume that the court acted properly. See *Fitzgerald* v. *Fitzgerald*, 61 Conn. App. 162, 164, 763 A.2d 669 (2000).[7]

its discretion by failing to conclude that the motion to restore should be granted because of any allegedly fraudulent conduct of the defendant.

[7] Similarly, in *Stamford* v. *Ten Rugby Street, LLC*, 164 Conn. App. 49, 55 n.5, 137 A.3d 781, cert. denied, 321 Conn. 923, 138 A.3d 284 (2016), this court held: "Pursuant to Practice Book § 61-10 (b), 'this court will not decline to review a claim on appeal solely on the basis of a party's failure to seek an articulation.' . . . This court has previously stated that this section does not absolve a defendant of that defendant's duty to preserve the record or prevent the court from declining to review a claim where the record is inadequate for reasons other than the failure to seek an articulation. . . . As we stated in *Gordon* v. *Gordon*, 148 Conn. App. 59, 67–68, 84 A.3d 923

The plaintiffs' primary argument[8] challenging the court's denial of their motion to restore is that the court "improperly ignored the clear and unambiguous waiver of the four month rule contained in the settlement agreements, which enabled it to restore the case to the docket." That argument fails for two reasons. First, the court specifically referenced that claim in its decision denying the motion to restore. Given the court's finding

(2014), '[t]he record contains no findings by the court with regard to the defendant's claim. . . . Cognizant that we must make every reasonable presumption in favor of the correctness of the court's decision . . . we are left to conclude on the basis of our review of the limited record provided that the court acted reasonably . . . .' " (Citations omitted.)

[8] The plaintiffs also argue that the present case is akin to *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 192, 884 A.2d 981 (2005), in which our Supreme Court addressed the question of whether this court "properly conclude[d] that the four month limitation period of § 52-212a deprived the trial court of the authority to restore the withdrawn cases to the docket . . . ?" In concluding that the trial court had such authority under the circumstances of that case, our Supreme Court stated: "We conclude that § 52-212a did not preclude the trial court from restoring the withdrawn cases to the docket because the court had continuing jurisdiction over those cases for the limited purpose of adjudicating [a] claim regarding . . . sealed documents." Id., 211. In making its decision, the court relied, in part, on the well settled rule "that a trial court retains the power to modify or lift a protective order that it has entered." (Internal quotation marks omitted.) Id., 214. As the court explained: "Because protective orders operate like injunctions and have the same purpose and effect, and because courts have inherent power to revisit protective orders or injunctions when a change in circumstances or pertinent law makes it equitable to do so, we see no reason why a protective order that remains in effect more than four months after judgment or withdrawal should be treated any differently, for purposes of § 52-212a, than an injunction that survives that four month period. We conclude, therefore, that, just as a court has continuing jurisdiction to vacate or to modify an injunction after the four month limitation period of § 52-212a has expired, so, too, does a court have continuing jurisdiction to vacate or to modify a protective order after the expiration of that limitation period." Id., 215–16. *Rosado* is clearly distinguishable from the present case, which does not involve an injunction, protective order, or other order that is equitable in nature. Moreover, the continuing jurisdiction of the trial court in *Rosado* was for the limited purpose of adjudicating a certain claim. Although the plaintiffs in the present case claim that the trial court had continuing jurisdiction because a prejudgment remedy was still in effect, that does not translate into authority to adjudicate any claim related to the settlement agreements. We, therefore, reject the plaintiffs' attempt to analogize the present case to *Rosado*.

that the parties each were claiming breaches of the settlement agreements, the court reasonably could have concluded that the plaintiffs failed to demonstrate the applicability of the waiver provisions in the settlement agreements when it stated that it had not been provided with a basis on which to restore the case to the docket. That is also evident from the fact that the court never found that the defendant was in default, which is a necessary predicate for the waiver provisions to apply.

Moreover, the problem with the plaintiffs' argument is that it assumes the applicability of the waiver provisions, namely, that the defendant breached or was in default of the settlement agreements. The issue of whether the waiver provisions applied, however, is far from settled. If, as the defendant claims, the plaintiffs, through their attorney and through Bob Doe's communication with his real estate agent, breached the confidentiality provisions of the agreements and if that occurred prior to the defendant's nonpayment and other claimed breaches of the agreements, the defendant may have been relieved of his obligations under the agreements. In turn, if the defendant was not in default, the waiver provisions of those agreements would not apply to excuse the plaintiffs' filing of the motion to restore beyond the statutory four month period. The court found that "[e]ach party claims a breach of contract," and this finding is clearly supported by the record. The issue of whether the actions of the plaintiffs' attorney and Bob Doe violated the confidentiality provisions of the agreements, which will require a careful examination of the settlement agreements and a determination of, inter alia, whether counsel was bound by the confidentiality provision[9] of John Doe's agreement or

[9] The issue of whether the plaintiffs' counsel was bound by John Doe's settlement agreement with the defendant stems from the fact that the plaintiffs' attorney had signed the agreement. Above his signature line it reads, "Approved as to Form and Agreed as to Paragraph 9." Paragraph 9 of the agreement provides in relevant part that, by executing the settlement agreement, the plaintiffs' counsel represented that there were "no other

whether his actions constituted a violation under an agency theory, is complex. Accordingly, we cannot conclude on the record before us that the court acted in clear abuse of its discretion in denying the motion to restore.[10] The parties are free to bring a separate action for breach of contract to address their claims.

II

The plaintiffs next claim that the court improperly denied their amended motion for reargument and reconsideration[11] of the denial of their motion to restore. We disagree.

We first set forth our standard of review for this claim. "[I]n reviewing a court's ruling on a motion to open, reargue, vacate or reconsider, we ask only whether the court acted unreasonably or in clear abuse of its discretion. . . . When reviewing a decision for an abuse of discretion, every reasonable presumption should be given in favor of its correctness. . . . As

persons or entities having any interest in the [s]ettlement amount." At the October 5, 2020 hearing, the defendant's counsel argued that the online posting by the plaintiffs' counsel constituted a breach because counsel "was bound in his right" and as an agent of the plaintiff. The plaintiffs' counsel countered that he "signed as to form and as to paragraph 9 only," and, thus, that he was not a party to or bound by the agreement, except with respect to paragraph 9.

[10] We also find unavailing the plaintiffs' claim that "the trial court was never without jurisdiction . . . ." The plaintiffs base that claim on the trial court's order of December 9, 2019, placing the case "on the settled but not withdrawn list for May 1, 2020." According to the plaintiffs, the court had continuing jurisdiction until May 1, 2020. We are not persuaded. The trial court found that the December 9, 2019 order did not restore the case to the docket, and we agree with that finding, as the action already had been withdrawn on November 15, 2019, prior to the issuance of that order. See generally *Law Offices of Frank N. Peluso, P.C.* v. *Cotrone*, supra, 178 Conn. App. 423–24.

[11] We note that the plaintiffs' amended motion for reargument and reconsideration corrected a scrivener's error in their original motion for reargument and reconsideration and was identical to the original motion in all other material respects. For simplicity, we refer to the amended motion for reargument and reconsideration in addressing this claim.

with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did." (Internal quotation marks omitted.) *First Niagara Bank, N.A.* v. *Pouncey*, 204 Conn. App. 433, 440, 253 A.3d 524 (2021); see also footnote 6 of this opinion.

The court summarily denied the plaintiffs' amended motion for reargument and reconsideration,[12] and the plaintiffs did not seek an articulation of the basis of the court's decision. The plaintiffs argue that the court overlooked and ignored the language of the waiver provisions in the settlement agreements. We are not persuaded.

In its decision denying the motion to restore, the court specifically referenced the plaintiffs' argument regarding the applicability of the waiver provisions in the case of a default by the defendant, found that the plaintiffs and the defendant each were claiming breaches of the settlement agreements by the other, and concluded that it had not been provided with a basis on which to restore the case to the docket. On the basis of its findings, the court reasonably could have rejected the plaintiffs' argument that the waiver provisions applied, especially when each side was claiming a breach by the other and the court had been presented with conflicting evidence and arguments on that issue. In light of our determination that the court properly denied the plaintiffs' motion to restore, the court did not abuse its discretion in denying the plaintiffs' amended motion to reargue and reconsider that decision. See *LendingHome Marketplace, LLC* v. *Traditions Oil Group, LLC*, 209 Conn. App. 862, 873, 269 A.3d 195 (2022) ("[b]ecause there was no error in the court's ruling [denying a motion to open], we also conclude that the court did not abuse its discretion in

[12] The court also summarily denied their original motion for reargument and reconsideration.

denying the defendant's motion to reargue/reconsider").

III

The plaintiffs' next claim is that the court improperly failed to hold a hearing in accordance with *Audubon*. We conclude that *Audubon* is not applicable to the facts of this case.

We first set forth our standard of review for this claim. "Whether *Audubon* applies is a pure question of law to which we apply plenary review. See *Gershon* v. *Back*, 201 Conn. App. 225, 244, 242 A.3d 481 (2020) ('[t]he plenary standard of review applies to questions of law'), cert. granted, 337 Conn. 901, 252 A.3d 364 (2021); *Matos v. Ortiz*, [166 Conn. App. 775, 791, 144 A.3d 425 (2016)] (explaining that whether *Audubon* applies is 'a pure question of law')." *Kinity* v. *US Bancorp*, 212 Conn. App. 791, 815, 277 A.3d 200 (2022).

In their appellate brief, the plaintiffs argue that they were present at the hearing on October 5, 2020, and ready to provide "testimony[13] regarding the agreements and the nature and extent of the claimed breaches" but that the court improperly failed or refused "to hold a hearing to address the sum and substance of the agreements and their enforceability. . . . [T]he court only addressed the first part of *Audubon*. Specifically, the court, in its written decision, acknowledges that the parties unequivocally agree that there was an agreement . . . and that the terms were clear and unambiguous . . . but it never addresse[d] the second part relative to the enforceability of the agreement. Under *Audubon*, the court should have held a hearing, with testimony and evidence to address the enforceability of the agreement[s]. In this case, the trial court indicated

[13] Our review of the transcript of the October 5, 2020 hearing demonstrates that the plaintiffs' counsel never requested to be able to present testimony from any witnesses.

that it was taking the papers on [the] plaintiffs' motion to restore the case to the docket." (Footnote added.) They expand on this argument further in their appellate reply brief, stating: "Nowhere in *Audubon* does it stand for the proposition . . . that 'where there are other breach claims being made by both sides' . . . the case cannot be restored to the docket or summary enforcement [cannot] take place. . . . Here, the trial court noted that each party claimed that the other party breached the terms. As such . . . the parties in this case were entitled not only to an *Audubon* hearing, but restoration to the docket as well as summary enforcement." The plaintiffs are mistaken in their assertion that *Audubon* applies to the restoration of a case to the docket.

This court recently addressed the purpose of an *Audubon* hearing in *Kinity* v. *US Bancorp*, supra, 212 Conn. App. 791, stating: "In *Audubon*, our Supreme Court shaped a procedure by which a trial court could summarily enforce a settlement agreement to settle litigation. . . . The court held that 'a trial court may summarily enforce a settlement agreement within the framework of the original lawsuit as a matter of law when the parties do not dispute the terms of the agreement.' " (Citation omitted; emphasis omitted.) Id., 815; see also *Reiner* v. *Reiner*, 190 Conn. App. 268, 270 n.3, 210 A.3d 668 (2019) ("[a] hearing pursuant to *Audubon* . . . is conducted to decide whether the terms of a settlement agreement are sufficiently clear and unambiguous so as to be enforceable as a matter of law" (citation omitted; internal quotation marks omitted)). In *Reiner* v. *Reiner*, supra, 268, we further stated: "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. . . . Agreements that end lawsuits are contracts, sometimes enforceable in a subsequent suit, but in many situations

enforceable by entry of a judgment in the original suit. . . . Summary enforcement is not only essential to the efficient use of judicial resources, but also preserves the integrity of settlement as a meaningful way to resolve legal disputes. When parties agree to settle a case, they are effectively contracting for the right to avoid a trial. . . . Nevertheless, the right to enforce summarily a settlement agreement is not unbounded. The key element with regard to the settlement agreement in *Audubon* . . . [was] that there [was] no factual dispute as to the terms of the accord. Generally, [a] trial court has the inherent power to enforce summarily a settlement agreement as a matter of law [only] when the terms of the agreement are clear and unambiguous . . . and when the parties do not dispute the terms of the agreement."[14] (Citations omitted; internal quotation marks omitted.) Id., 276–77. An *Audubon* hearing typically follows a party's filing of a motion to enforce a settlement agreement, and the hearing is conducted to determine whether the agreement is sufficiently clear and unambiguous to be summarily enforced. See id., 273.

