IN RE LIL'PATRICK T.*
(AC 45399)

Moll, Clark and DiPentima, Js.

Syllabus

The respondent father appealed to this court from the judgment of the trial court terminating his parental rights with respect to his minor child, P. He claimed, inter alia, that the trial court incorrectly concluded that the

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

petitioner, the Commissioner of Children and Families, proved by clear and convincing evidence that the Department of Children and Families had made reasonable efforts to reunify him with P, that he was unable or unwilling to achieve the requisite degree of personal rehabilitation, and that it was in P's best interest to terminate his parental rights. *Held*:

1. The trial court correctly concluded that the respondent father failed to achieve a sufficient degree of personal rehabilitation as would encourage the belief that, within a reasonable time, he could assume a responsible position in the life of P:

a. The father could not prevail on his challenge to the trial court's determinations with respect to his drug use: the father admitted to having smoked marijuana daily through the early stages of the department's involvement, and he was discharged from a clinic to which he was referred due to lack of engagement; moreover, the court did not improperly place the burden to provide drug testing on the father, rather, the court simply found that the father reported that he had stopped daily marijuana use but had submitted to only one toxicology screen, and the court did not indicate that it had inferred that the father was hiding drug use because he had taken only one drug test; furthermore, it was within the purview of the court to question the father's sincerity given his recent engagement in services in anticipation of litigation, despite the fact that he had had two years to participate in such services, and to conclude that the father's efforts were "too little too late."

b. The father could not prevail on his claim that the record did not support a finding that he had unresolved mental health issues that served as a barrier to reunification; in the present case, the trial court found that it had been determined that the father was dealing with stressors relating to the removal of P from his custody, the court stated that an issue for the father was possible mental health issues and found that it was recommended that he participate in counseling, the court found that the father did not follow through with a referral to a mental health clinic, and the court's determination that the father's failure to engage in services until just before trial was "too little too late" was supported by the evidence.

c. The record supported the trial court's finding that domestic violence between the father and the mother was an impediment to rehabilitation: the father and the mother had engaged in domestic violence on two occasions when P was present, the father and the mother were arrested following one such altercation, the father failed to engage in services for domestic violence treatment and, although the father scheduled an

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

intake for domestic violence counseling a few days after the trial on the petition for termination was originally scheduled, the court reasonably questioned the father's motivation in engaging in services given the timing of his recent engagement in anticipation of litigation; moreover, the record supported the court's findings that the father attended about one half of the available visits with P between December, 2020, and August, 2021, and that during one visit he became verbally aggressive toward P's foster mother and a social worker, left the visit and did not visit P for the next two months.

d. The father could not prevail on his claim that his lack of stable housing, under the facts of this case, was not a ground for termination of his parental rights, which was based on his claim that the trial court had suggested that he had moved away from the paternal family home by choice, rather than as a result of a fire that damaged the home, and that the court improperly failed to consider the impact of the fire on his ability to achieve stable housing: the court did not suggest that it viewed the father's inability to reside in a residence damaged by fire as a choice, and, although the father highlighted the fire as a reason why it was difficult for him to engage in services offered by the department, his failure to engage in services preceded the fire; moreover, despite the father's claim that the court did not acknowledge the difficulties that he experienced as a temporary worker in saving money for rent and a security deposit while also replacing possessions damaged by the fire, the record did not contain evidence of specific difficulties he experienced in achieving stable housing following the fire other than as a reason why he may not be able to reside with his mother, with whom he had a tumultuous relationship, and the evidence demonstrated that both before and after the fire, the father changed his location frequently; accordingly, there was an evidentiary basis for the court's finding that the father would likely not be able, within a reasonable time, to provide stable housing, and the court's determination regarding the father's failure to rehabilitate was not based solely on his inability to maintain adequate housing.

2. The respondent father could not prevail on his claim that the trial court incorrectly concluded that termination of his parental rights was in the best interest of P: the court determined that the seven factors delineated in the applicable statute (§ 17a-112 (k)) weighed in favor of the termination of the father's parental rights and, in reaching that determination, the court stated that the father had not shown a serious interest in addressing issues such as domestic violence, mental health and substance abuse, which it determined were barriers to P's reunification with him, and concluded that the father's willingness to participate in and benefit from services offered by the department was uncertain; moreover, because the father focused solely on the portion of the court's best interest analysis that noted his failure to rehabilitate, for the reasons that this court rejected the father's claim challenging the trial court's

conclusion that he failed to rehabilitate, this court rejected his challenge to the court's best interest determination.

3. The trial court did not commit plain error in canvassing the respondent father concerning his right to testify; there is no requirement, contrary to the father's claim, that the trial court specifically canvass him regarding the fact that the right to testify was his alone, rather, the court informed the father that he had the right to testify and questioned him regarding whether he had spoken to his counsel regarding that right, and the court did not state that the father's counsel may usurp that decision but, rather, stated that the decision whether to testify was one that he would make with his attorney.

Argued September 7—officially released October 26, 2022**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Hartford, Juvenile Matters, where the court, *Dannehy, J.*, rendered judgment terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed.*

Matthew C. Eagan, assigned counsel, for the appellant (respondent father).

Katherine Blouin, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Evan O'Roark* and *Nisa Khan*, assistant attorneys general (petitioner).

Opinion

DiPENTIMA, J. The respondent father, Lil'Patrick T., Sr., appeals from the judgment of the trial court terminating his parental rights with respect to his minor child, P.[1] On appeal, the respondent claims that the trial

** October 26, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] The court also terminated the parental rights of the respondent mother, who is not participating in this appeal. Accordingly, we refer in this opinion to the father as the respondent.

court (1) incorrectly concluded that he failed to achieve a sufficient degree of personal rehabilitation as would encourage the belief that, within a reasonable time, he could assume a responsible position in the life of P, (2) incorrectly determined that termination of his parental rights was in the best interest of P and (3) failed to canvass him adequately concerning his right to testify on his own behalf. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. In December, 2019, P was born prematurely, weighing four pounds, three ounces, and he tested positive for marijuana. Because S, P's biological mother, tested positive for marijuana and had a history of domestic violence,[2] including a May, 2019 incident with the respondent, the hospital notified the Department of Children and Families (department). P was discharged from the hospital six days later to reside with the respondent and S under a safety plan with the department. On January 14, 2020, the petitioner, the Commissioner of Children and Families, filed a motion for temporary custody along with a petition representing that P had been neglected. The court granted the order of temporary custody on January 24, 2020. On January 24, 2020, and on July 22, 2020, the court issued orders of specific steps for the respondent to undertake. On December 14, 2020, the court approved a permanency plan of termination of parental rights followed by adoption. On February 23, 2021, the petitioner filed a petition for the termination of the respondent's parental rights as to P.

On February 3, 2022, the court issued its memorandum of decision terminating the respondent's parental rights as to P. With respect to the adjudicatory phase,

[2] S had a history of domestic violence with the respondent, as well as in her prior relationships.

the court found, by clear and convincing evidence, both that the department had made reasonable efforts to reunify the respondent with P and that the termination of the respondent's parental rights with respect to P was warranted because of his failure to achieve sufficient personal rehabilitation. In the dispositional phase of the proceeding, the court found, by clear and convincing evidence, that termination of the respondent's parental rights was in P's best interest. This appeal followed.[3] Additional facts will be set forth as necessary.

We first note the following relevant legal principles. "A hearing on a termination of parental rights petition consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the court must determine whether the [petitioner] has proven, by clear and convincing evidence, a proper ground for termination of parental rights. . . . In the dispositional phase, once a ground for termination has been proven, the court must determine whether termination is in the best interest of the child." (Internal quotation marks omitted.) *In re Leilah W.*, 166 Conn. App. 48, 66–67, 141 A.3d 1000 (2016).

I

The respondent first claims that the court incorrectly concluded that he failed to achieve a sufficient degree of personal rehabilitation. We disagree.

As clarified by our Supreme Court in *In re Shane M.*, 318 Conn. 569, 587–88, 122 A.3d 1247 (2015), the standard of review of a trial court's determination that a parent has failed to achieve sufficient rehabilitation is as follows: "We have historically reviewed for clear error both the trial court's subordinate factual findings

[3] The attorney for the minor child filed a statement adopting the petitioner's brief in this appeal.

and its determination that a parent has failed to rehabilitate. . . . While we remain convinced that clear error review is appropriate for the trial court's subordinate factual findings, we now recognize that the trial court's ultimate conclusion of whether a parent has failed to rehabilitate involves a different exercise by the trial court. A conclusion of failure to rehabilitate is drawn from both the trial court's factual findings and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in [General Statutes] § 17a-112 (j) (3) (B). Accordingly, we now believe that the appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court."[4] (Citations omitted; emphasis omitted; internal quotation marks omitted.)

We note the following relevant legal principles. "In the adjudicatory phase of the proceeding, the court must decide whether there is clear and convincing evidence that a statutory ground for the termination of parental rights exists." (Internal quotation marks omitted.) *In re Jennifer W.*, 75 Conn. App. 485, 493, 816

[4] The respondent also claims that the standard of review of evidentiary sufficiency established by our Supreme Court in *In re Shane M.*, supra, 318 Conn. 569, is improper and that the proper standard of review for such claims should be clear error. He states that this claim was made only for purposes of preservation and acknowledges that this court does not have the authority to overturn the precedent of our Supreme Court. We agree that we are bound by our Supreme Court's decision in *In re Shane M.*, and, therefore, reject the respondent's standard of review claim. See *State* v. *Henry*, 76 Conn. App. 515, 551, 820 A.2d 1076 ("it is not the province of an intermediate appellate court to overturn the precedent of the jurisdiction's highest court"), cert. denied, 264 Conn. 908, 826 A.2d 178 (2003).

A.2d 697, cert. denied, 263 Conn. 917, 821 A.2d 770 (2003). In the present case, the court determined that the respondent had failed to achieve a sufficient degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B) (i). "Failure of a parent to achieve sufficient personal rehabilitation is one of six statutory grounds on which a court may terminate parental rights pursuant to § 17a-112. [See General Statutes § 17a-112 (j) (3) (B) (i).] That ground exists when a parent of a child whom the court has found to be neglected fails to achieve such a degree of rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, the parent could assume a responsible position in the life of that child. . . .

"Personal rehabilitation as used in [§ 17a-112 (j) (3) (B) (i)] refers to the restoration of a parent to his or her former constructive and useful role as a parent. . . . [Section 17a-112] requires the trial court to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further, that such rehabilitation must be foreseeable within a reasonable time. . . . [The statute] requires the court to find, by clear and convincing evidence, that the level of rehabilitation [he or she] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he or she] can assume a responsible position in [his or her] child's life. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved [his or her] ability to manage [his or her] own life, but rather whether [he or she] has gained the ability to care for the particular needs of the child at issue." (Citations omitted; internal quotation marks omitted.) *In re Leilah W.*, supra, 166 Conn. App. 67–68.