In *Audubon*, after the parties had reached a settlement agreement and the action had been withdrawn, the defendant failed to abide by the terms of the agreement, which prompted the plaintiff to seek to restore the case to the docket by filing a timely motion to open. *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, supra, 225 Conn. 806–807. The trial court granted the motion to open and ordered jury selection to begin on a subsequent date. Id., 807. Thereafter, the plaintiff filed a motion for judgment in accordance with

[14] Notably, in the present case, the parties disagree as to whether the plaintiffs' counsel is bound by and violated the confidentiality provision of John Doe's settlement agreement and as to whether the actions of Bob Doe violated the confidentiality provision of his settlement agreement with the defendant.

and enforcement of the settlement agreement, and the court, following a hearing, rendered judgment against the defendants in accordance with the settlement agreement. Id. Likewise, in *Reiner*, the plaintiff withdrew his action after the parties reached a settlement agreement. *Reiner* v. *Reiner*, supra, 190 Conn. App. 273. Subsequently, the plaintiff filed a timely motion to restore the case to the docket, which was granted, and the defendant filed a motion to enforce the settlement agreement. Id. Following an *Audubon* hearing, the court denied the defendant's motion to enforce the agreement, concluding that "the agreement was clear and unambiguous in conformance with the plaintiff's interpretation." Id., 275. On appeal, this court reversed the judgment of the trial court on the ground that the agreement could not be enforced summarily because it was not clear and unambiguous. Id., 283–84.

The key difference between *Reiner* and the present case is that, in *Reiner*, the action had been restored to the docket within the four month period of § 52-212a prior to when an *Audubon* hearing was held. That is, there was a pending case on the docket in which an *Audubon* hearing could be held. Similarly, in *Audubon*, the action had been timely restored to the docket before the court summarily enforced the settlement agreement. *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, supra, 225 Conn. 807. In the present case, the court denied the plaintiffs' motion to restore, which we already have determined was not an abuse of discretion. The issue before the court in deciding whether to grant or to deny the motion to restore was whether the matter could or should be restored to the docket, not whether the terms of the settlement agreements were "sufficiently clear and unambiguous so as to be enforceable as a matter of law." (Internal quotation marks omitted.) *Reiner* v. *Reiner*, supra, 190 Conn. App. 270 n.3. Because the

issue in an *Audubon* hearing—the enforceability of a settlement agreement— is entirely separate from and unrelated to the restoration of a case to the docket, the court's failure to conduct an *Audubon* hearing in relation to the plaintiffs' motion to restore and to make findings regarding the enforceability of the settlement agreements was not improper.

Moreover, as we have stated previously in this opinion, unless an action has been restored to the docket, a court cannot proceed with it further. See *Palumbo* v. *Barbadimos*, supra, 163 Conn. App. 111; see also *Law Offices of Frank N. Peluso, P.C.* v. *Cotrone*, supra, 178 Conn. App. 421 (effect of withdrawal of action is analogous to erasure of case from docket). To the extent that the plaintiffs' claim regarding an *Audubon* hearing relates to their motion to enforce the settlement agreements, the court could not have conducted a hearing on a matter that had been erased from the docket, let alone decide whether the agreement was sufficiently clear and unambiguous to be summarily enforced. See part IV of this opinion.

The plaintiffs' claim regarding an *Audubon* hearing, therefore, fails.

IV

The plaintiffs' next claim is that the court did not have the authority to refuse to rule on their motion to enforce the settlement agreements. The outcome of this claim is dictated by our resolution of the claim in part III of this opinion.

The following additional facts are relevant to this claim. After the plaintiffs filed a motion to enforce the settlement agreements but before the motion was decided, the plaintiffs filed an appeal challenging the denial of their motion to restore. Thereafter, the court issued two orders related to the plaintiffs' motion to

enforce the settlement agreements. In an order dated March 2, 2021, the court stated: "The court has been advised that an appeal has been filed in this matter. . . . Accordingly, the motion which was marked take the papers on [February 1, 2021] is marked off." In an order dated March 15, 2021, the court stated: "The plaintiff[s] marked the motion for [an] order [to enforce the settlement agreements] . . . 'take papers' on the March 12, 2021 short calendar. . . . Pursuant to Practice Book § 61-11, '[i]f an appeal is filed, such proceedings shall be stayed until the final determination of the cause.' "

On March 5, 2021, the plaintiffs filed a motion for reconsideration of the court's order marking off their motion to enforce the settlement agreements and failing to adjudicate the motion, which the court denied in a similar order explaining that the proceedings had been stayed in light of the pending appeal. On appeal, the plaintiffs argue that it was improper for the court not to adjudicate their motion to enforce the settlement agreements. We agree with the court's action but for a reason different from the one on which the court relied. See *Florian* v. *Lenge*, 91 Conn. App. 268, 281, 880 A.2d 985 (2005) ("[i]t is axiomatic that [w]e may affirm a proper result of the trial court for a different reason" (internal quotation marks omitted)). Because the case had not been restored to the docket, there was no pending matter in which the plaintiffs properly could file a motion to enforce the settlement agreements. For these reasons, the plaintiffs' claim fails.

V

The plaintiffs' last claim is that the court improperly denied their motion to set aside the appellate stay and to order enforcement of the settlement agreements. We decline to review this claim.

After the court denied the plaintiffs' motion for reconsideration of the court's order marking off their motion

to enforce the settlement agreements and failing to adjudicate the motion, the plaintiffs filed a motion to terminate the appellate stay for the purpose of permitting the court to adjudicate their motion to enforce the settlement agreements. After the court denied the motion to terminate the appellate stay, the plaintiffs filed a motion for review with this court, which granted review but denied the relief requested therein.

Pursuant to Practice Book § 61-14, "[t]he sole remedy of any party desiring the court to review an order concerning a stay of execution shall be by motion for review under Section 66-6." "Issues regarding a stay of execution cannot be raised on direct appeal." (Internal quotation marks omitted.) *Santoro* v. *Santoro*, 33 Conn. App. 839, 841, 639 A.2d 1044 (1994); see also *East Hartford Housing Authority* v. *Morales*, 67 Conn. App. 139, 140, 786 A.2d 1134 (2001). Although the plaintiffs filed a motion for review of the denial of their motion to terminate the appellate stay, this court denied the relief requested therein. The plaintiffs cannot now challenge that ruling on appeal. Accordingly, we decline to review this claim. See *Santoro* v. *Santoro*, supra, 841–42 (dismissing amended appeal taken from granting of motion to terminate stay when appellant had filed motion for review of stay order, which this court denied as to relief requested).

The judgment is affirmed.

In this opinion the other judges concurred.

REUBEN KABEL *v.* BETH ROSEN, EXECUTRIX (ESTATE OF MARCIA CHAMBERS), ET AL.
(AC 44604)

Moll, Cradle and Clark, Js.

Syllabus

The plaintiff, the nephew of the decedent, appealed from the judgment of the trial court rendered in favor of the defendant R, in her capacity as

executrix of the estate of the decedent. The decedent left a detailed, unambiguous will in which she made specific monetary bequests to various individuals and entities. She also directed that R sell her real property and divide the net proceeds among certain of the defendants, namely, her surviving stepsons, S and W, and H, the wife of her deceased stepson. The decedent further specified that 10 percent of her residuary estate should go to the plaintiff and that the remainder should go to S, W, H, and their defendant children in varying percentages. The estate had insufficient funds to satisfy the specific monetary bequests and administrative costs, and, accordingly, the residual beneficiaries, including the plaintiff, did not receive residuary distributions. The decedent had an individual retirement account valued at more than $2 million that did not pass through the will because it named S, W, and H as designated beneficiaries. The plaintiff commenced this action, alleging that the decedent had mistakenly believed that the retirement account was a probate asset subject to distribution under her will, that she had relied on such mistaken assumption in making the numerous bequests in her will, and that the plaintiff was damaged by her mistaken belief. He argued that the provision of the will that provided for the distribution of the net proceeds from the sale of the decedent's real property should be subject to equitable abatement to fund his claim for monetary damages. On the plaintiff's appeal to this court, *held* that the trial court did not err in refusing to consider the plaintiff's request for an equitable remedy: the court did not err in failing to adhere to its prior denial of a motion to strike the plaintiff's complaint filed by S, W, and H because, under the law of the case doctrine, the court's interlocutory order denying the motion to strike did not bind the court in its ultimate adjudication of the plaintiff's claim on the merits, and the fact that the same judge ruled on the motion to strike and conducted the trial did not render the court's denial of the motion any more binding; moreover, the plaintiff's contention that the trial court should have considered intrinsic evidence within the will pointing to the decedent's intent failed, as the will did not reference the retirement account, the plaintiff failed to identify or explain with any specificity the alleged intrinsic evidence, and the plaintiff's argument that provisions in the will establishing residuary beneficiaries constituted intrinsic evidence because the decedent would not have constructed the will with such provisions if she did not believe that the retirement account was a part of her probate estate was akin to the argument that our Supreme Court rejected in *DiSesa* v. *Hickey* (160 Conn. 250); furthermore, the plaintiff's argument that the trial court erred in failing to consider extrinsic evidence when assessing the intent of the decedent was unavailing because the evidence that the plaintiff relied on, namely, the testimony of the attorney who drafted the will, did not support the plaintiff's contention that such attorney had stated that the decedent held the mistaken belief that the will would control the disposition of her retirement account; additionally, the equitable

remedy of reformation requested by the plaintiff was unavailable as a matter of law and this court declined to recognize it because our appellate courts repeatedly have refused to recognize reformation of a will as a remedy and the defendant failed to provide any Connecticut case law to the contrary.

Argued February 3—officially released October 4, 2022

Procedural History

Action, inter alia, seeking to enjoin the distribution of the net proceeds of the sale of a decedent's real property in accordance with her will, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *S. Richards*, *J.*; judgment for the named defendant, from which the plaintiff appealed to this court. *Affirmed.*

Joseph A. Hourihan, for the appellant (plaintiff).

Scott T. Garosshen, with whom was *Brendon P. Levesque*, for the appellee (named defendant).

Opinion

MOLL, J. The plaintiff, Reuben Kabel, appeals from the judgment of the trial court, rendered following a bench trial, in favor of the defendant Beth Rosen, in her capacity as executrix of the estate of the decedent, Marcia Chambers, who was the plaintiff's aunt.[1] On appeal, the plaintiff claims that the court erred in failing to consider his request for an equitable remedy (i.e., "to alter the disposition of property under the distribution plan set forth under the decedent's will") that effectively would have resulted in the reformation of the decedent's unambiguous will, which he claims was necessary in light of a mistake that he alleges she made

[1] Although the plaintiff's complaint also named as defendants/interested parties Jeaninne Wheeler, also known as Janine Wheeler, Patricia Wheeler, Gwendolyn Wheeler, Owen Wheeler, Lauren Wheeler, Jeffrey Wheeler, Steven Wheeler, Warren C. Wheeler, Haynie Wheeler, and Emily Wheeler, none of these parties is participating in this appeal. We therefore refer to Beth Rosen, in her capacity as executrix of the decedent's estate, as the defendant.

concerning whether a particular individual retirement account would be included in her residuary estate. We conclude that the court did not err in refusing to consider the plaintiff's request for an equitable remedy in the form of reformation of an unambiguous will, a remedy that has never been recognized in Connecticut. Accordingly, we affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. The decedent died on July 13, 2018. The decedent left a detailed will dated March 23, 2018, in which she nominated and appointed the defendant as the executrix of the will. The will was admitted to probate, and the Probate Court for the district of Branford-North Branford appointed the defendant as the executrix of the will. The will made several specific monetary bequests, including to (1) the decedent's stepchildren and their families, (2) her housekeepers and various friends, (3) the New Haven Independent, and (4) her deceased husband's alma mater, Yale Law School. The decedent directed that the defendant sell her real property—her home at 100 Clark Avenue in Branford—"on such terms as [the defendant], in [the defendant's] sole discretion, shall determine," and divide the net proceeds three ways among her two surviving stepsons and the wife of her deceased third stepson. Additionally, she left a piano to a friend and the "remainder of [her] tangible personal effects, (excluding money and securities of any kind) any automobile or automobiles which may be in [her] name at the time of [her] death, all of [her] household furniture and furnishing, and all other tangible personal property owned by [her] at the time of [her] death" to be divided, in as nearly equal shares as practicable, among the issue of her deceased husband, per stirpes, and the plaintiff. The decedent also specified that her residuary estate, "[a]ll the rest, residue and remainder of [her] property and estate, real, personal or mixed," should be divided

in the following manner: 15 percent to each of her two surviving stepsons and to the wife of her deceased third stepson, 10 percent to the plaintiff, 10 percent to each of the two children of her deceased stepson, and 5 percent to each of the five children of her surviving stepsons.

On or about November 9, 2018, the defendant filed an initial inventory of the estate's assets. On April 25, 2019, the defendant filed an updated inventory, which valued the estate at $682,230.63. On May 23, 2019, the defendant completed a pro forma form 706,[2] which provided that the estate had $62,816.57 in funeral expenses and expenses incurred in administering property subject to claims. The form also showed a Fidelity Individual Retirement Account (IRA) valued at $2,127,023.47 on the date of the decedent's death. Because that IRA had designated beneficiaries, however, it did not pass through the will. The plaintiff was not a named beneficiary of the IRA. The estate had insufficient assets to fully satisfy the specific monetary bequests and administrative costs; therefore, the residual beneficiaries, including the plaintiff, did not receive a residuary distribution.

On June 7, 2019, the plaintiff commenced this action. The plaintiff alleged that the decedent mistakenly believed that the IRA was a probate asset subject to distribution under her will and that she relied on this mistaken assumption in "includ[ing] the numerous bequests and devise in her will." Accordingly, the plaintiff claimed that "he ha[d] been damaged by [the decedent's mistaken belief] as to [the IRA] not being a probate asset to the value of ten percent of the value of said retirement account at the time of [her] death" and argued that article VII of the will, which provided for

[2] A form 706 is a "United States Estate (and Generation-Skipping Transfer) Tax Return."

the distribution of the net proceeds from the sale of the decedent's real property, should be subject to equitable abatement in order to fund the plaintiff's claim for monetary damages.[3] The beneficiaries of the net proceeds from the sale of the decedent's home were the same individuals designated as the beneficiaries of the IRA.

The matter was tried to the trial court, *S. Richards*, *J.*, on November 10, 2020. Following trial, the court issued its memorandum of decision rendering judgment in favor of the defendant. The court first determined that the key question raised by the plaintiff's claims was whether, in the absence of "any obvious ambiguity in [the decedent's] will, extrinsic evidence presented could defeat [the decedent's] bequest to [the plaintiff] if a mistake in [the decedent's] understanding about the nature of the IRA bequest was established." The court then held "that extrinsic evidence cannot be considered under the circumstances alleged by [the plaintiff]. Under our general rules of law . . . the court is not permitted to read ambiguity into the four corners of [the decedent's] will where there is none nor consider extrinsic evidence relating to allegations by [the plaintiff] concerning scrivener's errors on the part of [the decedent's attorney] in drafting [the decedent's] will or [the decedent's] supposed misunderstanding about her IRA bequest in the will." As to the plaintiff's requested equitable remedy, the court added: "In light of this conclusion, the court finds that it is unnecessary to address the equitable remedy that [the plaintiff] presented to the court for disposition." This appeal followed. Additional facts will be set forth as necessary.

On appeal, the plaintiff does *not* challenge—and we leave undisturbed—the court's conclusion that the

[3] In addition to money damages, the plaintiff requested (1) "[a]n injunction to enjoin the distribution of the net proceeds of the sale of No. 110 Clark Avenue, Branford, Connecticut, in any manner which does not recognize the claim of the plaintiff" and (2) "[s]uch other relief as to equity may pertain."

decedent's will is unambiguous.[4] The plaintiff claims, instead, that, notwithstanding the lack of any ambiguity in the decedent's will, the court erred in failing to consider his requested equitable remedy, which would effectively require reformation of the decedent's will and which he claims was necessary in light of the decedent's purported misunderstanding regarding how the IRA would be disposed of on her death. In support of this claim, the plaintiff's contentions distill to whether the trial court failed: (1) to apply the law of the case doctrine, (2) to consider intrinsic evidence to determine the decedent's intent, and (3) to consider extrinsic evidence to determine the decedent's intent. We address, and reject, each of these contentions and conclude that the plaintiff's claim suffers from a more fundamental, and indeed fatal, flaw, namely, that equitable reformation of the decedent's unambiguous will is not an available remedy as a matter of law.

I

Relying on the law of the case doctrine, the plaintiff first contends that the court erred in failing to adhere to the court's prior denial of the motion to strike the plaintiff's complaint filed by the defendants Steven Wheeler, Warren C. Wheeler, and Haynie Wheeler (movants). This contention warrants little discussion.

"The application of the law of the case doctrine involves a question of law, over which our review is plenary. . . . The law of the case doctrine expresses the practice of judges generally to refuse to reopen what [already] has been decided . . . . [When] a matter has previously been ruled [on] interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of

[4] The plaintiff states in his principal appellate brief: "[T]here is nothing ambiguous about the language of the will."

some new or overriding circumstance. . . . A judge should hesitate to change his own rulings in a case and should be even more reluctant to overrule those of another judge. . . . Nevertheless, if . . . [a judge] becomes convinced that the view of the law previously applied by his coordinate predecessor was clearly erroneous and would work a manifest injustice if followed, he may apply his own judgment." (Citations omitted; internal quotation marks omitted.) *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 322, 63 A.3d 896 (2013); see also *Breen* v. *Phelps*, 186 Conn. 86, 98–99, 439 A.2d 1066 (1982) ("A judge is not bound to follow the decisions of another judge made at an earlier stage of the proceedings, and if the same point is again raised he has the same right to reconsider the question as if he had himself made the original decision. . . . [O]ne judge may, in a proper case, vacate, modify, or depart from an interlocutory order or ruling of another judge in the same case, upon a question of law." (Citations omitted; internal quotation marks omitted.)).

Here, the movants argued in their motion to strike that the complaint should be stricken because it failed to allege facts that would excuse the plaintiff's failure to file in a timely manner an appeal from the Probate Court's admission of the will. Citing *Folwell* v. *Howell*, 117 Conn. 565, 169 A. 199 (1933), inter alia, the plaintiff objected to the motion on the basis that the complaint was "seeking equitable relief from the effect of the admission of the will . . . ."[5] In denying the motion to strike, the court stated that it "agree[d] with the plaintiff's position and the authority cited in its objection." The plaintiff claims that the judgment of the court rendered after trial must be reversed because the court improperly "changed its mind" concerning the availability of the requested equitable relief.

[5] We address the plaintiff's reliance on *Folwell* in part IV of this opinion.

Applying the well settled principles governing the law of the case doctrine, we conclude that the court's interlocutory order denying the motion to strike did not bind the court in its ultimate adjudication of the plaintiff's claim on the merits. Even assuming that the same legal issue was raised at trial, the court had the "right to reconsider the question . . . ." *Breen* v. *Phelps*, supra, 186 Conn. 98. The fact that the same judge ruled on the motion to strike and conducted the trial in this matter does not render the court's denial of the motion to strike any more binding.

II

We next address the plaintiff's contention that the trial court should have considered "intrinsic evidence within the will" pointing to the decedent's intent. This contention fails.

We find helpful to our analysis, in an analogous context, our Supreme Court's decision in *DiSesa* v. *Hickey*, 160 Conn. 250, 278 A.2d 785 (1971). In *DiSesa*, the widow of a testator and grantor of an inter vivos trust (decedent) appealed from a judgment construing the decedent's will and determining the effect of the dispositive provisions of the trust. Id., 256–57. The trial court had concluded, inter alia, that the trust property should be distributed under the will, despite the will making no reference to the trust agreement nor to the power of appointment reserved in the trust agreement to the decedent. Id., 254, 257. The court reasoned that "[t]he power of appointment reserved [by the decedent in the trust] was exercised by the will as a whole, read in the light of all the surrounding circumstances."[6] Id., 257.

On appeal, our Supreme Court reversed the judgment, stating: "The appellees place much reliance upon the

[6] The decedent's widow would take the trust estate in the absence of an exercise of the power of appointment. *DiSesa* v. *Hickey*, supra, 160 Conn. 260.

circumstance that unless the will were construed to be an exercise of the power of appointment there were not sufficient assets in his estate to accomplish in full the objectives of his will providing for specific bequests with a residue to a favored niece." Id., 261. The court rejected that contention, reasoning that "at the time the will was executed [the decedent] had full and complete power to withdraw from the trust any part or all of the principal and had the right to exercise this power right up until the time of his death. He was thus in a position at any time before his death to change the size of the estate which would pass by the terms of his will and thus the ultimate disposition of it by withdrawing from the trust principal which would pass by his will or refraining from such withdrawal and leaving the entire principal to be distributed under the default provisions of the trust."[7] Id. Accordingly, the court held that the trial court erred in concluding that the will exercised the decedent's power of appointment. Id., 261–62.

Here, the will similarly makes no reference to the IRA. Although the plaintiff asserts that there is intrinsic evidence within the will to contradict the disposition of the decedent's property, he fails to identify or explain with any specificity this alleged intrinsic evidence. He does cite, however, to articles VII and VIII of the will, which set out the decedent's devise of real property to her two surviving stepsons and the wife of her deceased third stepson, and her residuary estate, respectively. He thus appears to be claiming that articles VII and VIII

[7] Prior to reaching its holding, the court emphasized: "In Connecticut . . . the common-law rule applies . . . . Under this rule, a testator will not be considered as having executed or having intended to execute a testamentary power of appointment unless the will contains a reference to the power itself or to the subject of it, [or] unless the intention to execute [the power] is manifest from the fact that the will would remain inoperative without the aid of the power, or is so clearly demonstrated by words or acts . . . that the transaction is not fairly susceptible of any other interpretation." (Internal quotation marks omitted.) *DiSesa* v. *Hickey*, supra, 160 Conn. 258.

of the will constitute intrinsic evidence of the decedent's intention to have the IRA pass under the will because she would not have constructed the will with various residuary beneficiaries if she did not believe that the IRA was part of her probate estate. This is akin to the argument that our Supreme Court rejected in *DiSesa*. See id., 261. We similarly reject the plaintiff's contention that there is intrinsic evidence within the will to alter the unambiguous disposition of the decedent's property.

III

The plaintiff also contends that the court erred in failing to consider extrinsic evidence when assessing the intent of the decedent. We discern no error.

In support of this contention, the plaintiff makes the following representation in his principal appellate brief: "Attorney Barbara Green, who represented [the decedent] and prepared her will, testified that when she made [the decedent's] will, [the decedent] held the mistaken belief that the will would control the disposition of her IRA . . . ." He cites in support thereof the following excerpt from the trial transcript, reflecting a colloquy between the plaintiff's counsel and Green:

"Q. Okay. And when the . . . March 23, 2018 will was drafted and executed, was there any contrary understanding that is different from the understanding that you had when this letter was written as to the ownership of that [IRA]?

"A. Well, we didn't discuss the—we didn't discuss her—her assets on the date that she executed the will. So, I'm—

"Q. At any time between March 24, 2016, and—and the day of the execution of the will, which was February—March 23, 2018, almost two years to the day, was

there ever any discussion that indicated any understanding by [the decedent] that this account was anything but an account that she owned individually and controlled?

"A. Not that I recall.

"Q. Was there any discussion with her in any way indicating that this account was not gonna be controlled by her will?

"A. Not that I recall."

This excerpt simply does not support the premise of the plaintiff's contention that the trial court failed to consider this purported extrinsic evidence of the decedent's intent to have the IRA pass under the residual clause of the will.[8] Thus, the plaintiff's argument is unavailing.

IV

Finally, we address the fatal flaw in the plaintiff's requested equitable remedy. As stated previously, the remedy sought by the plaintiff was to have the court

[8] We note that the court, in support of its refusal to consider extrinsic evidence, relied on *Connecticut Junior Republic* v. *Sharon Hospital*, 188 Conn. 1, 448 A.2d 190 (1982), overruled by *Erickson* v. *Erickson*, 246 Conn. 359, 716 A.2d 92 (1998). In that case, our Supreme Court held that extrinsic evidence of a mistake by a scrivener of a testamentary instrument is not admissible in a proceeding to determine the validity of the testamentary instrument. Id., 2, 9. We acknowledge that, in *Erickson* v. *Erickson*, 246 Conn. 359, 372, 716 A.2d 92 (1998), our Supreme Court overruled its prior holding in *Connecticut Junior Republic* by holding that, "if a scrivener's error has misled the testator into executing a will on the belief that it will be valid notwithstanding the testator's subsequent marriage, extrinsic evidence of that error is admissible to establish the intent of the testator that his or her will be valid notwithstanding the subsequent marriage." Nevertheless, *Erickson* does not affect our decision here because, as our Supreme Court noted in that decision, to invoke the *Erickson* doctrine, "[t]he proponent would have to establish the scrivener's error by clear and convincing evidence." Id., 375. In the present case, the plaintiff did not make such a showing. Furthermore, the plaintiff does not argue on appeal that the court erred in failing to apply *Erickson* to his claim.

alter the distribution of net proceeds from the sale of the decedent's real property—from which the plaintiff would otherwise not benefit—in a manner that would give the plaintiff the monetary amount he would have received had the IRA passed under the residue clause of the will. Although the court found it "unnecessary to address the equitable remedy that [the plaintiff] presented to the court for disposition," we conclude that such a remedy is unavailable as a matter of law.

Whether the trial court had the power to order a reformation of the will "is a question involving the scope of the trial court's inherent powers and, as such, is a question of law. . . . Accordingly, our review is plenary." (Citation omitted.) *AvalonBay Communities, Inc.* v. *Plan & Zoning Commission*, 260 Conn. 232, 239–40, 796 A.2d 1164 (2002).

Our Supreme Court, interpreting a prior version of the Statute of Wills, now codified as General Statutes § 45a-251,[9] explained: "The statute is not only directory but also prohibitive and exhaustive. It permits one to make provision by will for the disposition of his property after death, that is, by bequest or devise, upon complying with the conditions prescribed in the statute and not otherwise, and one condition is that each bequest shall be contained in a writing executed with the prescribed formalities. . . . We are limited to the language used. We may construe a will, but we are powerless to reconstruct one." (Citation omitted.) *Smuda* v. *Smuda*, 153 Conn. 430, 432, 217 A.2d 59 (1966).