In the present case, the court determined that the department made reasonable efforts to reunify P with the respondent and that the respondent was unable or

unwilling to benefit from efforts to reunify; the respondent does not challenge these findings. The court determined that the failure to rehabilitate ground in § 17a-112 (j) (3) (B) (i) had been established by clear and convincing evidence. Specifically, the court found that the respondent's issues, at the time of removal, were domestic violence[5] with S, abuse of marijuana and lack of stable housing. The court noted that trial was originally scheduled to begin on December 1, 2021, and that, thereafter, the respondent requested new referrals for, and attended an intake at, Wheeler Clinic, which addresses substance abuse and mental health; began Fatherhood Engagement Services, which works to help strengthen bonds between fathers and children and to enhance the level of involvement of fathers in their case planning with the department; and scheduled an intake for domestic violence counseling. The court stated that it "question[ed] the sincerity of [the respondent's] motivation, given the timing of his recent engagement in anticipation of litigation, and considering he had two years to participate in services. In any event it remains too little too late. [The respondent] is in no better position today than at the end of December, 2019, when the child was removed from his care. Considering the age and needs of the child . . . the court finds by clear and convincing evidence that [the respondent] has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, he could assume a reasonable position in the life of the child."

A

The respondent challenges several of the court's subordinate findings. We first address the respondent's

[5] The evidence before the court and the court's memorandum of decision refer to this issue as domestic violence, interpersonal violence and intimate partner violence interchangeably. For ease of reference, we use the term domestic violence.

arguments challenging the court's findings regarding marijuana use. In the section of the court's memorandum of decision that sets forth its general factual findings, the court found that the respondent "disclosed to the investigative worker that he uses marijuana daily, which continued through the early stages of [the department's] involvement. He tested positive in December, 2019. He later told [the department] that he stopped in January, 2020, without treatment. A toxicology screen taken by Wheeler [Clinic] shortly thereafter was negative. That was the last screen that he provided." In the section of the decision involving the adjudicatory phase of the proceedings, the court found that the respondent "report[ed] that he ha[d] stopped his daily marijuana use but ha[d] only submitted to one toxicology screen."

The respondent argues that "[t]he trial court's judgment concerning the respondent's marijuana use is not grounded in the facts of the case. The department was responsible for determining the time and method of drug testing with regard to the respondent and it determined that the respondent was compliant with his testing requirements. The trial court incorrectly placed the burden of providing tests on the respondent and suggested in its decision that the respondent was hiding his continued drug use by failing to provide such tests. The only evidence in the case is that the respondent told providers that he was going to stop using marijuana in January of 2020 and that he provided a negative drug screen in April, 2021."

The respondent's argument with respect to the court's determinations of his drug use fails for at least two reasons. First, the evidence supports the court's finding that the respondent's efforts were too little too late. The respondent admitted to having smoked marijuana daily through the early stages of the department's involvement, and the court-ordered specific steps that included the respondent submitting to substance abuse

evaluation and following treatment recommendations. In order to address concerns of both marijuana abuse and mental health, the respondent was referred to Wheeler Clinic for an intake, which was conducted in July, 2020, and it was recommended that he participate in individual counseling to help him deal with the stressors caused by the removal of P from his custody. He, however, was discharged from the program in November, 2020, due to lack of engagement. A second intake at Wheeler Clinic was conducted in April, 2021, when it was recommended that he resume individual counseling, but he again was discharged for lack of engagement. He was referred for a third intake in November, 2021, and, at the time of the court's decision, was treating at Wheeler Clinic. Second, contrary to the respondent's assertion that the court improperly placed the burden to provide testing on him rather than on the department, the court simply found the following: "[The respondent] reports that he has stopped his daily marijuana use but has only submitted to one toxicology screen." There is nothing further in the court's memorandum of decision to indicate that it made an inference that the respondent was hiding continued drug use because he had taken only one drug test.

The respondent points to the testimony of Jennifer Lanza, an integrated health supervisor at Wheeler Clinic, that the respondent seemed to have resolved his prior history of marijuana use. He ignores, however, her additional testimony concerning her "impression . . . that there may be more than what he thought that it was relevant to disclose" and that it "was challenging to get [the respondent] to recognize that treatment would—or him engaging in treatment would—be beneficial to be able to potentially address matters that had come up."

"The ultimate issue the court must evaluate is whether the parent has gained the insight and ability

to care for his or her child given the age and needs of the child within a reasonable time." (Internal quotation marks omitted.) *In re Omar I.*, 197 Conn. App. 499, 575, 231 A.3d 1196, cert. denied, 335 Conn. 924, 233 A.3d 1091, cert. denied sub nom. *Ammar I.* v. *Connecticut*, U.S. , 141 S. Ct. 956, 208 L. Ed. 2d 494 (2020). In the present case, the court questioned the respondent's sincerity, given his recent engagement in services in anticipation of litigation despite the fact that he had two years prior to participate in services, and concluded that it remained "too little too late." It was well within the purview of the court to make such determinations. See, e.g., *In re Gabriella A.*, 319 Conn. 775, 790, 127 A.3d 948 (2015) ("[i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence" (internal quotation marks omitted)).

B

The respondent next argues that "[t]he record does not support a finding that [he] has unresolved mental health issues that serve as a barrier to reunification." In support of this argument, he highlights the testimony of Lanza that the respondent did not self-report any mental health symptoms specific enough to satisfy the criteria for a diagnosis and that, based on the respondent's intake session at Wheeler Clinic, it was recommended that he engage in individual therapy as long as he felt it would help him cope with current stressors.

The court found that the respondent made "no complaint of any mental health issues, which was reflected in an evaluation conducted by Wheeler Clinic, but [that] it was later determined he [was] dealing with stressors around the removal and involvement of [the department]." In its analysis of the respondent's failure to rehabilitate, the court did not make a specific finding

regarding mental health as a presenting issue. In its reasonable efforts analysis, the court stated that a presenting issue for the respondent was "possible mental health issues" and found that, after he was referred to Wheeler Clinic for an intake in July, 2020, it was recommended that he participate in individual counseling to help him deal with the stressors caused by the removal of P from his custody. In its assessment of the respondent's failure to rehabilitate, the court found that the respondent "did not follow through with . . . Wheeler Clinic for substance abuse and mental health." The court's determination that the respondent's failure to engage in services at Wheeler Clinic until just before trial was to begin was "too little too late" is supported by the evidence, for the reasons we stated previously in this opinion when addressing his argument concerning marijuana use. We additionally note that Lanza testified that the respondent failed to remain in treatment "consistently and long enough thus far to be able to further delve into how it is that certain stressors may be potentially impacting behavior or mental health." She also testified that it was difficult to conduct an assessment in part due to the respondent's lack of attendance. The respondent finally engaged in treatment in November, 2021, which was close to the date that trial originally was set to begin. Lanza testified that when the respondent came to the clinic in November, 2021, she diagnosed him with an unspecified adjustment disorder "with the intent to be able to assess further while he's engaged in treatment."

C

The respondent next argues that the record does not support a finding that domestic violence between him and S was an impediment toward rehabilitation. The court found that the respondent and S engaged in domestic violence in December, 2019, which began as a verbal altercation and resulted in both "grabbing each

other and tussling." One week later in December, 2019, a verbal altercation between the respondent and S escalated into a physical confrontation. The police were called, but no arrests were made. P was present during each incident. Following a physical altercation on August 9, 2020, both the respondent and S were arrested, and protective orders were issued. The respondent admitted to domestic violence in previous relationships.

The record reflects that the respondent repeatedly failed to engage in services to which he was referred for domestic violence treatment. To address the issue of domestic violence, the department made referrals for the respondent to participate in the Inspire Me program and the Intimate Partner Violence-Family Assessment Intervention Response (IPV-FAIR) program. He did not respond to attempts to engage him in the Inspire Me program and, although he attended an intake session at the IPV-FAIR program, he was discharged for failure to attend. The department pursued treatment for the respondent for domestic violence through Radiance Innovation Services, but he did not respond to the first referral in March, 2021, or to the second referral in May, 2021. Following his arrest on domestic violence charges in August, 2020, in compliance with the criminal court order, the respondent participated in a family violence program that was not a clinical program but a group educational program. Finally, the respondent scheduled an intake for domestic violence counseling for December 9, 2021, a few days after the trial was originally scheduled. The court reasonably questioned the respondent's motivation in engaging in services, "given the timing of his recent engagement in anticipation of litigation, and considering he had two years to participate in services." The court determined that, "[i]n any event it remains too little too late."

The respondent contends that he was loving and attentive during his visits with P and that there was no evidence that he was ever aggressive or inappropriate with P. The court found that the respondent attended about one half of the available visits between December, 2020, and August, 2021, and that during a visit on February 18, 2021, he became verbally aggressive toward P's foster mother and a social worker and abruptly left the visit and did not visit P for the next two months. The evidence in the record supports the court's findings. Although the respondent may love P and may not have been aggressive toward P, "[t]he fact that [a parent] may love [a] child does not in itself show rehabilitation," and "motivation to parent is not enough; ability is required." (Internal quotation marks omitted.) *In re Paul M.*, 154 Conn. App. 488, 499–500, 107 A.3d 552 (2014).

D

The respondent also argues that his "lack of stable housing was not grounds for termination under the facts of this case." He contends that the court's finding that, "[a]fter moving from the family home, [the respondent] has lived with a variety of friends and relatives," suggests that he moved by choice, rather than as the result of a fire that damaged the paternal family home, and that the court improperly failed to consider the impact of the fire on his ability to achieve stable housing.

The court found that, when the department first became involved, the respondent and S resided together at the paternal family home but that, in February, 2021, that residence was damaged in a fire and was condemned. Contrary to the respondent's argument, there is nothing in the court's memorandum of decision to suggest that the court viewed the respondent's inability to reside in a residence that was damaged by fire as a choice. Although the respondent highlights the fire as a

reason why it was difficult for him to engage in services offered by the department, the record reveals that his failure to engage in services was a pattern that preceded the fire. He was referred to Wheeler Clinic for substance abuse and mental health treatment and attended an intake but was discharged for lack of engagement in November, 2020. A March 19, 2021 social study conducted by the department, which was admitted as a full exhibit, indicated that the respondent was referred in January, 2020, to Inspire Me for in-home services and that he did not comply with the services offered. Treatment with the IPV FAIR program was scheduled to begin in June, 2020, but he was discharged from the program for failure to attend.

The respondent highlights the court's finding that he "has a history of employment and is currently working through a temp agency" and argues that the court was unwilling to acknowledge the difficulties inherent in a temporary worker saving first and last month's rent money and a security deposit while also attempting to replace possessions. The respondent did not testify at trial, and the record does not contain evidence of specific difficulties he experienced in achieving stable housing following the fire, other than his tumultuous relationship with his mother. He makes no claim on appeal that the department failed to provide him with adequate services to assist him with respect to his housing situation following the fire.[6] Social studies by the department, which were admitted as full exhibits, demonstrate that both before and after the fire, the respondent changed housing locations frequently. A social

[6] To the extent that the respondent is attempting to challenge the statutory scheme on the ground that "[t]he inequities of . . . § 17a-112 (j) (3) (B) (i) are directly felt by the working poor," we decline to review that claim because, among other reasons, it is not adequately briefed. See, e.g., *C. B.* v. *S. B.*, 211 Conn. App. 628, 630, 273 A.3d 271 (2022) ("[w]e repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief" (internal quotation marks omitted)).

study dated October 15, 2020, which was prior to the fire, indicates that the respondent stayed with friends or family, changed his location frequently and intended to move back to the family home once he "settle[d] the protective order with [S]." Another social study dated March 19, 2021, approximately one month after the fire, indicates that the paternal family home was condemned as a result of the fire, that the respondent stayed with friends or family and changed his location frequently, and that his last reported address was at the residence of his father. A social study dated August 26, 2021, approximately six months following the fire, indicates that the respondent "[did] not maintain consistent communication with the department to fully assess th[e] specific step," of getting and/or maintaining adequate housing, and that the last report given to the department indicated that the respondent was staying with friends or family and that he changed his address frequently.