Accordingly, our appellate courts steadfastly have refused to recognize equitable reformation of a will as

[9] General Statutes § 45a-251 provides: "A will or codicil shall not be valid to pass any property unless it is in writing, subscribed by the testator and attested by two witnesses, each of them subscribing in the testator's presence; but any will executed according to the laws of the state or country where it was executed may be admitted to probate in this state and shall be effectual to pass any property of the testator situated in this state."

a remedy. Id.; see also *Mott* v. *Teagle Foundation, Inc.*, 156 Conn. 407, 415, 242 A.2d 739 (1968) ("The function of this court is to construe the language used by the testator and thus to ascertain, and give effect to, his expressed intent. We have no power to change that language or to rewrite his will."); *Carr* v. *Huber*, 18 Conn. App. 150, 156, 557 A.2d 548 (1989) ("the court may not modify a will by construction in order to make it conform to its own opinion as to a more equitable distribution").

Here, the plaintiff does not argue that the language of the decedent's will is ambiguous. Rather, the plaintiff contends that this "is an appeal in equity to the court to alter the disposition of property under the distribution plan set forth under the decedent's will." The plaintiff relies on, among other cases, *Folwell* v. *Howell*, supra, 117 Conn. 565, to support his contention that equitable reformation of the testator's will is appropriate. That reliance is misplaced. In *Folwell*, our Supreme Court concluded that the plaintiffs "sufficiently allege[d] that the will was procured by the defendants by means of such fraud, imposition and undue influence as would have constituted a good defense against the application for its admission to probate," and thus allowed the plaintiffs to bring a late challenge to the admission of the will. Id., 570. Here, the plaintiff did not request that the court allow him to bring a late challenge to the admission of the will to probate. Rather, he requested that one of the provisions of the decedent's will be altered in order to fund his claim for monetary damages. Furthermore, the plaintiff has not pointed this court to any existing case law in which a Connecticut court ordered the equitable reformation of a will and, given the bevy of Connecticut cases in which the court refused to equitably reform or reconstruct a will; *Mott* v. *Teagle Foundation, Inc.*, supra, 156 Conn. 415; *Smuda* v. *Smuda*, supra, 153 Conn. 432; *Carr* v. *Huber*,

supra, 18 Conn. App. 156–57; he is asking us to recognize a novel remedy that has been rejected in Connecticut. We decline to recognize such a remedy under these circumstances.

The judgment is affirmed.

In this opinion the other judges concurred.

SHARON FIVEASH *v.* CONNECTICUT CONFERENCE OF MUNICIPALITIES ET AL.

SHARON FIVEASH *v.* JOSEPH DELONG ET AL. (AC 44824)

Alvord, Elgo and Clark, Js.

Syllabus

The plaintiff, a director of member services at the defendant C Co., sought to recover damages from various defendants for alleged gender discrimination and retaliation in violation of a provision (§ 46a-60) of the Connecticut Fair Employment Practices Act. A few years after the plaintiff was hired, several employees in her department resigned while she was the director, and a few of those employees expressed displeasure with working for her and voiced complaints about her during exit interviews. In response, the defendant D, the executive director of C Co., instructed B, the director of human resources of C Co., to conduct an investigation into the allegations, which resulted in the termination of the plaintiff's employment. The plaintiff then commenced an action against C Co. and a related entity and a separate action against D, B and the defendant T, the deputy director of C Co., with whom the plaintiff did not get along. The two actions were consolidated for the purposes of discovery, pretrial pleadings and trial. Subsequently, the defendants filed a motion for summary judgment in each case, arguing that there were no genuine issues of material fact that would permit an inference of gender discrimination or, in the alternative, that her termination was a pretext for gender discrimination. The trial court granted the defendants' motion, and the plaintiff appealed to this court. *Held* that the trial court properly granted the defendants' motion for summary judgment in each case, as no reasonable jury could have concluded that the plaintiff's termination was motivated in whole or in part by gender discrimination: the plaintiff did not demonstrate the existence of a genuine issue of material fact as to whether the defendants' legitimate, nondiscriminatory justification for her discharge, namely, repeated charges of mismanagement of

employees and failure to respect authority as detailed in the report of the investigation, was a pretext for unlawful discrimination, and the record was devoid of any evidence that the plaintiff engaged in a protected activity giving rise to a claim of retaliation.

Argued May 11—officially released October 4, 2022

Procedural History

Actions to recover damages for alleged employment discrimination, and for other relief, brought to the Superior Court in the judicial district of Hartford where the matters were consolidated; thereafter, the court, *Moukawsher*, *J.*, granted the defendants' motion for summary judgment in each case, from which the plaintiff appealed to this court. *Affirmed.*

James H. Howard, for the appellant (plaintiff in each case).

Rachel V. Kushel, for the appellees (defendants in each case).

Opinion

PER CURIAM. In these employment discrimination actions, the plaintiff, Sharon Fiveash, appeals from the summary judgment rendered in favor of the defendants, Connecticut Conference of Municipalities (CCM), Connecticut Interlocal Risk Management Agency, Inc. (CIRMA), Faith Brooks, Joseph DeLong, and Ronald W. Thomas. On appeal, the plaintiff claims that the court erred in concluding that there were no genuine issues of material fact regarding the plaintiff's claims of gender discrimination and retaliation. We disagree and, accordingly, affirm the judgments of the trial court.

The following facts, viewed in the light most favorable to the plaintiff, and procedural history are revealed by the record. CCM is Connecticut's statewide association of towns and municipalities. CIRMA is a separate legal entity through which CCM provides insurance services to its members.

The plaintiff was hired on or about May 5, 2015, as director of member services at CCM. Throughout the plaintiff's tenure with CCM, she received positive employment reviews. In 2018, however, several employees in the plaintiff's department resigned while she was the director. During exit interviews, a few of those employees expressed displeasure with working for the plaintiff and voiced complaints about her. In response to these negative complaints, DeLong, the executive director of CCM, instructed Brooks, the director of human resources, to conduct an investigation into the allegations coming from the member services department. The plaintiff was notified by letter of the workplace complaints and the initiation of an investigation and was placed on a paid suspension pending the completion of the investigation. The investigation focused on, inter alia, whether the plaintiff abused her authority, micromanaged, created an unhealthy work environment, and/or failed to respect authority. Following the investigation, Brooks issued an investigation report, which substantiated many of the allegations against the plaintiff. The plaintiff's employment with CCM was terminated on October 19, 2018.

In June, 2019, the plaintiff commenced an action against Brooks, DeLong, and Thomas, who served as deputy director of CCM, claiming that they aided and abetted gender discrimination against her in violation of General Statutes § 46a-60 (b) (5).[1] In August, 2019, she commenced a separate action against CCM and CIRMA claiming that they committed workplace discrimination against her on the basis of gender in violation of § 46a-60 (b) (1)[2] and retaliated against her in

[1] General Statutes § 46a-60 provides in relevant part: "(b) It shall be a discriminatory practice in violation of this section . . . (5) For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any act declared to be a discriminatory employment practice or to attempt to do so . . . ."

[2] General Statutes § 46a-60 provides in relevant part: "(b) It shall be a discriminatory practice in violation of this section . . . (1) For an employer,

violation of § 46a-60 (b) (4).[3] On October 2, 2019, the plaintiff filed a motion to consolidate, requesting that the court consolidate the actions for purposes of discovery, pretrial pleadings and trial, explaining that the individual defendants in the first action are the officers and/or employees of the entities that are the defendants in the second action. On November 13, 2019, the court, *Sheridan*, *J.*, granted the motion.

On March 19, 2021, following discovery, the defendants filed a motion for summary judgment in each case, arguing that there were no genuine issues of material fact that would permit an inference of gender discrimination, or, in the alternative, that her termination was a pretext for gender discrimination. On May 11, 2021, the plaintiff filed her opposition to the defendant's motion for summary judgment.

In a memorandum of decision dated June 22, 2021, the court, *Moukawsher*, *J.*, granted the defendants' motion for summary judgment. The court focused its attention on the final step of the *McDonnell Douglas*

by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, gender identity or expression, marital status, national origin, ancestry, present or past history of mental disability, intellectual disability, learning disability, physical disability, including, but not limited to, blindness or status as a veteran . . . ."

Although the legislature has amended § 46a-60 (b) (1) since the events underlying the present case; see Public Acts 2021, No. 21-69, § 1; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[3] General Statutes § 46a-60 provides in relevant part: "(b) It shall be a discriminatory practice in violation of this section . . . (4) For any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because such person has opposed any discriminatory employment practice or because such person has filed a complaint or testified or assisted in any proceeding under section 46a-82, 46a-83 or 46a-84 . . . ."

Corp. v. *Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) burden shifting framework, evaluating whether CCM's articulated, nondiscriminatory reason for the plaintiff's termination was pretextual.[4] It stated: "CCM says [it] fired [the plaintiff] because she micromanaged and bullied the employees she supervised. More than one of them said so in exit interviews. There was an investigation. The complaints were deemed well-founded. [The plaintiff] was fired, and CCM cited this bullying as the reason.

"[The plaintiff] insists this isn't the real reason. She says the real reason was because a supervisor . . . Thomas, didn't like her because she is a woman and that this led to her being fired. In support she cites a variety of indirect evidence—and, yes, indirect evidence is not only enough, it is often all there is.

"[The plaintiff] says her office was smaller than the offices given to male supervisors and she was paid less. She says there are too few women in proportion to men at CCM. While the sister organization [CIRMA] she is suing has women in leadership, she was the only woman among her peers at CCM. She says a subordinate employee not under her charge once called her a 'bitch.' She claims the head of CCM joked at a meeting that she was a 'slave driver' to her staff. [The plaintiff's]

[4] Under the *McDonnell Douglas Corp.* burden shifting analysis, the employee must "first make a prima facie case of discrimination. . . . The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. . . . The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." (Internal quotation marks omitted.) *Rossova* v. *Charter Communications, LLC*, 211 Conn. App. 676, 684–85, 273 A.3d 697 (2022).

In the present case, the court appears to have assumed, without deciding, that the plaintiff established a prima facie case of gender discrimination. It also concluded that the defendants had satisfied their burden of articulating a legitimate, nondiscriminatory reason for the plaintiff's termination. The court thus focused its analysis on whether the defendants' proffered reason for the termination was pretextual, concluding that it was not.

expert says . . . Brooks did a poor job looking into the complaints and suggests she was swayed by Thomas. [The plaintiff] says Thomas was friendly to the male supervisors and unfriendly to her, unreasonably interfering with her job duties. She says Thomas wouldn't answer her emails. Thomas complains she wouldn't answer his. The parties offered evidence of arguments between the two via email.

"All of this must be looked at through the lens . . . for summary judgment motions. . . . From what has been submitted, should [the plaintiff] get to a jury with the question whether her gender was a substantial factor in her firing? [The plaintiff] has described conditions at CCM that are different for her than men in her office. But to get to a jury these things have to be at least substantially linked with the decision to fire her. It isn't enough that they existed. They have to be a substantial cause of her firing. And that's where the trouble is. The court doesn't see anything a jury might latch onto to connect the two.

"The evidence about Thomas in particular points unmistakably to a different problem. The submissions of both sides document that when [the plaintiff] started her job she thought she would report solely to the head of CCM . . . DeLong. But when she got the paperwork after arriving for work it showed her reporting to . . . Thomas. She complained immediately, and DeLong immediately temporized, explaining that she would report to Thomas for administrative matters and to DeLong on matters of substance.

"Thomas plainly didn't think so. He repeatedly sought to assert control over [the plaintiff] and [the plaintiff] repeatedly fought back, appealing to DeLong and DeLong continued to temporize. While Thomas said many positive things about [the plaintiff] in her reviews,

more than once he complained that she wouldn't recognize his authority. He continued to assert it. She continued to combat it. If there was bad blood between the two, the only evidence is that it was about this issue.

"The uncontradicted reality of this dispute is fatal also to [the plaintiff's] secondary claim of retaliation. The parties agree that the same case law applies to the § 46a-60 (b) (4) claim that she was fired for complaining about Thomas' gender animus. But the evidence shows that the complaints were solely about the supervision controversy, particularly the July and August, 2015 emails [the plaintiff] points to as evidence of her allegedly protected complaints. No evidence suggests, until she faced firing, that she directly or indirectly complained to DeLong or anyone else about gender animus in any way at any time.

"As for the other indirect evidence, [the plaintiff] hasn't offered any evidence that Thomas picked her office, set her salary, and picked the rest of the staff she complains of as being too freighted with men. Instead, she shifts back and forth pointing out these circumstances, suggesting an institutional problem but then pointing to Thomas without connecting him as the decision maker who created the alleged institutional problems. With equal inconsistency she points to DeLong as her protector in some places and then without explanation lumps him into the problem.

"As for the investigation, [the plaintiff] hired an expert to scrutinize the process, suggesting an outside investigator would have been more neutral and that . . . Brooks sometimes asked the wrong questions of some and not all of the questions she should have of others.

"Again, nothing about what Brooks did is linked to gender as being [a] substantial factor in [the plaintiff's] firing. Nothing about the flaws suggest that she was

fired because of the flaws rather than because of the repeated charges of mismanagement revealed by those [the plaintiff] supervised. There is only the murky suggestion that it is somehow part of an overall gender biased scheme orchestrated by Thomas without anything a jury could find to support that link.

"There just isn't enough here to recognize a disputed issue of material fact between the parties. Viewing everything most favorably to [the plaintiff], avoiding credibility judgments, applying only the need to make gender a substantial factor, a reasonable jury would still be missing the most important thing. It would be missing any evidence to connect the circumstances [the plaintiff] points out with the decision to fire her. Indeed, the evidence shows that her problem with Thomas had everything to do with her refusal to submit to his supervision instead of DeLong's—a very solid explanation for the trouble between them and one that appears on the scene without anything to link it to gender. Likewise, there is evidence that complaints and an investigation led to the decision to fire her. . . . Perhaps a silken thread here would be enough to mean a jury not a judge should decide the matter. But the thread here doesn't run." (Citations omitted; emphasis omitted; footnotes omitted.) Accordingly, the court granted "CCM summary judgment because on this record no reasonable jury could find for her on her claim that it discriminated or retaliated against her. All of [the plaintiff's] claims against the other defendants—even assuming they are properly joined—similarly rely on the same gender and retaliation claims. Since these claims fail, the court grants all the remaining defendants summary judgment as well." This appeal followed.

On the basis of our careful review of the record, the parties' briefs, and their oral arguments before this court, and applying the well established principles that

govern our review of a court's decision to render summary judgment in cases alleging violations of the Connecticut Fair Employment Practices Act, General Statutes § 46a-51 et seq.; see, e.g., *Stubbs* v. *ICare Management, LLC*, 198 Conn. App. 511, 520–22, 233 A.3d 1170 (2020); we conclude that the judgment of the trial court in each case should be affirmed. We agree with the court that the plaintiff has not demonstrated the existence of a genuine issue of material fact as to whether the defendants' legitimate, nondiscriminatory justification for her discharge was a pretext for unlawful discrimination.[5] See *Luth* v. *OEM Controls, Inc.*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-17-6025657-S (December 6, 2019) (reprinted at 203 Conn. App. 673, 686, 252 A.3d 412) (granting summary judgment in favor of defendant when "the defendant has provided a nondiscriminatory reason for the plaintiff's termination, and the plaintiff has failed to provide any sufficient evidence indicating that these reasons were pretextual"), aff'd, 203 Conn. App. 673, 252 A.3d 406 (2021). We similarly agree with the trial court that the record is devoid of any evidence that the

[5] The plaintiff argues, inter alia, that the court erred in rendering summary judgment by "permitting the defendants to use hearsay evidence to proffer a 'legitimate reason' for the adverse employment action." To that end, it appears that she is arguing that the sole evidence that the defendants rely on to articulate a nondiscriminatory reason for her termination is the investigation report, which, in her view, is impermissible hearsay evidence. This argument lacks any merit and warrants little discussion. First, when the plaintiff brought her hearsay concerns to the court's attention, the court made clear that it would "not consider the investigation documents for the truth of the matters asserted in them but only to show that steps were taken to investigate claims against [the plaintiff] and that the investigation conclusion was linked to the decision to fire [the plaintiff]." Second, aside from the investigation report, both DeLong and Brooks, the decision maker and investigator, respectively, testified in depositions about what prompted the investigation, the investigation itself, and the reasons for her termination. Lastly, the plaintiff herself submitted and relied upon the investigation report in opposition to the defendants' motion for summary judgment. We therefore reject the plaintiff's argument.

plaintiff engaged in a protected activity giving rise to a claim of retaliation. See *Agosto* v. *Premier Maintenance, Inc.*, 185 Conn. App. 559, 587–88, 197 A.3d 938 (2018) (affirming grant of summary judgment in favor of defendant when allegations and facts of case "do not constitute a protected activity" and when plaintiff failed to establish that defendant knew that plaintiff "was engaged in a protected activity").

On the record before us, no reasonable jury could conclude that the plaintiff's termination was motivated in whole or in part by gender discrimination. See *Taing* v. *CAMRAC, LLC*, 189 Conn. App. 23, 28, 206 A.3d 194 (2019) (to defeat summary judgment motion, "the plaintiff's admissible evidence must show circumstances that would be sufficient to permit a rational finder of fact to infer that the defendant's employment decision was more likely than not based in whole or in part on discrimination" (internal quotation marks omitted)). We therefore conclude that the court properly granted the defendants' motion for summary judgment in each case.

The judgments are affirmed.

IN RE PROBATE APPEAL OF STEPHEN TUNICK
(AC 43486)

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

Syllabus

The plaintiff T appealed to the Superior Court from the decree of the Probate Court approving the payment of attorney's fees to the defendant D for services rendered to certain cotrustees of a trust of which T was a remainder beneficiary. In 2017, T filed the underlying probate appeal, asserting that he was aggrieved by the decree. In 2019, the trial court dismissed the appeal following a trial de novo, concluding that T had failed to demonstrate that he was aggrieved because, inter alia, distribution of the attorney's fees to D was premature in light of a pending forensic accounting. Following the judgment of dismissal, but before

the plaintiff filed the present appeal, the successor trustee of the trust, M, filed with the Probate Court a motion for advice, requesting permission to distribute trust funds to D for his attorney's fees. The Probate Court then issued a second decree allowing the distribution to D. T filed another probate appeal to the Superior Court from the second decree, which remains unresolved. Subsequently, T appealed to this court, claiming that the trial court improperly concluded that he was not aggrieved by the first probate decree and failed to consider certain trust documents in rendering its judgment. *Held* that this court concluded that it need not examine the merits of T's claims, the appeal having been rendered moot following the entry of the second probate decree; moreover, if this court were to grant the relief requested by T, it would have been purely academic because the first probate decree, wherein the Probate Court authorized the payment of attorney's fees to D, was superseded by the second probate decree, wherein the Probate Court permitted M to distribute the same funds to D, and, accordingly, the first probate decree was no longer in effect and no practical relief could be afforded to T as to that decree; furthermore, proceedings in the second probate appeal, which encompassed the same claims raised by T in the first probate appeal, remained ongoing.

Argued November 8, 2021—officially released October 4, 2022

Procedural History

Appeal from the decree of the Probate Court for the district of Greenwich approving the payment of attorney's fees to the defendant Richard S. DiPreta, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Sommer*, *J.*; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Appeal dismissed.*

Laurel Fedor, for the appellant (plaintiff).

Cynthia Andrews DiPreta, for the appellee (defendant).

Opinion

MOLL, J. The plaintiff, Stephen Tunick, appeals from the judgment of the trial court dismissing his appeal from a probate decree approving the payment of attorney's fees to the defendant, Richard S. DiPreta. On appeal, the plaintiff claims that the court improperly

(1) concluded that he was not aggrieved by the probate decree and (2) failed to consider certain trust documents in rendering its judgment. We do not reach the merits of these claims because we conclude that the probate decree at issue in this appeal was superseded by a subsequent probate decree, which is the subject of a separate probate appeal pending in the Superior Court, and, therefore, we dismiss this appeal as moot.

The following facts, as found by the trial court or as undisputed in the record, and procedural history are relevant to our disposition of this appeal. The plaintiff is a remainder beneficiary of a trust executed in 1981 by the plaintiff's father, who died in 1997. At the time of the father's death, there were three cotrustees of the trust: (1) the plaintiff; (2) the plaintiff's sister, Barbara Tunick (Barbara); and (3) the plaintiff's mother, Sylvia Tunick (Sylvia). On July 7, 2004, the Probate Court for the district of Greenwich, *Caruso*, *J.*, removed the plaintiff as cotrustee of the trust. Thereafter, Barbara and Sylvia continued to function as cotrustees of the trust until June 11, 2013, when the Probate Court, *Hopper*, *J.*, removed them from those roles and appointed Richard J. Margenot as the successor trustee.

In March, 2015, the defendant filed with the Probate Court a petition seeking approval and payment of attorney's fees for services that he had rendered to Barbara and Sylvia in their capacities as cotrustees of the trust. On March 7, 2017, the Probate Court issued a decree approving the payment of $109,133.74 to the defendant (2017 probate decree).

Soon thereafter, the plaintiff filed the underlying probate appeal in the Superior Court challenging the 2017 probate decree (2017 probate appeal). In his operative complaint, which was his second revised complaint filed on November 15, 2018, the plaintiff asserted that he was aggrieved by the 2017 probate decree on the

basis of his belief "that the [attorney's] fees have been double billed and reimbursement has already been made with prior distributions as accounted for in the trust accountings. Such accountings are currently being investigated pursuant to [a civil] action in the Superior Court [commenced by the plaintiff in 2017; see *Tunick* v. *Tunick*, Superior Court, judicial district of Fairfield, Docket No. CV-16-5031896-S (2017 civil action)]; for breach of fiduciary duty against the former trustees of the [trust]. The Probate Court has entered orders to appoint an independent forensic accountant to determine indiscretions and/or illegal acts of the trustees. Therefore, any distribution, if warranted, is premature until the forensic accounting has been completed."[1]

On May 10, 2019, following a trial de novo, the trial court, *Sommer*, *J.*, issued a memorandum of decision dismissing the 2017 probate appeal.[2] The court concluded that the plaintiff failed to demonstrate that he was aggrieved by the 2017 probate decree because, as he had asserted in his operative complaint, distribution of the $109,133.74 sum to the defendant was "premature in light of the pending forensic accounting"[3] referenced

[1] On June 12, 2018, in granting a motion to strike filed by the defendant, the trial court, *Jacobs*, *J.*, struck portions of the plaintiff's original complaint filed in the 2017 probate appeal. The plaintiff's operative complaint contained three subparagraphs that were intentionally left blank and not repleaded in order to preserve his appellate rights. The June 12, 2018 decision is not at issue in this appeal.

[2] We observe that "[a]n appeal from a Probate Court to the Superior Court is not an ordinary civil action. . . . When entertaining an appeal from an order or decree of a Probate Court, the Superior Court takes the place of and sits as the court of probate. . . . In ruling on a probate appeal, the Superior Court exercises the powers, not of a constitutional court of general or common law jurisdiction, but of a Probate Court. . . . When, as here, no record was made of the Probate Court proceedings, the absence of a record requires a trial de novo." (Citation omitted; internal quotation marks omitted.) *Silverstein* v. *Laschever*, 113 Conn. App. 404, 409, 970 A.2d 123 (2009).

[3] On January 31, 2017, the Probate Court, *Hopper*, *J.*, in acting on a motion to compel an independent forensic accounting filed by the plaintiff, issued an order, with the agreement of the parties, appointing an accounting firm

in the plaintiff's operative complaint. The court further concluded that the claims raised by the plaintiff were outside of the scope of the 2017 probate decree from which he appealed. The court also declined to order payment of the $109,133.74 sum to the defendant on the ground that payment was premature in light of the pending forensic accounting. Additionally, addressing "an issue of the procedure for application of payment of attorney's fees," the court determined that, "because . . . attorney's fees are a personal obligation of [a] fiduciary, in this case the trustees, the request for approval and payment [of the $109,133.74 sum] from the trust must be made by the trustees, not the payee attorney." On October 11, 2019, after the court had denied a motion for clarification and reargument that the plaintiff had filed,[4] the plaintiff filed this appeal taken from the May 10, 2019 judgment.

On June 3, 2019, following the May 10, 2019 judgment but before the plaintiff had filed this appeal, Margenot, acting in his capacity as successor trustee, filed with the Probate Court a motion for advice, requesting permission to distribute $109,133.76 in trust funds to the defendant "in light of" the May 10, 2019 judgment dismissing the 2017 probate appeal. On July 1, 2019, the Probate Court, *Hopper*, *J.*, issued a decree allowing the distribution of $109,133.76 to the defendant (2019 probate decree).[5]

to perform a forensic accounting "of all [t]rust finances from the period of 1997 to [September 11, 2013]."

[4] On May 30, 2019, the plaintiff filed a motion for clarification and reargument, which the court, *Hernandez*, *J.*, denied on June 17, 2019. On June 26, 2019, the plaintiff filed a motion to reargue and to vacate Judge Hernandez' order, arguing that the motion for clarification and reargument should have been adjudicated by Judge Sommer, who had rendered the May 10, 2019 judgment. Thereafter, on September 23, 2019, Judge Sommer issued an order stating that "[t]he court confirms that it has considered the plaintiff's motion [for clarification and reargument] and the motion is denied."

[5] There is a minute discrepancy between the $109,133.76 figure set forth in the 2019 probate decree, as well as in Margenot's motion for advice, and the $109,133.74 figure set forth in the 2017 probate decree. We do not

Subsequently, the plaintiff filed with the Superior Court an appeal from the 2019 probate decree. See *Tunick* v. *DiPreta*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-19-6042945-S (2019 probate appeal). In his most recent complaint filed in the 2019 probate appeal, which is his second revised complaint filed on June 28, 2021, the plaintiff asserted as follows with respect to the portion of the 2019 probate decree authorizing payment of the $109,133.76 sum to the defendant:

"(i) The [plaintiff] has claimed that the [attorney's] fees have been double billed and reimbursement has already been made with prior distributions as accounted for in the trust accountings.