The respondent contends that his plan to assume the lease of his mother's apartment was a reasonable response to economic realities. The court found that the respondent "currently resides with his mother with whom he has what has been described as a toxic relationship. His plans to assume her lease when she moves out can only be described as speculative and the court attaches no weight to this plan." The court rejected the respondent's plan to assume the lease as not credible on the ground that it was speculative whether the series of events would unfold as the respondent suggested. It was noted in a November 30, 2021 social study addendum, which was admitted as a full exhibit, that the respondent informed the department on November 29, 2021, that he had moved in with his mother. The study concluded that, because he is not on the lease and because he has a "tumultuous relationship" with his mother, "there is [a] concern he could lose this housing

without notice." The respondent seeks to have us reassess the evidence, which we cannot do. See *L. H.-S.* v. *N. B.*, 341 Conn. 483, 498, 267 A.3d 178 (2021) (reviewing court does not reweigh evidence to determine if it supports challenged finding).

Nothing in the court's decision suggests that it somehow required the respondent to achieve stable housing without the use of available support systems. "[P]ersonal rehabilitation . . . does [not] require the parent to be able to assume full responsibility for a child, without the use of available support programs." (Internal quotation marks omitted.) *In re Harlow P.*, 146 Conn. App. 664, 675 n.4, 78 A.3d 281, cert. denied, 310 Conn. 957, 81 A.3d 1183 (2013). "In the absence of any evidence to the contrary, [j]udges are presumed to know the law . . . and to apply it correctly." (Internal quotation marks omitted.) Id., 674 n.3. The record provides an evidentiary basis for the court's finding that the respondent would likely not be able, within a reasonable time, to provide stable housing. Additionally, the court's determination regarding the respondent's failure to rehabilitate was not based solely on the respondent's inability to maintain or to afford adequate housing.

The court's subordinate findings are sufficient to establish that the respondent failed to achieve sufficient rehabilitation, despite the evidence of the respondent's eventual participation in programs, which, as the court determined, "was too little too late." See, e.g., *In re Sheila J.*, 62 Conn. App. 470, 481–82, 771 A.2d 244 (2001) (court's determination that respondent failed to rehabilitate sufficiently was proper when court found that respondent's demonstrated efforts were "too little and too late"). In sum, we conclude that the court reasonably could have concluded, on the basis of the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was

sufficient to justify its ultimate conclusion that the respondent had failed to achieve a sufficient degree of personal rehabilitation as would encourage the belief that, within a reasonable time, he could assume a responsible position in the life of P.

II

The respondent next claims that the court erred in determining that it was in the best interest of P to terminate his parental rights.

We first set forth the applicable standard of review that governs our analysis of this claim. "[A]n appellate tribunal will not disturb a trial court's finding that termination of parental rights is in a child's best interest unless that finding is clearly erroneous. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling." (Internal quotation marks omitted.) *In re Malachi E.*, 188 Conn. App. 426, 443, 204 A.3d 810 (2019). "In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . In the dispositional phase . . . the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven factors delineated in [General Statutes] § 17a-112 [k]. . . . The seven factors serve simply as guidelines for the court and are not statutory prerequisites that need to be proven before termination can be ordered." (Citations omitted; internal quotation marks omitted.) *In re Victoria B.*, 79 Conn. App. 245, 261, 829 A.2d 855 (2003).

The court determined that the seven statutory factors weighed in favor of the termination of the respondent's parental rights. In reaching that determination, the court stated, inter alia, that the respondent "had not shown a serious interest in addressing" issues such as domestic violence, mental health and substance abuse, which the court determined were "legitimate barriers to the child's reunification with him," and concluded that the respondent's "ongoing willingness to participate in and benefit from those services is uncertain." The respondent argues that the court erroneously concluded that termination was in P's best interest. His argument focuses solely on the court's findings in the best interest analysis regarding the respondent's failure to rehabilitate. As a result, he repeats the same arguments that he made when challenging the court's determination that he had failed to achieve sufficient personal rehabilitation. In his reply brief, the respondent states, "[o]bviously, if this court determines that the trial court erred in determining the respondent failed to rehabilitate, any best [interest] analysis would be superfluous." Additionally, at oral argument before this court, the respondent's counsel acknowledged that the respondent's best interest claim was "essentially the same claim" as his claim regarding the court's conclusion that he had failed to achieve sufficient personal rehabilitation. Because the respondent focused solely on the portion of the court's best interest analysis that noted the respondent's failure to rehabilitate, our analysis as to both claims is similar. For the reasons that we rejected the respondent's claim challenging the court's conclusion that he had failed to rehabilitate, we reject the respondent's challenge to the court's best interest determination.

III

The respondent last claims that the court did not canvass him adequately concerning his right to testify

on his own behalf pursuant to *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015). He acknowledges that this claim is unpreserved and seeks reversal under the plain error doctrine. There is no plain error.

"The plain error doctrine is a rule of reversibility reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . [Thus, an appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Internal quotation marks omitted.) *In re Miyuki M.*, 202 Conn. App. 851, 858 n.4, 246 A.3d 1113 (2021).

The following additional facts and procedural history are relevant to our review of this claim. Before the start of trial, the court advised the respondent: "You do have the right to testify. That's a decision you make with your attorney. I'm not going to draw any adverse inference from your failure to testify." After the petitioner finished presenting evidence, the following colloquy took place:

"The Court: All right. Thank you. And [the respondent's counsel], do you have any witnesses?

"[The Respondent's Counsel]: No witnesses, Your Honor, and I did discuss my client testifying and he's not testifying. We did have that discussion.

"The Court: And, [respondent], you talked to your lawyer about testifying; is that correct? [Respondent], can you hear me?

"[The Respondent]: Yes, Your Honor.

"The Court: Did your lawyer . . . talk to you about testifying?

"[The Respondent]: Yes, I'm confirming. Yes, Your Honor."

"Our Supreme Court exercised its supervisory powers in *In re Yasiel R.* to announce a new rule that, although not constitutionally required, it concluded was necessary to protect the perceived fairness of the judicial system with regard to termination of parental rights proceedings." *In re Leilah W.*, supra, 166 Conn. App. 60. In *In re Yasiel R.*, our Supreme Court held that "in all termination proceedings, the trial court must canvass the respondent prior to the start of the trial. The canvass need not be lengthy as long as the court is convinced that the respondent fully understands his or her rights." *In re Yasiel R.*, supra, 317 Conn. 795. One of the rights that the court must include in its canvass is "the respondent's right to testify on his or her own behalf . . . ." Id.

The respondent argues that, "[a]lthough the trial court informed [him] that he had the right to testify, it couched the right as 'a decision you make with your attorney.' . . . [T]he right belongs to the respondent alone and is not a right that can be usurped or placed in the hands of counsel. . . . Because neither the . . . canvass nor the subsequent colloquy concerning the respondent's right to testify on his own behalf made clear—as required by our Supreme Court in [*In re*] *Yasiel R.*—that the right belonged exclusively to the respondent, the canvass was inadequate."

The respondent's argument is unavailing. He misinterprets both the requirements of *In re Yasiel R.*, and the court's canvass. *In re Yasiel R.*, supra, 317 Conn.

795, requires a trial court to canvass a respondent concerning "the respondent's right to testify on his or her own behalf . . . ." The court did so in the present case. There is no requirement under *In re Yasiel R.* that the trial court specifically canvass the respondent regarding the fact that the right to testify is his alone. The court informed the respondent that he had the right to testify and questioned him regarding whether he had spoken to his counsel regarding that right. The court did not state that the respondent's counsel may usurp that decision but, rather, the court stated, "[t]hat's a decision *you* make with your attorney." (Emphasis added.) See *In re Josiah D.*, 202 Conn. App. 234, 257, 245 A.3d 898 ("[i]t is without question that a parent may not be compelled to testify at a termination of parental rights trial and need not testify on his or her own behalf"), cert. denied, 336 Conn. 915, 245 A.3d 424 (2021). There is no error, much less plain error. Accordingly, we conclude that the extraordinary circumstances that would warrant reversal under the plain error doctrine are not present.

The judgment is affirmed.

In this opinion the other judges concurred.

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10 MARIETTA STREET, LLC *v.* MELNICK PROPERTIES, LLC, ET AL.
(AC 44833)

Prescott, Elgo and Cradle, Js.

Syllabus

The plaintiff, T Co., sought to recover damages for, inter alia, environmental contamination to a parcel of land it owned, allegedly caused by hazardous materials from a drainpipe that extended onto the land from an adjacent parcel of property owned by the defendant M Co. The defendants filed a motion for summary judgment, claiming that T Co. could not meet its burden of production with respect to any of its causes of action and arguing that T Co.'s responses to certain discovery failed to

provide them with clear and explicit details about the alleged contamination of T Co.'s property. The plaintiff filed an objection to the defendants' motion for summary judgment, a supporting memorandum of law, and several exhibits, including an affidavit from a licensed environmental professional who had conducted an environmental study of T Co.'s property. At the hearing on the motion, T Co. asserted that it had presented sufficient evidence to raise a genuine issue of material fact as to whether hazardous material from M Co.'s property had contaminated T Co.'s property. The trial court granted the motion for summary judgment, and T Co. appealed to this court. *Held* that the trial court improperly granted the defendants' motion for summary judgment, this court having concluded that there were genuine issues of material fact, and the trial court's conclusions to the contrary were not legally and logically correct and were not supported by the record: to avoid summary judgment, T Co. was not required to prove its causes of action to the satisfaction of the trial court, and the defendants did not attempt to delineate or explain the substantive law governing any of T Co.'s common-law or statutory claims, failing to set forth how the purported deficiencies in the evidentiary record necessarily established a lack of a genuine issue of material fact with respect to any particular element of any of the causes of action alleged in T Co.'s complaint; moreover, rather than demonstrating how they met the legal standard for granting a motion for summary judgment, the defendants' motion principally was founded on their argument that T Co. failed to answer certain interrogatories served on it, and, to the extent the court's granting of summary judgment focused too narrowly on this argument and thus could be construed as sanctioning T Co. for some perceived failure to comply with discovery, summary judgment was a wholly improper vehicle by which to do so; furthermore, even if the defendants met their initial burden of demonstrating the absence of any genuine issue of material fact, T Co. presented evidence in opposition to the motion for summary judgment that demonstrated its entitlement to a trial, as a trier of fact might reasonably infer from the evidence presented that contaminants in T Co.'s soil came from the drainpipe attached to the defendants' building and that, given their exclusive control over the property, the defendants, either directly or through negligence, were responsible for allowing the contaminants to enter the drain.

Argued April 11—officially released November 1, 2022

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven, where Kathleen A. Bednarcik was cited in as a party defendant; thereafter, Kathleen A. Bednarcik,

executrix of the estate of George Bednarcik, was substituted for the defendant George Bednarcik; subsequently, the court, *Wahla*, *J.*, granted the motion for summary judgment filed by the defendants, from which the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Leonard C. Reizfeld, for the appellant (plaintiff).