"(ii) The [Probate] Court failed to take the double billing into consideration, thereby reducing the defendant's claimed attorney's fees owed.

"(iii) Such accountings are currently being investigated pursuant to [the 2017 civil action] . . . .

"(iv) The Probate Court has entered orders to appoint an independent forensic accountant to determine if there are indiscretions and/or illegal acts of the [t]rustees.

"(v) The forensic accountant is appointed and working on the review.

"(vi) Therefore, any distribution [of the attorney's fees] is erroneous . . . . The [plaintiff] has been

consider this discrepancy to be of import, and we construe the attorney's fees at issue in the 2017 probate decree and the 2019 probate decree to be one and the same. During the trial de novo held in the 2017 probate appeal, the defendant testified that $109,133.74 was the sum that he sought vis-à-vis the March, 2015 petition that led to the 2017 probate decree. Moreover, in the motion for advice, Margenot sought permission to distribute trust funds to the defendant "in light of" the May 10, 2019 judgment.

We also note that the 2019 probate decree addressed the payment of other fees, which are not germane to this appeal.

aggrieved by the distribution of said attorney's fees . . . ." (Citation omitted.) To date, the plaintiff's claim in the 2019 probate appeal concerning the $109,133.76 sum remains unresolved.[6]

The plaintiff raises two claims on appeal. First, he asserts that the court improperly concluded that he was not aggrieved by the 2017 probate decree. Second, he asserts that the court improperly failed to consider certain trust documents before rendering the May 10, 2019 judgment. We need not examine the merits of these claims because we conclude that this appeal has been rendered moot following the entry of the 2019 probate decree.[7]

[6] On July 17, 2019, after the 2019 probate decree had been issued, the plaintiff filed with the Superior Court in the 2017 probate appeal a motion for contempt, asserting that Margenot improperly had disbursed trust funds to the defendant in violation of a stay imposed by the court in this matter on May 30, 2017, and without court approval. On December 9, 2019, the court, *Krumeich, J.*, issued a memorandum of decision in which it found that, by way of a check dated July 10, 2019, Margenot had paid the defendant $109,133.76, which the defendant then had deposited into his law firm's bank account. The court denied the motion for contempt, but ordered the defendant to deposit $109,133.74 into a separate interest bearing account, with such funds and any accrued interest not to be "disbursed until th[is] appeal from Judge Sommer's [May 10, 2019 judgment] has been decided and the rights to receive the funds has been adjudicated or until further order." We note that the sum that Judge Krumeich found Margenot to have paid to the defendant ($109,133.76) is not the same as the sum that Judge Krumeich enjoined the defendant from disbursing ($109,133.74). As we explain in footnote 5 of this opinion, this discrepancy is of no import.

[7] On November 1, 2021, after the parties had filed their respective appellate briefs and in advance of oral argument before this court, we ordered sua sponte that "counsel should be prepared to address at oral argument how, if at all, the proceedings in [the 2019 probate appeal] affect this appeal. This includes, but is not necessarily limited to, whether the appeal should be dismissed (1) for lack of aggrievement in the event the court concludes that the plaintiff has in effect received the relief he requested in the trial court; see *In re Allison G.*, 276 Conn. 146, 158 [883 A.2d 1226] (2005); or, alternatively, (2) on the ground that the appeal is moot because the underlying probate order has been superseded by a subsequent probate order addressing the same issue. See *Thunelius* v. *Posacki*, 193 Conn. App. 666, 686 [220 A.3d 194] (2019)." Because we conclude that this appeal is moot, we need not address the issue of aggrievement.

"Mootness implicates [the] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a well-settled general rule that the 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. . . . Because mootness implicates subject matter jurisdiction, it presents a question of law over which our review is plenary. . . . Mootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition or affairs between the parties. . . . A case is moot when due to intervening circumstances a controversy between the parties no longer exists." (Internal quotation marks omitted.) *Barber* v. *Barber*, 193 Conn. App. 190, 220–21, 219 A.3d 378 (2019).

The plaintiff requests as relief on appeal that we reverse the May 10, 2019 judgment and remand the case to the Superior Court with direction to sustain the 2017 probate appeal taken from the 2017 probate decree or, alternatively, to conduct a new trial. Granting such relief would be purely academic. The 2017 probate decree, wherein the Probate Court, in acting on a petition filed by the defendant, authorized payment of the $109,133.74 sum to the defendant, was superseded by the 2019 probate decree, wherein the Probate Court, in resolving a motion filed by Margenot, permitted Margenot to distribute the same funds to the defendant. See footnote 5 of this opinion. Accordingly, the 2017 probate decree is no longer in effect and no practical relief can be afforded to the plaintiff as to that decree, rendering this appeal moot.[8] See, e.g., *Dempsey* v. *Cappuccino*,

[8] After we had heard oral argument in this appeal, the plaintiff filed an appeal with the Superior Court taken from a probate decree issued on December 21, 2021. See *Tunick* v. *DiPreta*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-22-6055088-S. This probate decree addressed, inter alia, a separate application filed by the defendant seeking

200 Conn. App. 653, 659, 240 A.3d 1072 (2020) (subsequent visitation orders superseded orders challenged on appeal, rendering appeal moot); *Thunelius* v. *Posacki*, 193 Conn. App. 666, 686, 220 A.3d 194 (2019) (subsequent orders addressing appointment of guardian ad litem for child superseded order challenged on appeal, rendering portion of appeal moot). Moreover, as we noted earlier in this opinion, proceedings in the 2019 probate appeal, which encompasses the same claims raised by the plaintiff in the 2017 probate appeal, remain ongoing. See *Murphy's Appeal from Probate*, 22 Conn. App. 490, 496–97, 578 A.2d 661 (in affirming Superior Court's judgment dismissing plaintiff's probate appeals, which challenged orders concerning administration of estate, as moot following distribution of estate's property and approval of final accounting, agreeing with Superior Court's conclusion that separate, pending probate appeal taken by plaintiff from approval of final accounting "sufficiently protect[ed]" plaintiff's rights), cert. denied, 216 Conn. 823, 581 A.2d 1057 (1990).

The appeal is dismissed.

In this opinion the other judges concurred.

JODI BIALIK *v.* SCOTT BIALIK
(AC 44699)

Alvord, Clark and Seeley, Js.

Syllabus

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

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the payment of attorney's fees. In adjudicating the application, the Probate Court, *Hopper*, *J.*, authorized the payment of $140,252.69 to the defendant. It is not clear whether the $140,252.69 sum encompasses the attorney's fees at issue in this appeal. Whatever the nature of the $140,252.59 sum may be, our conclusion that this appeal is moot remains unchanged.

modifying the defendant's alimony obligation. The parties' separation agreement, which was incorporated into the judgment of dissolution, required the defendant to make weekly alimony payments of $2769.23 to the plaintiff, an amount that was nonmodifiable downward unless the defendant earned less than $350,000 in annual adjusted gross earnings. Adjusted gross earnings was defined in the separation agreement, in part, as gross business receipts less business expenses. The defendant claimed that a substantial decrease in his annual income from his dental practice as a result of the COVID-19 pandemic constituted a change in circumstances that warranted a reduction in his alimony payments. The trial court heard expert testimony that the parties presented from accountants about the defendant's financial circumstances and his receipt of $159,000 in loans and grants the federal government distributed in 2020 to businesses nationwide to help offset their loss of income during the COVID-19 pandemic. Both parties' accountants believed that the federal government would forgive the full amount of the loans. The plaintiff's accountant, T, determined that the defendant would not incur any federal income tax obligation due to the government's forgiveness of the loans and that the defendant would benefit from the deduction of payroll expenses on his corporate tax return. The defendant's accountant, L, determined that the defendant had adjusted gross earnings of $240,123 in 2020, which did not include the funds received from the federal government, and that the proceeds of the loans would not reduce the defendant's expenses or be considered income or forgiveness of debt. The court concluded that the defendant had established a change in circumstances on the basis of L's determination that the defendant had adjusted gross earnings of $240,123 in 2020. The court reasoned that the federal funds were intended as one-time emergency loans that should not be considered as ordinary income. The court reduced the defendant's weekly alimony payment to $1038 and required the plaintiff to reimburse him for his overpayment of $34,853 in alimony. On appeal, the plaintiff claimed, inter alia, that the court's conclusion that the defendant had established a change in circumstances was incorrect as a result of the court's failure to include the federal funds in its calculation of his adjusted gross earnings. *Held*:

1. The trial court improperly calculated the defendant's adjusted gross earnings by failing to include the federal funds he received, and, because the court's finding of a substantial change in circumstances was predicated on that incorrect calculation, the court's modification of his alimony obligation had to be reversed and the case remanded for a new modification hearing: the federal funds constituted gross business receipts within the separation agreement's definition of adjusted gross earnings and, thus, cash flow that was transferred into the defendant's business; moreover, the funds were virtually indistinguishable from ordinary business receipts, and the trial court understood that the federal government intended the funds to be essentially replacement business

income; furthermore, despite the defendant's contention to the contrary, this court was not convinced that the funds should be excluded from gross business receipts merely because the federal government disbursed them for targeted purposes or intended them to be one-time or emergency disbursements.

2. The trial court's acceptance of L's calculation as to the defendant's $7974.18 tax deduction for disability insurance payments in 2020 was clearly erroneous, as that finding was not supported by the evidence: L testified that he did not know the exact amount the defendant spent on disability insurance as part of the defendant's business overhead, and both L and the defendant testified that some portion of the $7974.18 should have been added back into the defendant's adjusted gross earnings as defined in the parties' separation agreement.

Argued May 12—officially released October 4, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the court, *Winslow*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Truglia*, *J.*, granted the defendant's motion for modification of alimony and denied the plaintiff's motions for contempt and contribution for certain expenses, and the plaintiff appealed to this court; subsequently, the court, *Truglia*, *J.*, issued an articulation of its decision. *Reversed in part*; *further proceedings.*

Christopher P. Norris, for the appellant (plaintiff).

Laura A. Goldstein, with whom was *Eva M. DeFranco*, for the appellee (defendant).

Opinion

ALVORD, J. The plaintiff, Jodi Bialik, appeals from the postjudgment ruling of the trial court granting the motion of the defendant, Scott Bialik, for a modification of his alimony obligation. On appeal, the plaintiff claims that the court erred in (1) failing to consider the impact of funds received by the defendant's dental practice

from the federal Paycheck Protection Program (PPP); see 15 U.S.C. § 636 (a) (36); and the Economic Injury Disaster Loan (EIDL) program; see 15 U.S.C. § 636 (b) (2); both of which are administered by the United States Small Business Administration (SBA), in calculating the defendant's annual adjusted gross earnings, as defined in the parties' separation agreement, and (2) its treatment of disability insurance premiums paid by the defendant's business.[1] We agree with the plaintiff and,

[1] The plaintiff also claims on appeal that (1) the court erred in "not considering [funds received from the United States Department of Health and Human Services (HHS)] as income and appears to have not realized that the defendant's expert had removed the HHS moneys from his calculation of adjusted gross income," (2) the court abused its discretion in reducing the amount of the defendant's alimony obligation by $90,000 per year after determining that the defendant's income was $110,000 below the threshold for modification, and (3) abused its discretion in ordering the modification in alimony payments retroactive to the date she was served with the motion for modification. Because we reverse the court's judgment on the motion for modification of alimony and remand the case for a new hearing on that motion, we need not consider the plaintiff's claim regarding the court's treatment of the HHS funds or her claims that the court abused its discretion in reducing the amount of the alimony payments and ordering that the modification be retroactive to the date of service. See *Steller* v. *Steller*, 181 Conn. App. 581, 599, 187 A.3d 1184 (2018). We will, however, consider the plaintiff's claim that the court erred in its treatment of the disability insurance premiums, as this issue is likely to arise on remand.

Finally, the plaintiff claims on appeal that the court improperly denied her motions for contempt, in which she alleged that the plaintiff was in arrears on his alimony payments to her. The defendant responds, inter alia, by noting that the plaintiff "provides no case law or statutory references to support any aspect of her claim that the trial court's decision with regard to the motion for contempt was in error." We conclude that the plaintiff's claim is inadequately briefed and, therefore, we decline to review it.

"We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Internal quotation marks omitted.) *Scalora* v. *Scalora*, 189 Conn. App. 703, 735–36, 209 A.3d 1 (2019). In the present case, the plaintiff's brief is devoid

accordingly, reverse in part the judgment of the trial court.

The following facts and procedural history are relevant to our review of the plaintiff's claims. The court, *Winslow*, *J.*, dissolved the parties' marriage on December 14, 2016. At the time of the dissolution, the parties had two minor children, aged fifteen and twelve. The judgment of dissolution incorporated by reference the parties' separation agreement (agreement). With respect to alimony, the defendant was obligated to pay the plaintiff $2769.23 per week "until the first of the following to occur: either party's death, the [plaintiff's] remarriage, or ten (10) years from the dissolution of marriage." The parties agreed that alimony was "nonmodifiable as to an extension of the term."

Pursuant to Section 20 (C) of the agreement, the amount of alimony paid by the defendant to the plaintiff is "nonmodifiable downward unless the [defendant] earns less than . . . $350,000 . . . annual adjusted gross earnings. If the [defendant] earns less than . . . $350,000 . . . annual adjusted gross earnings, then the amount of alimony may be modifiable if a court of competent jurisdiction so determines, based on a motion for modification properly filed and proceeded upon."

Section 20 of the agreement defines "adjusted gross earnings" as "gross business receipts less business expenses, less straight-line depreciation of business equipment; with add-backs for the following: travel and entertainment expenses of $5,000.00 per year; advertising expenses in excess of $5,000.00 per year; any charitable contributions, owner's percentage of profit sharing; medical insurance of owner, attorney and

of citation to legal authority. The entirety of her briefing of this claim consists of representations as to the defendant's income, expenses, and arrearage, and block quotations from the transcript of the hearing on the parties' motions. The plaintiff has failed to proffer any authority or analysis in support of her claim. Accordingly, we decline to review it.

accounting fees in excess of $15,000.00 per year, but not including professional fees paid in connection with insurance, tax or Medicaid audits; dues and subscriptions in excess of $3,600.00; auto expenses in excess of $6,000.00; auto depreciation; home office rent or expenses; equipment for personal use; and any W-2 gross income paid to the owner."

The agreement also included safe harbor provisions, pursuant to which the plaintiff could earn up to $50,000 gross employment earnings annually, and the defendant could earn up to $700,000 "adjusted gross earnings annually," without either being deemed a substantial change in circumstances. (Internal quotation marks omitted.) The agreement stated that "[o]nly those sums which exceed the 'safe harbor' amount shall be considered in any proceeding for a modification of alimony, if the claim is an increase in . . . earnings. This 'safe harbor' amount and its term may be modified by a court of competent jurisdiction."

On March 22, 2018, the defendant filed a motion to modify his alimony obligation, in which he alleged, inter alia, that his "income ha[d] substantially decreased, which amount[ed] to a substantial change in circumstances." On October 1, 2018, the parties entered into a stipulated agreement, which provides in relevant part: "There shall be no modification of alimony at this time. It is agreed by the parties that if either party ever brings this matter back to court to address a change in alimony, the income of the parties to be considered shall be the incomes from date of dissolution and the then income of the parties when the motion is filed and/or addressed."[2]

[2] The parties also agreed that "[t]he [defendant] shall not have the right to file any motion(s) to modify alimony prior to December 31, 2020, if such reduction is based upon a reduction of his earned income as calculated in the manner set forth in the initial dissolution judgment and claimed to be below the $350,000 gross income level required by the dissolution judgment unless" certain preconditions were met. The court stated in its memorandum of decision that it had determined, after a hearing, that the defendant had met such preconditions.

On June 2, 2020, the plaintiff filed a motion for contempt in which she alleged that, beginning in March, 2020, the defendant unilaterally had reduced the amount of alimony he paid to her. She alleged, inter alia, that the defendant was $17,879.80 in arrears on his alimony payments.

On July 15, 2020, the defendant filed a motion to modify his alimony obligation, alleging that his annual income had decreased substantially and was less than $350,000. He represented, inter alia, that, "[d]ue to the unforeseeable COVID-19 pandemic, the defendant was forced to completely shutter his offices for months, resulting in little or no income. After the defendant was permitted to reopen, the number of patients has decreased significantly."

On January 8, 2021, the plaintiff filed a second motion for contempt, in which she represented that the defendant had refused to pay the previous arrearage "until days prior to the hearing on a contempt motion addressing that arrearage." She alleged that the defendant again was failing to pay his periodic alimony obligation and "has unilaterally determined he doesn't need to pay for [two] weeks."

The court, *Truglia*, *J.*, held an evidentiary hearing on the defendant's motion for modification and the plaintiff's two motions for contempt in April, 2021.[3] The defendant presented the testimony of Frederick Landwehr, a certified public accountant and financial advisor who prepares the defendant's tax returns and

[3] The court also heard evidence with respect to a motion filed by the plaintiff seeking contributions from the defendant for the private school expenses of the parties' youngest child. In its memorandum of decision, the court denied this motion after finding that "the defendant does not have sufficient resources with which to pay the plaintiff's proposed order for contribution." The plaintiff does not challenge this ruling on appeal.

financial statements. The plaintiff presented the testimony of Theodore Lanzaro, a certified public accountant and certified forensic accountant. Both parties also testified.

On April 12, 2021, the defendant filed revised proposed orders in which he requested that the court reduce his alimony obligation to $1038 per week and that the modification be made retroactive to the date of service of his motion for modification, August 8, 2020.

On April 20, 2021, the court issued its memorandum of decision. The court first found that the defendant had demonstrated a substantial change in circumstances in that his income from his business "ha[d] declined steadily since December, 2016." The court "accept[ed] the figures offered by the defendant" and found that he had annual adjusted gross earnings of $240,123 in 2020. The court next turned to the factors set forth in General Statutes § 46b-82 (a) and determined that "an alimony payment of $2769.23 per week represents an unreasonable portion of the defendant's current earnings."[4] The court reduced the defendant's weekly alimony obligation to $1038, as requested by the defendant

[4] The court stated: "The court found both parties credible. The parties are close in age, and both appear to be in good overall health. The court notes that the defendant now has no significant assets other than his practice and the equity in his personal residence . . . while the plaintiff's assets have remained steady since the time of judgment . . . . The plaintiff has not worked in her field during the marriage; her earning capacity is therefore much smaller than the defendant's. The court understands that the plaintiff relies on the alimony award to meet her current expenses and to maintain her station in life. The plaintiff, however, currently has income from her work as a preschool teacher. She also receives steady child support from the defendant.

"The court also understands that the parties' marriage was a long one and that the original alimony award represents a return on the plaintiff's significant investment over time in the defendant's earning capacity. With regard to the parties' respective expenses, the court appreciates the plaintiff's desire to continue the younger child's private school education; the child is doing well at the school, and she should continue her studies there . . . . The court also takes into consideration the costs of the defendant's

in his revised proposed orders, and made its order retroactive to the date of service of the defendant's motion for modification, which was August 8, 2020. Applying the retroactive effective date, the court determined that the defendant had overpaid alimony in the amount of $34,853 and ordered the plaintiff to reimburse the defendant for the overpayment on or before June 1, 2021.

Considering the motions for contempt, the court determined "that the plaintiff has not carried her burden of proof by clear and convincing evidence that the defendant has wilfully violated the court's clear orders regarding payment of alimony." The court found that the defendant was "unable to comply with the [alimony] order after he was ordered to close his office in March, 2020, and again in December, 2020." The court additionally found "that the defendant acted in good faith at all times in his dealings with the plaintiff."[5]

On April 27, 2021, the plaintiff filed a motion to reargue, which was denied. Thereafter, the plaintiff filed a motion for articulation, asking the court to articulate its findings concerning the PPP and EIDL funds and

choice of daily transportation . . . . Nevertheless, after consideration of all of the factors of § 46b-82, it is clear that an alimony payment of $2769.23 per week represents an unreasonable portion of the defendant's current earnings." (Citations omitted; footnotes omitted; internal quotation marks omitted.)

[5] In support of this finding, the court noted that "[t]he defendant notified the plaintiff in writing in advance in the spring of 2020 that it was unlikely that he would be able to meet his obligations . . . ." (Citations omitted.) For example, one such notification states: "As of today, I have heard that my Emergency Payroll Loan (PPP Loan) application was accepted and sent to the SBA for processing. I have not received any funds for that nor the SBA Emergency Disaster Relief (EDIL Loan). The Dental Office has been closed and there isn't enough coming in to cover the overhead. I have arranged for the child support payment to be paid in full from my personal savings, and it will be transferred Fri. As for the Alimony, right now I simply do not have the income to cover any of it. I was unable to even transfer any money to myself. If/when these loans come in I will notify you and we can figure things out. I just wanted to give you a heads up beforehand."

disability insurance premiums paid as an expense of the defendant's business. The court denied the motion for articulation.[6] This appeal followed.[7]

We first set forth principles of law relevant to the plaintiff's claims. "[General Statutes §] 46b-86 governs the modification or termination of an alimony or support order after the date of a dissolution judgment. When . . . the disputed issue is alimony . . . the applicable provision of the statute is § 46b-86 (a), which provides that a final order for alimony may be modified by the trial court upon a showing of a substantial change in the circumstances of either party." (Internal quotation marks omitted.) *Birkhold* v. *Birkhold*, 343 Conn. 786, 809, 276 A.3d 414 (2022). "Under that statutory provision, the party seeking the modification bears the burden of demonstrating that such a change has occurred. . . . To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it. Because the establishment of changed circumstances

[6] The plaintiff also had requested that the court articulate "how it considered the approximately $16,000 the defendant received from [the United States Department of Health and Human Services (HHS)], which was considered taxable business income by the defendant's expert as recently as [two] weeks prior to hearing into the calculation of the defendant's 2020 income." On May 13, 2021, the plaintiff filed with this court a motion for review of the denial of her motion for articulation. On June 16, 2021, this court granted the plaintiff's motion for review and granted, in part, the relief requested therein. On June 21, 2021, the trial court issued its articulation with respect to the HHS funds.

[7] On May 26, 2021, the plaintiff filed a motion requesting that the court stay its order directing her to reimburse the defendant for overpaid alimony resulting from the court's retroactive modification order, and the defendant filed an objection thereto. The court denied the motion, and the plaintiff filed a motion for review with this court. This court sua sponte ordered the trial court to provide a memorandum of decision regarding its denial of the plaintiff's motion for a stay. On August 9, 2021, the trial court issued its memorandum of decision, and, thereafter, this court granted the motion for review but denied the relief requested therein.

is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order." (Internal quotation marks omitted.) *Malpeso* v. *Malpeso*, 189 Conn. App. 486, 499, 207 A.3d 1085 (2019).

Prior to addressing the plaintiff's claims, we note that the plaintiff does not claim on appeal that the defendant did not meet the agreement's $350,000 threshold for proceeding with a motion for modification. Additionally, both parties acknowledge that the safe harbor provisions contained in the agreement do not relieve the party seeking modification of the statutorily mandated burden of demonstrating a substantial change in circumstances. See *Budrawich* v. *Budrawich*, 200 Conn. App. 229, 255, 240 A.3d 688 (2020) (alimony provision permitting modification if plaintiff earns less than $100,000 per year did not relieve plaintiff of burden to demonstrate substantial change in circumstances), cert. denied, 336 Conn. 909, 244 A.3d 561 (2021). At issue in this appeal is whether the court erred in finding that the defendant sustained his burden of demonstrating a substantial change in circumstances.[8]

I

We first address the plaintiff's claim that the trial court erred in failing to include the PPP and EIDL funds in its calculation of the defendant's income for purposes of determining whether the defendant had shown a substantial change in circumstances warranting modification of his alimony obligation. Specifically, she claims that the court improperly accepted the determination

[8] We also note that neither party raises a claim on appeal that the trial court erred in using the definition of "adjusted gross earnings" contained in the parties' agreement in determining that the defendant had shown a substantial change in circumstances. Although the plaintiff's counsel suggested during oral argument before this court that the trial court was not required to use the formula, the plaintiff does not raise the issue on appeal as a claim of error.

of the defendant's expert that the defendant's 2020 adjusted gross earnings totaled $240,123, which did not include the PPP and EIDL funds or consideration of the nontaxable nature of those funds. We agree with the plaintiff that the court should have included the PPP and EIDL funds in its determination of the defendant's adjusted gross earnings. Because the court's finding of a substantial change in circumstances was predicated on the defendant's decreased earnings, without consideration of the PPP and EIDL funds, that finding cannot stand.

The following additional procedural history is relevant to our resolution of this claim. As noted previously, both parties presented expert testimony at the hearing. Landwehr, the defendant's certified public accountant, calculated the defendant's 2020 adjusted gross earnings as $240,123, which did not include the PPP and EIDL funds. Landwehr opined that the EIDL grant and the PPP funds were not business receipts.[9] Landwehr testified with respect to the EIDL that it was "a grant that was paid to businesses in 2020. If they applied for the grant, they were applied up to $10,000 to get a grant that does not have to be paid back to stimulate the . . . business as a nontaxable item for the effects of the coronavirus on their businesses." On cross-examination, Landwehr acknowledged that the grant of the EIDL funds increased the defendant's cash flow but maintained that the grant did not increase his business income.

As to the PPP funds, Landwehr testified that funds in the amount of $75,000 were received by the defendant in April, 2020, and deposited into a separate account. The account's balance had been reduced to $39.99 by

[9] Landwehr explained: "My understanding of gross receipts is from services provided in the business, and this is not for services provided in the business."

the end of July, 2020. Landwehr also acknowledged that the defendant received an additional $75,000 in PPP funds in 2021. Landwehr testified that it was a "loan," and that the defendant "has to provide proof that he used it to cover the payroll, rent, personal protection equipment, etc., then he has to submit for forgiveness." Landwehr described the purpose of the program as "tak[ing] people off the unemployment rolls" and testified that it was "for companies to pay those employees for not even coming to work."