Joshua A. Winnick, for the appellees (defendants).

Opinion

PER CURIAM. The plaintiff, 10 Marietta Street, LLC, appeals from the summary judgment rendered by the trial court in favor of the defendants, Melnick Properties, LLC, Kenneth Maratea, Ellen Maratea, and Kathleen Bednarcik.[1] On appeal, the plaintiff claims that the court improperly determined that no genuine issue of material fact existed and the defendants were entitled to judgment as a matter of law on all thirty counts of the plaintiff's operative complaint, which seeks to hold the defendants responsible for environmental contamination of the plaintiff's property. We agree with the plaintiff that genuine issues of material fact exist regarding whether one or more of the defendants are legally responsible for the alleged contamination of the plaintiff's land and its groundwaters. Accordingly, we reverse the judgment of the trial court.

The following facts and procedural history are gleaned from the pleadings, affidavits, and other proof submitted, viewed in a light most favorable to the plaintiff. See *Dubinsky* v. *Black*, 185 Conn. App. 53, 56, 196 A.3d 870 (2018). The plaintiff owns a vacant parcel

[1] Kathleen Bednarcik is named as a defendant in her individual capacity and in her representative capacity as both the executrix of the estate of George Bednarcik and as trustee of a revocable trust in her own name. George Bednarcik originally was named a defendant but died during the pendency of the action.

of land known as 0 Marietta Street in Hamden. The defendant Melnick Properties, LLC, owns an adjacent parcel of real property known as 24 Marietta Street, on which is a commercial building that has been used for a number of purposes, including as an auto repair facility. The remaining defendants are prior owners of 24 Marietta Street and/or were involved in managing the property over a substantial period of time.

On September 25, 2019, the plaintiff initiated the present action. The operative complaint, filed on October 6, 2020, contains thirty counts sounding in negligence, negligence per se, trespass, nuisance, and violations of General Statutes §§ 22a-16[2] and 22a-452,[3] and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. § 9601 et seq.[4] The complaint

[2] General Statutes § 22a-16 provides in relevant part: "[A]ny person, partnership, corporation, association, organization or other legal entity may maintain an action in the superior court for the judicial district wherein the defendant is located, resides or conducts business . . . for declaratory and equitable relief against . . . any person, partnership, corporation, association, organization or other legal entity . . . for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction . . . ."

[3] General Statutes § 22a-452 provides in relevant part: "(a) Any person, firm, [or] corporation . . . which contains or removes or otherwise mitigates the effects of oil or petroleum or chemical liquids or solid, liquid or gaseous products or hazardous wastes resulting from any discharge, spillage, uncontrolled loss, seepage or filtration of such substance or material or waste shall be entitled to reimbursement from any person, firm or corporation for the reasonable costs expended for such containment, removal, or mitigation, if such oil or petroleum or chemical liquids or solid, liquid or gaseous products or hazardous wastes pollution or contamination or other emergency resulted from the negligence or other actions of such person, firm or corporation. . . ."

[4] CERCLA, also known as the Superfund Act, was enacted "in response to the serious environmental and health risks posed by industrial pollution" and "was designed to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." (Internal quotation marks omitted.) *Burlington Northern & Santa Fe Railway Co.* v. *United States*, 556 U.S. 599, 602, 129 S. Ct. 1870, 173 L. Ed. 2d 812 (2009).

contains a series of general allegations that are incorporated by reference as part of each count of the complaint. The gravamen of these general allegations is that the defendants knew or should have known that hazardous and toxic chemicals, including petroleum products, solvents, and metals, have flowed from the building on 24 Marietta Street through a drainpipe that extends underground from the 24 Marietta Street building onto the plaintiff's property.[5] The plaintiff asks for compensatory and punitive damages for the alleged harm caused to its property, and for declaratory and injunctive relief requiring the defendants to remediate the pollution and to remove the drainpipe.

On December 14, 2020, the defendants filed a joint motion asking the court to render summary judgment in their favor as to all counts of the complaint. The sole basis on which the defendants claimed entitlement to summary judgment was that the plaintiff could not meet its burden of production with respect to any of the causes of action alleged in the complaint, and "[t]he plaintiff's inability to meet its burden of production means, ipso facto, that it cannot prove the elements of the seven causes of action alleged." The defendants

[5] Specifically, paragraphs seven, eight, nine, and fifteen of the operative complaint provide in relevant part: "7. When the [building at 24 Marietta Street was constructed], George Bednarcik . . . intentionally cause[d] two interconnected floor drains to be installed in the building which was then piped out and onto the property now known as 0 Marietta Street . . . without the knowledge or permission of the property owner . . . .

"8. George Bednarcik . . . intentionally [buried] the floor drainpipe exiting the building . . . onto the abutting property . . . to hide his knowingly illegal activity of trespass and draining hazardous material[s]. . . .

"9. . . . [A]ll of the [d]efendants . . . had knowledge of, or reasonably should have had knowledge of the illegal and deceptive actions of . . . George Bednarcik. . . .

"15. . . . [T]he [d]efendants knew or should have known, in the exercise of due care and reasonable inspection, that dangerous, hazardous and toxic levels of oil, solvents, hydrocarbons, metals and the like were being flushed down the floor drains and onto the abutting property and into the ground water."

stated in their accompanying memorandum of law that they had served written interrogatories on the plaintiff that sought further details regarding the primary allegation in the complaint that the defendants knew or should have known that contamination of the plaintiff's property was occurring as the result of "dangerous, hazardous and toxic levels of oil, solvents, hydrocarbons, metals and the like . . . being flushed down the floor drains and onto the abutting property and into the ground water." The defendants argue that the plaintiff's responses failed to provide them with "clear and explicit details about the alleged contamination of the plaintiff's property, including precisely what happened, how it happened and when it happened." The defendants argue that the plaintiff "has no facts to produce in support of the dispositive allegation of its complaint" and is unable to proffer any evidence that the alleged flushing of hazardous materials through the drainpipe in question ever occurred.[6] The defendants provided limited legal analysis explaining how the purported evidentiary lacuna that it identified specifically related to the different causes of action alleged in the complaint or how the lack of direct evidence regarding how contaminants were introduced to the defendants' floor drain entitled the various defendants to judgment as a matter of law under any of the disparate theories of recovery advanced by the plaintiff.

The plaintiff filed an objection to the defendants' motion for summary judgment, a supporting memorandum of law, and several exhibits, including an affidavit from a licensed environmental professional, Darrick F. Jones, who had conducted an environmental study of

[6] At the hearing on the motion for summary judgment, the defendants' counsel summarized his argument as follows: "So, the claim in the motion for summary judgment is if the plaintiff cannot prove when and how and who flushed the contaminants down the drain, he can't prove his case. And, therefore . . . summary judgment should enter for the defendants because without proof . . . of all these flushing, the plaintiff has no case."

the plaintiff's property.[7] Jones averred in his affidavit that "there was a buried metal pipe [that] exited the abutting building at 24 Marietta Street onto [the plaintiff's property] . . . ." He further averred that the metal pipe extended about two feet onto the plaintiff's property before transitioning first into "Orangeburg" piping and then PVC plastic piping. According to Jones, these different piping sections were not secured together well and, where there were breaks, "a strong smell of oil contaminants was emanating from the surrounding ground." Samples were collected from the ground and from within the pipe itself and tested by a laboratory. Jones' report, which was attached to the affidavit, indicated that the contaminants found in the pipe were the same type, just in higher concentrations, as the contaminants found in the surrounding soil on the plaintiff's property.

On June 9, 2021, the parties appeared before the court for a virtual hearing on the defendants' motion for summary judgment. The plaintiff took the position that, contrary to the defendants' arguments, it had no obligation to prove who had dumped what down the defendants' drains or when but, instead, merely had to prove that hazardous materials went down the defendants' floor drains, through the drainpipe, and onto the plaintiff's property while the defendants had exclusive ownership or control of the property and the drainage system. The plaintiff asserted that it had presented sufficient evidence to raise a genuine issue of material fact as to whether hazardous materials from the defendants' property had contaminated the plaintiff's property, directing the court's attention to Jones' affidavit. The plaintiff argued: "So . . . it's an issue of strict liability,

[7] In addition to Jones' affidavit, the plaintiff submitted, inter alia, affidavits of the defendants Kenneth Maratea, Ellen Maratea, and Kathleen Bednarcik; certified records from the Department of Motor Vehicles; and building permits for the 24 Marietta Street property.

joint and several liability. There is nothing for the plaintiff to prove as far as who dumped what, when . . . down the defendants' floor drains. It's strict liability, Your Honor. The law is clear, both federal and state."[8]

On July 2, 2021, the court issued a "postcard" order granting the motion for summary judgment. The postcard order contains the court's entire memorandum of decision. After first reciting boilerplate law regarding the appropriate standard of review, the memorandum of decision provided the following legal analysis: "The defendants filed the interrogatories and request for production pertaining to the plaintiff's allegations in its complaint, [e]specially as to the paragraph 12, dangerous, hazardous and toxic levels of oil, solvents, hydrocarbons, metals and the like . . . being flushed down the floor drains and onto the abutting property and into the ground water.

"The [court agrees] with the defendants that the answers to these questions should have provided clear and explicit details about the alleged contamination of the plaintiff's property, including precisely what happened, how it happened and when it happened, and/or the sources of and the basis of its allegation. The plaintiff has not provided any such information. Except the plaintiff's repeated responses . . . [that] the floor drains were installed when the building was built . . . [and] the original defendant owner . . . used the building . . . to store his oil delivery trucks.

[8] At oral argument on the motion for summary judgment, the plaintiff, in addition to arguing that a property owner has strict liability under both the federal and state statutes for any contamination that emanates from the owner's property, argued that "if a landlord owns a piece of property and they have multiple tenants, that if the landlord can determine who dumped what down . . . their drains and contaminated the neighbors, then . . . the obligation is on them to prove it. If they can't prove it, it's joint and several liability."

"The court concludes that if the plaintiff is unwilling and/or unable to provide the basic minimum information—which is his burden of production/proof. The court further concludes that . . . the plaintiff has not put forward [any] evidence except attempting to shift the burden of production to the defendant[s], contrary to the rules of practice.

"Hence, the court grants the motion for summary judgment to all counts." From this judgment, the plaintiff now appeals.

The plaintiff claims on appeal that the trial court improperly rendered summary judgment because the defendants failed to meet their burden of showing that no genuine issues of material fact existed and that they were entitled to judgment as a matter of law with respect to each of the causes of action alleged in the complaint. The plaintiff further claims that it provided evidence from which, if credited, a fact finder reasonably could infer that the pollution on its property came from the defendants' property via the drainpipe, thus establishing the culpability of one or all of the defendants. According to the plaintiff, at the very least, this evidence raised a genuine issue of material fact regarding the alleged flushing of contaminants down the building's floor drains and entitled the plaintiff to a trial on the merits of its complaint. We agree that the defendants failed to meet their burden of showing the absence of a genuine issue of material fact that would entitle them to summary judgment as a matter of law.

We begin with generally applicable principles of law, including our standard of review. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for

summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact . . . . [T]he party moving for summary judgment is held to a strict standard. [The moving party] must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . A material fact is a fact that will make a difference in the result of the case. . . . Because the court's decision on a motion for summary judgment is a legal determination, our review on appeal is plenary." (Citations omitted; internal quotation marks omitted.) *Walker* v. *Housing Authority*, 148 Conn. App. 591, 596, 85 A.3d 1230 (2014). "[W]e must [therefore] decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *McFarline* v. *Mickens*, 177 Conn. App. 83, 90, 173 A.3d 417 (2017), cert. denied, 327 Conn. 997, 176 A.3d 557 (2018).

Having reviewed the summary judgment record, including the pleadings, affidavits and other proof submitted by the parties, as well as the briefs and arguments before this court, we conclude that genuine issues of material fact exist that should have precluded the court from rendering judgment in favor of the defendants as a matter of law.

To avoid summary judgment, the plaintiff was not required to prove its causes of action to the satisfaction of the trial court. "In ruling on a motion for summary judgment, the court's function is not to *decide* issues of material fact . . . but rather to determine whether any such issues exist." (Emphasis added; internal quotation marks omitted.) *Episcopal Church in the Diocese of Connecticut* v. *Gauss*, 302 Conn. 408, 421–22, 28 A.3d 302 (2011), cert. denied, 567 U.S. 924, 132 S. Ct. 2773,

183 L. Ed. 2d 653 (2012). Moreover, "[a]n important exception exists . . . to the general rule that a party opposing summary judgment must provide evidentiary support for its opposition, [although] that exception has been articulated in our jurisprudence with less frequency than has the general rule. On a motion by the defendant for summary judgment the burden is on [the] defendant *to negate each claim as framed by the complaint*. . . . It necessarily follows that it is only [o]nce [the] defendant's burden in establishing his entitlement to summary judgment is met [that] the burden shifts to [the] plaintiff to show that a genuine issue of fact exists justifying a trial." (Emphasis added; internal quotation marks omitted.) *Baldwin* v. *Curtis*, 105 Conn. App. 844, 850–51, 939 A.2d 1249 (2008).

The defendants' motion for summary judgment, like the court's memorandum of decision granting that motion, does not attempt to delineate or explain the substantive law governing any of the plaintiff's common-law or statutory claims. In particular, the defendants fail to set forth how the purported deficiencies in the evidentiary record identified in the motion for summary judgment necessarily establish a lack of a genuine issue of material fact with respect to any particular element of any of the causes of action alleged in the complaint. In the absence of such analysis, we are left to speculate as to the precise nature of the defendants' summary judgment claims and whether and how they are applicable to the thirty counts of the complaint. We decline to do so. After all, the defendants have the burden of establishing their entitlement to summary judgment, and courts must "hold the movant to a strict standard." (Internal quotation marks omitted.) *Baldwin* v. *Curtis*, supra, 105 Conn. App. 848; see also *Rickel* v. *Komaromi*, 144 Conn. App. 775, 792, 73 A.3d 851 (2013) ("[i]n assessing a motion for summary judgment, we hold the movants to their burden of showing that it is

quite clear what the truth is" (internal quotation marks omitted)).

Moreover, rather than demonstrating how they met the legal standard for granting a motion for summary judgment, the defendants' motion for summary judgment principally is founded on their argument that the plaintiff failed to answer certain interrogatories served on it by the defendants. To the extent that the court's granting of summary judgment focused too narrowly on this argument and thus could be construed as sanctioning the plaintiff for some perceived failure to comply with discovery, summary judgment is a wholly improper vehicle by which to do so. See generally *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 17, 776 A.2d 1115 (2001) (articulating requirements for imposition of discovery sanctions and reiterating that "[t]he sanction of dismissal should be imposed only as a last resort, and where it would be the only reasonable remedy available to vindicate the legitimate interests of the other party and the court" (internal quotation marks omitted)).

Finally, even if we were able to determine that the defendants met their initial burden of demonstrating the absence of any genuine issue of material fact, we would agree with the plaintiff that it presented evidence in opposition to the motion for summary judgment that demonstrated its entitlement to a trial. As the defendants conceded at oral argument before this court, the trial court improperly seemed to have determined that, to prevail in its opposition to summary judgment, the plaintiff needed to produce evidence of who placed contaminants into the drainpipe, the nature of those contaminants, how the contaminants came to be in the drainpipe, and when this occurred. The plaintiff certainly was not required, in defense of summary judgment, to provide the defendants or the court with any and all evidence needed to prove its case at trial. It was

enough to present evidence that raised a disputed issue of material fact that needed to be resolved by a fact finder, thus defeating the defendants attempt to show the nonexistence of any disputed material facts. The plaintiff met this obligation.

In his sworn affidavit, Jones averred that "there was a buried metal pipe which exited the abutting building at 24 Marietta Street onto [the plaintiff's property] . . . ." Jones further averred that contaminants were found in soil samples taken from areas on the plaintiff's property in which there were breaks in the piping, and that "[t]he residue samples from the [piping] showed higher concentrations of the same type[s] of contaminants that were found in the soil." Jones' affidavit and accompanying report additionally tends to demonstrate that the types of oil like contaminants found in the soil samples were consistent with the types of businesses and activities that had operated at 24 Marietta Street, and thus provided an additional causal link between the contaminants found on the plaintiff's property and the activities of the defendants.[9] The defendants do not argue that Jones' affidavit and report were improper summary judgment evidence. The affidavit of the defendant Kenneth Maratea also reflects that the defendants or their tenants maintained exclusive control over the premises for the duration of their ownership of the property. A trier of fact might reasonably infer from the aforementioned evidence that the contaminants in

[9] Jones averred in his affidavit that "laboratory results of the contaminants found in the soil resembled diesel fuel or #2 heating oil however based on the absence of volatile organic compounds (VOC's) and the presence of elevated metals, crankcase oils may also be a source." The report stated that city directory listings showed that the 24 Marietta Street building had been occupied at various times by various types of automobile and motorcycle repair businesses and clubs, a house cleaning operation, and various contractors. The defendant Kathleen Bednarcik also averred in her affidavit that George Bednarcik had used the building for a number of years as a parking garage for an oil truck.

the plaintiff's soil came from the drainpipe attached to the defendants' building and that, given their exclusive control over the property, the defendants, either directly or through negligence, were responsible for allowing the contaminants to enter the drain. It is true that the defendant Kenneth Maratea, in his answer to an interrogatory, wrote that the floor drain was somehow sealed or closed up. Nevertheless, viewed in the light most favorable to the nonmoving party, the proffered evidence clearly establishes disputed issues of material fact that entitle the plaintiff to a trial on the merits, leaving such factual disputes to be resolved at trial rather than by the trial judge in adjudicating a motion for summary judgment.

We conclude that there are genuine issues of material fact that preclude the granting of summary judgment. The trial court's conclusions to the contrary are not legally and logically correct and are not supported by the record. Accordingly, the court improperly granted the defendants' motion and rendered summary judgment in favor of the defendants.

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

CRYSTAL HORROCKS ET AL. *v.* KEEPERS, INC., ET AL.
(AC 44321)

Alvord, Cradle and Flynn, Js.

Syllabus

The plaintiffs sought to recover damages from the defendants for, inter alia, unpaid wages. In their complaint, the plaintiffs, who worked as exotic dancers at a gentlemen's club that was owned and operated by the defendants, alleged that they were improperly characterized as independent contractors as opposed to employees, and, as a consequence, they were unable to obtain workers' compensation benefits, an appropriate minimum wage and overtime pay, and were forced to pay the defendants

certain gratuities that they received from the club's customers. The trial court thereafter ordered a stay of the proceedings pending arbitration pursuant to a mandatory arbitration clause in the agreement that governed the employment relationship between the parties. The parties then proceeded to arbitration during which the defendants submitted incomplete written records concerning the number of hours that the plaintiffs worked, and the plaintiffs provided oral testimony on that issue. In his initial award, the arbitrator determined that the plaintiffs were employees rather than independent contractors. In a subsequent award, the arbitrator determined that the parties' employment agreement was illegal and unenforceable because it was an attempt to circumvent statutory wage and hourly requirements, and that the plaintiffs were entitled to be paid the appropriate minimum wage and overtime for the hours they worked during a certain two year period. The arbitrator awarded the plaintiffs $113,560.75 in damages, as well as attorney's fees and costs. Thereafter, the trial court granted the plaintiffs' application to confirm the arbitration awards and denied the defendants' motion to vacate the awards. On the defendants' appeal to this court, *held* that the trial court did not err in rejecting the defendants' claim that the arbitrator's calculation of damages awarded to the plaintiffs constituted a manifest disregard of the law because the defendants had the right to present evidence of the precise amount of work the plaintiffs performed and the arbitrator should have based his damages calculation on the defendants' written records, not on the plaintiffs' oral testimony; in the present case, the defendants were not prevented from submitting evidence to prove the precise number of hours worked by the plaintiffs but, rather, they submitted written records that the arbitrator determined were deficient, and, therefore, in light of that deficiency, the arbitrator properly considered the plaintiffs' oral testimony in calculating the damages award.

(*One judge concurring separately*)

Argued January 13—officially released November 1, 2022

Procedural History

Action to recover damages for, inter alia, unpaid wages, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Wilson*, *J.*, granted the defendants' motion to stay the proceedings pending arbitration; thereafter, the court, *Abrams*, *J.*, granted the plaintiffs' application to confirm the arbitration awards, denied the defendants' motion to vacate the awards and rendered judgment

for the plaintiffs, from which the defendants appealed to this court. *Affirmed.*

Stephen R. Bellis, for the appellants (defendants).

Kenneth J. Krayeske, for the appellees (plaintiffs).

Opinion

CRADLE, J. This appeal stems from a dispute between the plaintiffs, Crystal Horrocks, Yaritza Reyes, Dina Danielle Caviello, Jacqueline Green, Sugeily Ortiz and Zuleyma Bella Lopez, and the defendants, Keepers, Inc., and Joseph Regensburger,[1] as to the proper characterization of the plaintiffs as independent contractors, instead of employees, for services rendered as exotic dancers at a gentlemen's club owned and operated by the defendants. The defendants appeal from the judgment of the trial court denying their motion to vacate, and granting the plaintiffs' application to confirm, arbitration awards finding that the plaintiffs were employees, not independent contractors, and awarding them damages. We affirm the judgment of the trial court.

The trial court set forth the following relevant procedural history. "The plaintiffs . . . brought suit against the defendants . . . for alleged violations of the relevant state and federal minimum wage and overtime laws. As alleged in the plaintiffs' complaint, each of the plaintiffs worked as an exotic dancer at Keepers Gentlemen's Club located in Milford. This establishment is owned and operated by the defendants. The plaintiffs allege[d] that, during their time working for the defendants, they were improperly characterized as independent contractors as opposed to employees.

[1] Regensburger is the president of Keepers, Inc., and was sued in both his individual capacity and as an agent, principal or representative of Keepers, Inc. He has been involved throughout both the arbitration and the present case. The arbitrator's awards, which were later confirmed by the trial court's judgment, were against both defendants and made no mention of apportionment.

According to the plaintiffs, this improper employment relationship . . . caused them, inter alia, to be unable to obtain needed workers' compensation benefits, as well as not be paid the appropriate minimum wage and overtime pay. The plaintiffs also contend[ed] [that] they were illegally forced to pay the defendants certain gratuities that they received from customers. Accordingly, the plaintiffs' eight count complaint allege[d] the following causes of action: (1) count one—failure to pay minimum wage in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 206; (2) count two—failure to pay overtime in violation of the FLSA, 29 U.S.C. § 207; (3) count three—unlawful deductions from wages and/or gratuities in violation of the FLSA; (4) count four—failure to pay minimum wage in violation of General Statutes § 31-60; (5) count five—failure to pay overtime in violation of General Statutes § 31-76b; (6) count six—unlawful deductions from wages in violation of General Statutes § 31-71e; (7) count seven—unjust enrichment; and (8) count eight—breach of implied contract.