Landwehr acknowledged that the defendant's practice would have had to generate additional taxable business receipts in order to produce the equivalent of the financial benefit afforded by the tax-free moneys provided by the federal government. As to whether a business would be required to reduce the related business expenses deduction on its tax return corresponding to receipt of the PPP funds, Landwehr testified that "an issue on the PPP was originally that it would be not income to a business, but it would have to reduce expenses of a business on the tax return. . . . Then they came back and said, it does not have to reduce expenses, the PPP was to help the economic cause of businesses to try and keep them in business. And therefore, the proceeds of that, once it's forgiven, would not reduce expenses and would not be considered income or forgiveness of debt." Landwehr testified that the defendant had not engaged him to apply for forgiveness of the PPP loan. Landwehr testified that he believed "the full amount [of the PPP loan] will be forgiven" but stated that he had not done that analysis yet.

The defendant testified that his business income had declined since the dissolution of the parties' marriage in 2016. Specifically, he testified that, although he previously was the only pediatric dentist in his area, there recently had been an increase in pediatric dentists in

his area, including corporate entities providing dental care. He further testified that more children had become covered under Medicaid and that Medicaid had not increased its rates since 2010.

With respect to the COVID-19 pandemic related decline in his income, the defendant testified that his office was closed from March 22 to May 22, 2020, except for emergency procedures. He explained that, because patients are seen every six months, he again had no patients scheduled from September to November, 2020. Also, the defendant was exposed to COVID-19 in December, 2020, and was required to close his dental practice for two weeks.

The defendant testified as to his understanding of the PPP loans, which was that the moneys were given to businesses to pay employees so as to prevent them from seeking unemployment compensation. When further questioned, he acknowledged that "[t]here were certain stipulations allowing a percentage of the rent" and utilities, but "either 85 or 65 percent of the PPP loan money had to be used on payroll." He also acknowledged in his testimony that he was hopeful that the PPP loans would be forgiven and explained that he had "furloughed [employees] for approximately four days because it was the four days between not having any money and then the PPP loan coming in."

Lanzaro, the plaintiff's expert, reviewed the defendant's financial information, including Landwehr's calculations, and prepared a report. Lanzaro testified regarding the PPP funds and the process for seeking forgiveness of the loan. Lanzaro reviewed the account in which the defendant had deposited the PPP funds and determined that his usage of the funds qualified for forgiveness. Lanzaro testified that he did not "see any reason why [the federal government] wouldn't give him 100 percent forgiveness."

Lanzaro testified that, in addition to incurring no federal income tax obligation due to the government's forgiveness of the PPP loan, the defendant also would benefit from the deduction of his payroll expenses on his corporate tax return. Lanzaro testified that, as long as the defendant similarly met the criteria of the program with respect to the 2021 PPP funds, the defendant would enjoy the exact same federal tax consequences.

The defendant requested that the court reduce his weekly alimony obligation from $2769.23 to $1038. In support of that request, the defendant argued that his income had decreased from $411,000 at the time of the marital dissolution in 2016 to approximately $240,000 in 2020. The plaintiff contended that certain amounts that had been excluded from the defendant's proposed figures should be included in his adjusted gross earnings. Specifically, the plaintiff argued that $84,000 in PPP and EIDL funds that the defendant had received in 2020 should be added to his income from business operations. The plaintiff further maintained that, because the PPP and EIDL funds were not considered taxable income by the federal government, the defendant would have had to generate additional taxable business receipts greater than the sum of the PPP and EIDL funds in order to produce the equivalent of the benefit afforded by the tax-free moneys. Accordingly, the plaintiff argued, the court should adjust upward from the government moneys when calculating the defendant's adjusted gross earnings for 2020. The plaintiff argued for the same treatment of the $75,000 in PPP funds that the defendant received in 2021.

In its memorandum of decision, the court rejected the plaintiff's position that the $159,000 in PPP and EIDL funds should be included in calculating the defendant's adjusted gross earnings. The court stated that it "fully acknowledges and understands the plaintiff's argument

that these funds were intended by the federal government to be, essentially, 'replacement business income.' Nevertheless, it is clear that the funds were also intended by the federal government as one-time emergency loans (not grants), which should not be considered as ordinary income. The court also notes that, according to the defendant's expert's uncontradicted testimony, if the PPP loans are forgiven, they are exempt from traditional Internal Revenue Code rules and regulations regarding cancellation of indebtedness income." The court accepted Landwehr's calculation as the "correct calculation of the defendant's 2020 adjusted gross earnings as defined by the agreement." On the basis of the decline in the defendant's income, the court found that there had been a substantial change in circumstances.

On appeal, the plaintiff claims that the court erred in finding a substantial change in circumstances because the court incorrectly determined that the PPP and EIDL funds should not be included in the defendant's adjusted gross earnings as defined by the agreement. "In a marriage dissolution action, an agreement of the parties executed at the time of the dissolution and incorporated into the judgment is a contract of the parties. . . . The construction of a contract to ascertain the intent of the parties presents a question of law when the contract or agreement is unambiguous within the four corners of the instrument. . . . The scope of review in such cases is plenary . . . [rather than] the clearly erroneous standard used to review questions of fact found by a trial court." (Internal quotation marks omitted.) *Steller* v. *Steller*, 181 Conn. App. 581, 588, 187 A.3d 1184 (2018). The language of the agreement in the present case, as incorporated into the dissolution judgment, is clear and unambiguous. Accordingly, our review is plenary.

The parties' agreement defines "adjusted gross earnings" as "gross business receipts less business expenses, less straight-line depreciation of business equipment," with certain "add-backs . . . ." Thus, we must examine the nature of the funds at issue to determine whether they constitute "gross business receipts." The court had before it the testimony from both parties' experts that they believed that the full amount of the PPP loans would be forgiven, although Landwehr noted that he had not been hired to complete that process and, thus, had not "done that analysis yet." Lanzaro, however, had reviewed the account in which the 2020 PPP funds were deposited and determined that the defendant's usage of the funds qualified for forgiveness.[10] Moreover, the plaintiff entered into evidence a copy of the defendant's bank statement for the account into which the PPP funds were deposited and a copy of a sample PPP loan forgiveness application form. With respect to the EIDL grant, Landwehr acknowledged that it did not have to be repaid, describing it as a "grant that does not have to be paid back to stimulate the . . . business as a nontaxable item for the effects of the coronavirus on their businesses."

Having reviewed the evidence admitted at the hearing, we agree with the plaintiff that the PPP and EIDL funds should be included within the definition of "adjusted gross earnings" under the agreement, in that they constitute gross business receipts.[11] The PPP and EIDL funds are virtually indistinguishable from ordinary business receipts, differing primarily in their extraordinary dual tax favored status. The court aptly noted that

[10] On cross-examination, the defendant's counsel did not challenge Lanzaro's determination that the usage of the PPP funds qualified for forgiveness.

[11] Because there was no competent evidence that the PPP funds would be required to be repaid, our conclusion does not implicate the long-standing guidance that, generally speaking, a bona fide loan is not to be considered in calculation of support. See, e.g., *Birkhold* v. *Birkhold*, supra, 343 Conn. 797–98.

it understood the plaintiff's argument that the funds were intended by the federal government to be "essentially, 'replacement business income.' " See N. Shafer, "Changing Tax Laws and Support: Keeping Up as the Ground Shifts," 33 J. Am. Acad. Matrim. L. 159, 174 (2020) ("For support purposes . . . how should [a hypothetical $100,000 PPP loan] be treated? The reality is that the business has $100,000 more of cash flow. Especially in a flow-through entity like an S Corp, partnership or LLC, or sole proprietorship, the reality of this financial shot in the arm of additional cash flow does not change the bottom line for tax purposes, but for cash flow purposes it could have an impact."). Thus, the PPP and EIDL funds constitute cash flow transferred into the defendant's business. Accordingly, we conclude, on the basis of this record, that the PPP and EIDL funds should be included in the calculation of the defendant's adjusted gross earnings.[12]

The defendant argues that the PPP and EIDL funds should not be included in his adjusted gross earnings because they "were expended as intended: to keep employees off of unemployment compensation and keep the business from closing." He notes that his staff was furloughed for four days before he received the PPP funds and that he was able to bring back and retain his employees despite a two month shutdown of his practice and a lack of patients and revenue. He further emphasizes that the EIDL grant is titled as an "emergency" grant. We are not convinced that the funds should be excluded from gross business receipts merely because they were disbursed by the federal government for targeted purposes or were intended to be one-time or emergency disbursements.

[12] The business owner's ability to deduct the business expenses paid using the PPP and EIDL funds is consistent with the inclusion of those funds in the defendant's gross business receipts as provided for in the agreement.

Accordingly, we conclude that the court improperly calculated the defendant's "adjusted gross earnings" as set forth in the agreement. Because the court's finding of a substantial change in circumstances was predicated on the defendant's decreased earnings, the court's judgment modifying the defendant's alimony obligation must be reversed and the case remanded for a new hearing on the defendant's motion for modification.

II

We next address the plaintiff's claim that the trial court erred in accepting the calculations of the defendant's expert, who "testified that [the] defendant's payments to disability insurance was deducted as a business expense even though portions of same may not have been appropriately deducted from income."[13] The defendant responds that, "[e]ven if an undetermined fraction of the $7974.18 should have been added back into the defendant's adjusted gross earnings, this minor amount would have no impact on the finding of a substantial change in circumstances or the amount of the modification." We agree with the plaintiff that the court improperly accepted the calculation of the defendant's expert.[14]

The following additional facts and procedural history are relevant to our resolution of this claim. The defendant entered into evidence a document prepared by Landwehr that identified, under the category of "add backs," a line item titled "disability insurance (business overhead)" that had no amount correlated with it. Landwehr testified with respect to that item that overhead

[13] Although our disposition of the plaintiff's claim in part I of this opinion disposes of this appeal, we address this claim because it is likely to arise on remand. See, e.g., *Ferraro* v. *Ferraro*, 168 Conn. App. 723, 733 n.7, 147 A.3d 188 (2016).

[14] Because we address this claim as an issue likely to arise on remand, we need not address whether the court's determination was harmful. See *State* v. *Raynor*, 337 Conn. 527 n.20, 561, 254 A.3d 874 (2020).

disability insurance is tax deductible, but that he did not have the breakdown on how much the defendant had spent on that disability insurance. Thereafter, the following colloquy occurred between the plaintiff's counsel and Landwehr:

"[The Plaintiff's Counsel]: So, we can't say whether or not the disability should or should not be added in because you can't tell us today, as an expert, whether it qualifies as a business expense?

"[The Witness]: What I'm telling—

"[The Plaintiff's Counsel]: (Indiscernible)'s paid, correct?

"[The Witness]: —what I'm telling you is, there's a portion of an expense that he usually has labeled as disability—

"[The Plaintiff's Counsel]: Right.

"[The Witness]: —that is actually business overhead. Okay? I do not know the exact amount of that. Okay?

"[The Plaintiff's Counsel]: Right.

"[The Witness]: And, I'm not gonna guess without pulling out those records and—and doing it.

"[The Plaintiff's Counsel]: So, what's the total amount of the disability paid by [the defendant] in 2020?

"[The Witness]: Okay, the amount shown on the cash flow report is $7974.18. We do not know how much of that is for . . . disability and how much of that is for the business overhead.

"[The Plaintiff's Counsel]: So, if disability was 6500 of that, that would need to be added back? Would you agree with me?

"[The Witness]: That's correct. And, I testified that we did not do an analysis of that over—that business—

the breakdown between the disability and the business overhead that's included in that account."

The defendant also testified that he did not know what portion of the coverage was attributed to business overhead, stating that "[i]t's all mixed together, and I don't understand . . . how to separate it." When asked whether he could obtain a breakdown, the defendant stated that "it would probably take me a while speaking to the agents, to figure out what the heck the breakdown is on it."

In its memorandum of decision, the court stated that it "accepts the analyses offered by the defendant's expert witness. The deduction taken for insurance noted by the defendant's expert is legitimate and reasonable in amount."

"[T]he trial court's findings [of fact] are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . 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.) *Norberg-Hurlburt* v. *Hurlburt*, 162 Conn. App. 661, 672–73, 133 A.3d 482 (2016).

In his appellate brief, the defendant does not contend that no portion of the disability insurance premiums should have been added back into his earnings. Rather, he emphasizes that adding back into his earnings "an undetermined fraction of the $7974.18" would have no impact on the finding of a substantial change in circumstances. We agree with the plaintiff that the court erred in accepting the calculations of the defendant's expert. Both the defendant's expert and the defendant himself testified that some portion of the $7974.18 should have

been added back into the defendant's adjusted gross earnings as defined in the agreement. The court, however, found the insurance premium deduction to be legitimate and reasonable. That finding is not supported by the evidence and, therefore, is clearly erroneous.

The judgment is reversed only as to the defendant's motion to modify alimony and the case is remanded for a new hearing on that motion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.