"On May 26, 2015, the defendants filed a motion to dismiss and/or stay this action . . . on the ground that the employment relationship between the parties was governed by an entertainment lease agreement [agreement] that contained a mandatory arbitration clause. The court, *Wilson, J.*, denied the motion to dismiss . . . on October 13, 2015, but it also ordered a stay of the proceedings pending arbitration on January 4, 2016 . . . . [T]he parties [thereafter] proceeded to an arbitration . . . . On July 18, 2019, [the arbitrator] issued his initial arbitration award wherein he determined that the plaintiffs were appropriately characterized as employees as opposed to independent contractors. Subsequently, on March 17, 2020, [the arbitrator] issued a further arbitration award where he determined, inter alia, that the . . . agreement was illegal and unenforceable because it was an attempt to circumvent statutory

wage and hour requirements, and, as a result, the plaintiffs were entitled to be paid the appropriate minimum and overtime wage for the hours they worked for the period between April 14, 2013, to April 14, 2015. [The arbitrator] awarded the plaintiffs $113,560.75 in damages. [The arbitrator] further denied the plaintiffs' request for double liquidated damages because he found [that] the defendants acted with a good faith belief they were complying with the law, but he also gave the plaintiffs $85,000 in attorney's fees and $2981.16 in costs." (Footnotes omitted.)

On March 17, 2020, the plaintiffs filed an application to confirm both the July 18, 2019 and the March 17, 2020 arbitration awards. On April 7, 2020, the defendants filed a motion to vacate the arbitration awards, claiming that (1) the arbitrator exceeded his authority because, when he determined that the agreement was void and unenforceable, the arbitration clause within the agreement was also rendered unenforceable, (2) the arbitrator's award of attorney's fees was improper and should be vacated because the arbitrator relied on the current revision of General Statutes § 31-72 as opposed to the iteration of the statute that was in existence between April, 2013, and April, 2015, and (3) it was incorrect for the arbitrator to rely on oral testimony of the plaintiffs regarding how much time they had worked. By way of a memorandum of decision filed on October 2, 2020, the court, *Abrams*, *J.*, granted the plaintiffs' application to confirm the arbitration awards and denied the defendants' motion to vacate the awards. This appeal followed.

On appeal, the defendants claim that the trial court erred by failing to conclude that the arbitrator's calculation of damages constituted a manifest disregard of the law because the arbitrator "should have based [that calculation] on the written records [presented by the

defendants] not [on] a verbal estimate of the plaintiffs.[2] We disagree.

"[T]he manifest disregard of the law ground for vacating an arbitration award is narrow and should be reserved for circumstances of an arbitrator's extraordinary lack of fidelity to established legal principles." (Internal quotation marks omitted.) *Blondeau* v. *Baltierra*, 337 Conn. 127, 161, 252 A.3d 317 (2020). "Under this highly deferential standard . . . our precedent instructs that three elements must be satisfied before we will vacate an arbitration award on the ground that the [arbitrator] manifestly disregarded the law: (1) the error was obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator; (2) the [arbitrator] appreciated the existence of a clearly governing legal principle but decided to ignore it; and (3) the governing law alleged to have been ignored by the [arbitrator] is [well-defined], explicit, and clearly applicable. . . . [E]very reasonable presumption and intendment will be made in favor of the [arbitration] award and of the arbitrators' acts and proceedings." (Citations omitted; internal quotation marks omitted.) Id., 161–62.

In setting forth the basis for the calculation of his award of damages, the arbitrator recounted the evidence presented by the parties, including evidence of

[2] The defendants also claim on appeal that the trial court erred by not holding that the arbitrator's awards violated a legitimate public policy of the freedom to contract, and by failing to sever the enforceable and unenforceable terms of the agreement and to determine that the defendants were entitled to a credit against wages for the entertainment fees paid to the plaintiffs. Because the defendants did not raise these claims before the trial court, we decline to review them. See *Board of Education* v. *Commission on Human Rights & Opportunities*, 212 Conn. App. 578, 590, 276 A.3d 447 ("[t]his court will not review issues of law that are raised for the first time on appeal" (internal quotation marks omitted)), cert. denied, 345 Conn. 902, A.3d (2022); see also Practice Book § 60-5 (reviewing court not bound to consider claim unless it was distinctly raised at trial).

the record keeping procedures used by the defendants to record the hours worked by the plaintiffs. The defendants submitted that they had used two systems to account for attendance. First, they used a sort of "punch card" system, whereby the identification card of each plaintiff was photocopied at the beginning of each shift, and from those "punch cards," the administrative staff would create a "daily business recap." After that recap was produced each day, the punch cards were discarded. The defendants also utilized a biometric system that scanned the plaintiffs' fingerprints at the beginning of their shifts. Due to a system malfunction, however, the records from that system were lost. Although the plaintiffs did not have written records of the hours they had worked, the arbitrator considered their oral testimony regarding those hours, along with the incomplete records of the defendants, to calculate damages.

Before the trial court, the defendants challenged the damages awarded by the arbitrator on the ground that they constituted a manifest disregard of the law. In rejecting the defendants' argument, the court explained that, "[a]lthough the defendants attempt to frame this portion of their motion as an attack on the overly speculative nature of [the arbitrator's] damages calculation, in reality, the defendants believe that [the arbitrator] erred when he credited the plaintiffs' oral testimony over certain written documentation offered by the defendants." The court referred to the arbitrator's assessment of the evidence submitted by the parties, explaining that the arbitrator had concluded that the defendants' record keeping was "inadequate and incomplete" and, therefore, that, "in calculating [the] plaintiffs' damages, [he] . . . necessarily relied on both the plaintiffs' testimony and the partial records of the defendants." (Internal quotation marks omitted.) On that basis, the court noted that the arbitrator "indicate[d] that he examined the defendants' attendance records,

but he found that they were not completely accurate. Therefore, he also relied on the plaintiffs' oral testimony in order to determine a complete total of the number of hours that they worked." The court concluded: "This finding is more than substantial evidence to support [the arbitrator's] damages calculations, and it is not the role of this court to substitute its judgment for that of the arbitrator. Consequently, the court also rejects this argument as a valid basis to grant the defendants' motion to vacate."

On appeal to this court, the defendants again challenge the damages awarded to the plaintiffs on essentially the same ground that they raised before the trial court. Specifically, the defendants contend that "the arbitrator disregarded the law that the defendants have the right to present evidence of the precise amount of work the plaintiffs performed." The defendants claim that the court "should have based the hours worked on the written records of the employer, not [on] a verbal estimate by the plaintiffs."[3] As aptly recounted by the trial court, the arbitrator considered the evidence presented by the defendants but concluded that the defendants' record keeping was "inadequate and incomplete" and, consequently, "relied on both the plaintiffs' testimony and the partial records of the defendants" in calculating the damages that he awarded to the plaintiffs. Contrary to the defendants' assertion, they were not prevented from submitting evidence to prove the number of hours worked by the plaintiffs, but the evidence that they did present, which was considered by the arbitrator, was deficient. Faced with that deficiency, the arbitrator considered the oral testimony of the plaintiffs. It was not improper for the arbitrator to do so.

[3] We note that, at oral argument before this court, counsel for the defendants acknowledged that it was not "improper for the arbitrator to credit some of the plaintiffs' [oral] testimony."

Accordingly, the court did not err in rejecting the defendants' claim that the arbitrator disregarded the law in calculating the damages awarded to the plaintiffs, and thus did not err in granting the plaintiffs' application to confirm, and denying the defendants' motion to vacate, the arbitration awards.

The judgment is affirmed.

In this opinion ALVORD, J., concurred.

FLYNN, J., concurring. I agree that the trial court's judgment should be affirmed. I write separately for the following reasons. It has been usual for this court either to address each claim raised by an appellant on appeal or, in the alternative, to explain why review is not undertaken. In the present case, the first claim of the defendants/appellants, Keepers, Inc., and Joseph Regensburger, is "[w]hether the standard of review for the trial court should have been de novo review rather than the more deferential review afforded arbitration decisions when the arbitrator found the entertainment lease agreement violated public policy and determined it to be illegal." This claim is listed as Roman numeral one in the defendants' statement of issues, and the defendants devote more than one half of their appellate brief to detailing their supporting arguments. I write separately to explain why I think this claim, ultimately, is unreviewable. In support of their argument, the defendants cite to *Schoonmaker* v. *Cummings & Lockwood of Connecticut, P.C.*, 252 Conn. 416, 425, 747 A.2d 1017 (2000) ("we conclude that because the arbitrator's decision regarding the postemployment payments implicated a legitimate public policy, that is, facilitating clients' access to an attorney of their choice, the trial court should have exercised de novo review"). In response, the plaintiffs, Crystal Horrocks, Yaritza Reyes, Dina Danielle Caviello, Jacqueline Green, Sugeily Ortiz and

Zuleyma Bella Lopez, contend: "Although the first issue raised by the defendants in this appeal is disguised as a legal question concerning the standard of review utilized by the trial court, they are actually asking this court to hold that the trial court applied an improper standard of review to a claim it was never asked to consider. Despite never challenging the arbitrator's determination that the . . . agreement was void as a matter of public policy, in [their] motion to vacate [the arbitration awards], the defendants now ask this court to reverse the trial court on an issue [they] never raised."

The defendants raise for the first time on appeal the issue of whether the arbitrator properly had determined that the agreement was void as a matter of the public policy of the freedom to contract and challenge the standard of review purportedly used by the trial court in addressing that issue. However, there is an obstacle in the path of reviewability. The defendants never raised in connection with their motion to vacate a challenge to the arbitrator's decision that the agreement was void as a matter of the public policy of the freedom to contract, and, as a result, the trial court did not address that issue, much less apply a standard of review to it. The defendants' mere citation in their motion to vacate to *Schoonmaker* v. *Cummings & Lockwood of Connecticut, P.C.*, supra, 252 Conn. 416, for the proposition that the arbitrator in the present case exceeded his authority under General Statutes § 52-418 (a) (4), is not sufficient. Although *Schoonmaker* concerns the necessity to review an arbitrator's decision de novo where it affects the public policy of a client's right to be represented by an attorney of his or her choice, reference to *Schoonmaker*, without more, would not alert a trial court to the distinct freedom to contract ground that the defendants now assert for the first time on appeal. This court cannot review a claim on appeal that the trial court applied the wrong standard of review to a claim that it had not

been asked to review. Issues must be distinctly raised before the trial court to be reviewable on appeal. See E. Prescott, Connecticut Appellate Practice & Procedure (7th Ed. 2021) § 8-2:1.1, p. 466; see also Practice Book § 60-5 (reviewing court not bound to consider claim not distinctly raised at trial).

WENDY M. MAZZA *v.* SAMUEL T. MAZZA, JR.
(AC 44984)

Elgo, Suarez and DiPentima, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court granting the plaintiff's postjudgment motion for contempt. The plaintiff alleged that the defendant violated a provision of the parties' separation agreement, which had been incorporated into the judgment of dissolution, requiring the defendant to pay to the plaintiff 50 percent of "all awards" that the defendant received from a workers' compensation proceeding that had been initiated when the defendant suffered a work-related injury during their marriage. Following the judgment of dissolution, the defendant entered into a stipulation that resolved the workers' compensation proceeding. The defendant thereafter failed to pay the plaintiff 50 percent of the workers' compensation award, totaling approximately $250,000, which the defendant received pursuant to the stipulation. The defendant, however, used a portion of the workers' compensation award to purchase a property in Kent. Having determined that the separation agreement clearly and unambiguously defined the term "all awards" to include the money the defendant received as part of the stipulation, the trial court granted the motion for contempt and ordered the defendant either to pay the plaintiff the money to which she was entitled or, as alternative relief, to transfer to the plaintiff the title to the Kent property. The defendant was ordered not to transfer, mortgage or in any way diminish the value of the Kent property prior to his full compliance with the court's contempt order. On the defendant's appeal to this court, *held*:

1. The trial court properly granted the plaintiff's motion for contempt, that court having correctly determined that the parties' separation agreement was unambiguous in that the phrase "all awards" properly included the defendant's compensation payment he received as a result of the stipulation: although the parties' settlement agreement did not define the phrase "all awards," the plain and ordinary meaning of those terms

clearly encompassed the defendant's $250,000 workers' compensation payment, the parties' use of the term "all" in the agreement indicated that their intention was that the plaintiff would be entitled to a portion of each and every workers' compensation payment, and the defendant's claim that the parties' did not contemplate dividing workers' compensation awards intended for medical expenses was unavailing, as this interpretation had no basis in the plain language of the agreement insofar as the parties did not place any limitation as to which portions of a workers' compensation award the defendant must pay to the plaintiff, and there was no language in the agreement permitting the defendant to unilaterally withhold from his workers' compensation payment funds that were attributable to medical expenses; moreover, the distinction the defendant attempted to draw between an award issued by an administrative law judge pursuant to statute (§ 31-300) and a voluntary agreement pursuant to statute (§ 31-296) was without any basis, as there was no reference to any statutory provisions in the separation agreement and, thus, no indication that the parties relied on the meaning of "award," as that term is used in any statute.

2. The trial court did not abuse its discretion in determining that the defendant wilfully violated the separation agreement, the record having sufficiently demonstrated that the defendant agreed to pay to the plaintiff 50 percent of all of his workers' compensation awards, but, upon receipt of his workers' compensation payment, he used the funds for his own purposes rather than complying with the separation agreement; in the present case, although the defendant claimed that his conduct was not wilful because he relied on the advice of his worker's compensation counsel, the trial court expressly found that it did not find the defendant's testimony credible, and this court would not reconsider on appeal the defendant's testimony at the contempt hearing, and, even if this court credited such testimony, his testimony failed to establish that he relied on counsel's advice or that counsel advised him not to pay any portion of the workers' compensation award to the plaintiff; furthermore, the defendant offered no explanation as to why he previously paid the plaintiff 50 percent of a workers' compensation award of $10,000, but failed to remit any of the $250,000 payment at issue.

3. The trial court did not improperly order alternative relief regarding the Kent property in granting the plaintiff's motion for contempt, as the ordered relief was a proper exercise of its remedial contempt authority to effectuate the terms of the judgment of dissolution: because the Kent property was purchased by the defendant postdissolution with the funds from the award and thus was not contemplated by the property provision of the separation agreement, the trial court had the authority to include the Kent property in its contempt orders as the plaintiff did not explicitly seek to modify the parties' property assignment but, instead, sought to enforce the practical effect of the original dissolution judgment; moreover, the evidence demonstrated that the defendant did not have the

available liquid funds to pay the plaintiff, and, having transformed the funds from the workers' compensation award intended for the plaintiff into nonliquid assets, including the Kent property, the defendant forced the court to consider alternative remedies in order to protect the integrity and purpose of the settlement agreement, and the court left the defendant with the possibility that he can pay the plaintiff the money to which she is entitled instead of transferring the Kent property.

Argued May 9—officially released November 1, 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 plaintiff's motion for contempt, and the defendant appealed to this court. *Affirmed.*

Alexander Copp, with whom was *Neil R. Marcus*, for the appellant (defendant).

Kathy Boufford, for the appellee (plaintiff).

Opinion

ELGO, J. The defendant, Samuel T. Mazza, Jr., appeals from the judgment of the trial court granting the postjudgment motion for contempt filed by the plaintiff, Wendy M. Mazza. On appeal, the defendant claims that the court improperly (1) granted the plaintiff's motion for contempt and (2) ordered alternative relief concerning the defendant's real property. We disagree and, accordingly, affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to this appeal. The parties married in August, 2003. In December, 2003, the defendant suffered an injury when a concrete tank fell onto his legs while he was performing work for his employer, M & M Precast Corporation, causing him to suffer a permanent loss of

motion to his right leg and back. The defendant's injury spawned a workers' compensation proceeding, and the defendant thereafter received workers' compensation payments throughout the parties' marriage.

On February 11, 2015, the court dissolved the marriage of the parties. The court incorporated into the judgment of dissolution the parties' separation agreement (agreement), which was executed on the same date. The agreement is a standard form JD-FM-172 (Rev. 7-10) that the self-represented parties completed by writing their agreed terms in the designated sections. The agreement resolved all of their then outstanding issues, including custody, visitation, child support, health insurance coverage, childcare costs, and postmajority education support with respect to their four minor children. In § 13 of the agreement, titled "Other," the parties agreed that the "plaintiff will receive 50 [percent] of all awards from [the] defendant's workers' compensation suit paid prior to [their] children's college graduation." The court held a hearing at which it canvassed the parties regarding their entire agreement, specifically including § 13, after which the court found that the entire agreement was fair and equitable. The defendant subsequently received a workers' compensation payment for $10,000, of which he remitted 50 percent to the plaintiff.[1]

On March 8, 2019, the defendant entered into a "Stipulation for Agreement and Award" (stipulation) that resolved his workers' compensation proceeding. Pursuant to the stipulation, the defendant's employer agreed to pay $250,000 to the defendant as a "full, final and complete settlement, adjustment, accord and satisfaction of all claims which [the defendant] might otherwise

[1] It is unclear from the record the date on which the defendant received this $10,000 payment and the date on which he remitted 50 percent of this payment to the plaintiff.

have against [his employer] . . . and is to be made and accepted in lieu of all other compensation payments . . . .'' The stipulation further provides that the parties' ''purpose and intent . . . [was] to resolve every and all claims for all injuries and conditions during, and related to, the [defendant's] employment with [his] employer under the Workers' Compensation Act [(act), General Statutes § 31-275 et seq.].'' Within the next few months, the defendant received a check for approximately $200,000 pursuant to the stipulation, which accounted for a deduction of $50,000 for attorney's fees and costs.[2] On his receipt of this $200,000 workers' compensation payment, the defendant did not remit 50 percent to the plaintiff. Instead, the defendant used the $200,000 workers' compensation payment to purchase and to renovate a residence in Kent (Kent property), to pay taxes and rent, to purchase a camper, to give his mother a monetary gift, and to pay the plaintiff outstanding alimony and child support. Both parties subsequently retained counsel in the present case.

On December 23, 2020, the plaintiff filed a motion for contempt. The plaintiff asserted that the defendant wilfully violated § 13 of the agreement because he failed to remit to her 50 percent of the $200,000 workers' compensation payment. As for relief, the plaintiff's motion for contempt sought 50 percent of the defendant's $200,000 workers' compensation payment, attorney's fees incurred in the prosecution of the motion for contempt, and ''any further or alternate relief the court deems fair and equitable.''

On August 19 and September 14, 2021, the court held an evidentiary hearing on the plaintiff's motion for contempt. Both the plaintiff and the defendant testified at

[2] For clarity, we hereinafter refer to the payment the defendant received pursuant to the stipulation as the ''$200,000 workers' compensation payment.''

the hearing regarding their formation and understanding of the agreement. Each party submitted a memorandum of law in which they advanced disparate interpretations of § 13 of the agreement and its application to the $200,000 workers' compensation payment. The defendant argued that the phrase "all awards from [the] defendant's workers' compensation suit" did not include his $200,000 workers' compensation payment because (1) he did not completely understand the terms of the agreement when he signed it, (2) the $200,000 workers' compensation payment was much larger than he anticipated when he signed the agreement, (3) the parties never contemplated that the plaintiff would be entitled to a workers' compensation payment attributable to his future medical expenses, (4) the time for him to provide the funds to the plaintiff had not yet expired, and (5) there is a legal distinction in the act between an "award" and an "approved stipulation." The plaintiff conversely argued that the agreement unambiguously provides that she was entitled to 50 percent of "all" of the workers' compensation awards that the defendant received, which clearly included the $200,000 workers' compensation payment that the defendant received pursuant to his workers' compensation stipulation.

On September 15, 2021, the court issued an order granting the plaintiff's motion for contempt. The court rejected each of the defendant's arguments and held that "the plaintiff has carried her burden of proof by clear and convincing evidence that the defendant has wilfully failed to obey a clear court order without justification or excuse." The court reasoned that it "does not find the language of the agreement ambiguous; there is a clear court order that the 'plaintiff will receive 50 [percent] of all awards from [the] defendant's workers' compensation suit paid prior to [their] children's graduation.' " The court further held that "[t]he defendant

received [the $200,000 workers' compensation payment] in March, 2019, but paid no portion to the plaintiff. There is no question . . . that the defendant did not consider a legal distinction between settlements and awards when he received the [$200,000 workers' compensation payment] and chose not to pay them to the plaintiff."

Consequently, the court issued a three part order of relief. First, the court ordered "the defendant to pay $101,300 to the plaintiff on or before October 15, 2021," and that the defendant shall "reimburse the plaintiff for a portion of her attorney's fees incurred in prosecuting this action in the amount of $7500." Second, the court ordered by way of "alternative" relief that the defendant convey by warranty deed to the plaintiff all of his right, title, and interest to his Kent property on or before October 15, 2021, and that the defendant was not to transfer, mortgage, or in any way diminish the value of the Kent property prior to his full compliance with the court's contempt order. Third, the court ordered that "the plaintiff may secure these orders by immediate judgment lien in accordance with Chapter 906 of the General Statutes." This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court improperly granted the plaintiff's motion for contempt. Specifically, the defendant argues that the court incorrectly determined that the phrase in the agreement that "all awards from [the] defendant's workers' compensation suit" clearly and unambiguously included his $200,000 workers' compensation payment. The defendant also argues that the court abused its discretion by determining that he wilfully violated the agreement.[3] We disagree.

[3] Subsumed within his first claim, the defendant devotes one paragraph to argue that "the trial court further erred in precluding the defendant's counsel from questioning the plaintiff as to whether she was seeking 50 percent of payments for medical expenses" at the August 19, 2021 hearing

We first set forth the standard of review and legal principles relevant to our resolution of the defendant's first claim. Our standard of review is mixed. We employ plenary review to the question of whether the court properly determined that the agreement incorporated into the judgment of dissolution was unambiguous. See *Birkhold* v. *Birkhold*, 343 Conn. 786, 811, 276 A.3d 414 (2022). We employ the abuse of discretion standard to review the question of whether the court properly determined that the defendant wilfully failed to comply with the agreement. Id.

"It is the burden of the party seeking an order of contempt to prove, by clear and convincing evidence, both a clear and unambiguous directive to the alleged contemnor and the alleged contemnor's wilful noncompliance with that directive." (Internal quotation marks omitted.) Id. "Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense. . . . Our review of a trial court's judgment of civil contempt involves a two part inquiry. [W]e first consider the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing

on her motion for contempt. We decline to review this claim on the ground that it is inadequately briefed because it is a mere conclusion that is unsupported by citations to any legal authority. See *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 802, 256 A.3d 655 (2021) ("'mere conclusory assertions regarding a claim, with no mention of relevant authority and minimal or no citations from the record, [are inadequately briefed]' ").

The defendant also argues in two sentences that "the trial court's award of attorney's fees was based on its finding that the defendant was in wilful contempt of a clear court order. If this court reverses the trial court's finding of contempt, it must also reverse its award of $7500 in attorney's fees to the plaintiff." In light of our conclusion that the court properly granted the plaintiff's motion for contempt, we do not address that contention.

to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding." (Citation omitted; internal quotation marks omitted.) *Hall* v. *Hall*, 335 Conn. 377, 391–92, 238 A.3d 687 (2020).

With respect to the first inquiry, "[b]ecause a separation agreement incorporated into a dissolution decree is in the nature of a contract, we note the following general principles of contract interpretation. A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. . . . [A]ny ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity." (Internal quotation marks omitted.) *Casiraghi* v. *Casiraghi*, 200 Conn. App. 771, 792–93, 241 A.3d 717 (2020). "[T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract." (Internal quotation marks omitted.) *Casablanca* v. *Casablanca*, 190 Conn. App. 606, 617–18, 212 A.3d 1278, cert. denied, 333 Conn. 913, 215 A.3d 1210 (2019).

In the present case, § 13 of the agreement broadly provides that the "plaintiff will receive 50 [percent] of

all awards from [the] defendant's workers' compensation suit paid prior to [their] children's college graduation."[4] (Emphasis added.) We agree with the court that the phrase "all awards" unambiguously was intended to apply to the $200,000 workers' compensation payment he received pursuant to the stipulation. Although the agreement does not define the phrase "all awards," the plain and ordinary meaning of those terms clearly encompasses the defendant's $200,000 workers' compensation payment. See, e.g., Black's Law Dictionary (11th Ed. 2019) p. 169 (defining "award" as "[a] final judgment or decision"); Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 86 (defining "award" as "a judgment or final decision" and "something that is conferred or bestowed esp[ecially] on the basis of merit or need"); Merriam-Webster's Collegiate Dictionary, supra, p. 31 (defining "all" as "every member or individual component of" and "as much as possible"). Here, the defendant's $200,000 workers' compensation payment finally resolved the workers' compensation proceeding. The stipulation provides that the $200,000 workers' compensation payment was a "full, final and complete settlement, adjustment, accord and satisfaction of all claims" that the defendant had and resulted in the defendant receiving one final award in lieu of future awards. The parties' use of the term "all" in the agreement indicates that their intention was that the plaintiff would be entitled to a portion of each and every workers' compensation payment, including the $200,000 workers' compensation payment. In fact, the stipulation itself is titled "Stipulation for Agreement and *Award*," which further indicates that the $200,000 workers' compensation payment made pursuant to the stipulation is an award.[5] (Emphasis added.) Accordingly, it is clear from

[4] It is undisputed that the defendant received his $200,000 workers' compensation payment "prior to [their] children's college graduation."

[5] The defendant attempts to distinguish the title of the stipulation by contending that "the stipulation is titled 'Stipulation for Agreement *and Award*' because it is a stipulation that *includes* an award, but is not *only*

the plain language of the agreement that the parties intended that the plaintiff was to receive 50 percent of the defendant's $200,000 workers' compensation payment because that payment was an award.

The defendant's interpretation to the contrary is not a reasonable one. The defendant argues that the parties did not intend that the term "all awards" would include all funds received by the defendant from his workers' compensation proceeding. Rather, the defendant asserts that it was the intent of the parties that the plaintiff *would not* be entitled to funds from the workers' compensation proceeding "intended for surgeries, medical care and medication," but that she *would be* entitled to funds attributable to an imprecise category of funds[6] generally, including loss of use, lost wages, and partial disability. Stated simply, the defendant's interpretation has no basis in the plain language of the agreement because the parties did not place any limitation as to which portions of a workers' compensation award the defendant must pay to the plaintiff. There is no language in the agreement stating that the defendant has the right to unilaterally withhold from his

an award." (Emphasis in original.) We are not persuaded by this semantical argument and, rather, view it as an implicit acknowledgement that the $200,000 workers' compensation payment remitted to the defendant pursuant to the stipulation was, in fact, an "award."

[6] The defendant has not consistently articulated before the trial court or before this court the portion, if any, of the $200,000 workers' compensation payment to which he believes the plaintiff is entitled. At different points before the trial court and before this court, the defendant argued that the plaintiff was entitled only to a portion of the $200,000 workers' compensation payment attributable to several differing and contrasting categories: "lost wages and partial loss of use," "loss of use, loss of wages," partial permanent disability payments, temporary partial disability payments, a partial permanent disability arrearage, missed work, or liquidated damages. Thus, the defendant's argument is undercut by his own shifting interpretation of the agreement. See *Hirschfeld* v. *Machinist*, 181 Conn. App. 309, 327, 186 A.3d 771 (plaintiff "completely undermined" her interpretation of separation agreement because she offered different interpretations during trial and appellate proceedings), cert. denied, 329 Conn. 913, 186 A.3d 1170 (2018).

workers' compensation payments funds that are attributable to medical expenses. Indeed, the plain language of the agreement states the opposite—that the plaintiff is entitled to 50 percent of *all awards*. If the parties intended to limit the plaintiff's entitlement to certain portions of the defendant's awards, they certainly could have done so.[7] We will not graft such a limitation into the agreement so as to support the defendant's position. See *Nation-Bailey* v. *Bailey*, 316 Conn. 182, 200, 112 A.3d 144 (2015) ("'[a]lthough parties might prefer to have the court decide the plain effect of their contract contrary to the agreement, it is not within its power to make a new and different agreement' ").

The defendant also contends that the stipulation was not an "award" as that term is used within the act. The defendant attempts to draw a distinction between a workers' compensation "award" issued by an administrative law judge pursuant to General Statutes § 31-300, and a "voluntary agreement" pursuant to General Statutes § 31-296. We are not persuaded. There is no reference to the act in the agreement and, thus, no indication that the parties relied on the meaning of "award" as that term is used in the act. As the defendant recognizes in his appellate briefs, "[t]his is not to say that the parties intended the word 'awards' to be construed exactly as that term is used in the . . . [a]ct" and that, "[a]t the time of the divorce, both were unsophisticated, pro se parties who were plainly not relying on any hyper specific statutory definition, but merely using the term as they had come to understand it

[7] On appeal, the defendant recognizes that the $250,000 sum provided for in the stipulation is not bifurcated into any categories. In particular, the stipulation provides that this sum represents "a full and final settlement of all compensation for said injuries, and for all results upon the claimant past, present and future, and for all claims for past, present and future medical, surgical, hospital and incidental expenses and all compensation which may be due . . . ."

. . . .”[8] In sum, we conclude that the court properly determined that the agreement was unambiguous.[9]

We next turn to the second inquiry, which requires that the defendant’s violation of the agreement incorporated into the judgment of dissolution was wilful. “Whether a party’s violation was wilful depends on the circumstances of the particular case and, ultimately, is a factual question committed to the sound discretion of the trial court. . . . Without a finding of wilfulness, a trial court cannot find contempt and, it follows, cannot impose contempt penalties.” (Internal quotation marks omitted.) *Hall* v. *Hall*, supra, 335 Conn. 392. As stated previously, we review the court’s determination that the defendant’s violation of the agreement was wilful under the abuse of discretion standard. *Birkhold* v. *Birkhold*, supra, 343 Conn. 811. “Under the abuse of discretion standard, [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

[8] Secondarily, even if the parties agreed that the meaning of the term “award” was governed by the act, there is no definition for that term within the act. Instead, § 31-296 (a), which governs voluntary agreements, provides in relevant part that a signed and approved agreement “shall be as binding upon both parties as an award by the administrative law judge.” Thus, under the circumstances of the present case, the stipulation has the same effect as an “award” as that term is used in the act. See R. Carter et al., 19A Connecticut Practice Series: Workers’ Compensation (2008 Ed.) § 28:18, p. 146 (“[t]he settlement agreement is an award by stipulation, like a stipulated judgment, and is usually referred to as a ‘stipulation’ ”).

[9] In further support of his contention that the agreement is ambiguous, the defendant makes several other arguments relying on the extracontractual evidence adduced at the hearing on the motion for contempt, including the transcript of the court’s canvass of the parties at the original dissolution hearing. We do not reach these arguments in light of our conclusion that the agreement is unambiguous on its face. See *Casablanca* v. *Casablanca*, supra, 190 Conn. App. 617–18 (“‘[w]hen only one interpretation of a contract is possible, the court need not look outside the four corners of the contract’ ”).

the law and reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) *L. W.* v. *M. W.*, 208 Conn. App. 497, 511, 266 A.3d 189 (2021).

The defendant contends that his violation of the agreement was not wilful because he relied on the advice of his workers' compensation attorney, Guy DePaul.[10] Particularly, at the September 14, 2021 hearing on the motion for contempt, the defendant testified that it was his understanding that the plaintiff would be entitled only to "awards," not "benefits," pursuant to the agreement. At the hearing, the defendant was asked by his attorney "why . . . [he] distinguish[ed] in [his] testimony between benefits and awards?" The defendant responded, "[t]hat's what I was always told," and "[t]hat's what had been explained to me by [DePaul] . . . ." The defendant then was asked whether he and "DePaul discussed how [his] case would be presented and disposed of ultimately; your workers' comp[ensation] case," and the defendant responded, "[y]es." The defendant contends that this testimony establishes that the court abused its discretion in finding his breach of the agreement was wilful. We do not agree.

The defendant's argument amounts to an invitation for this court to reconsider on appeal his testimony at the hearing. We decline to do so because the trial court is "the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . [When] there is conflicting evidence . . . we do not retry the facts or pass on the credibility of the witnesses. . . . The probative force of conflicting evidence is for the trier to determine." (Internal quotation marks omitted.) *Barlow* v. *Commissioner of Correction*, 343 Conn. 347, 359, 273 A.3d 680 (2022). This is particularly true because the court expressly found that it did "not find

[10] To be clear, the defendant does not claim that his actions were not wilful because he could not comply with the agreement.

the defendant's testimony credible on any of [the] points" he raised.

Even if the court had credited the defendant's testimony, his testimony fails to establish that DePaul advised him not to pay any portion of his $200,000 workers' compensation payment to the plaintiff *or* that the defendant withheld his settlement in reliance on the advice of DePaul. Instead, the defendant's testimony merely establishes that DePaul informed him that there was some distinction between "awards" and "benefits" in relation to his workers' compensation proceeding. See *Hall* v. *Hall*, supra, 335 Conn. 391–93 (rejecting claim that plaintiff's actions were not wilful because he relied on advice of his counsel when plaintiff failed to identify any testimony or evidence that counsel advised him to act in violation of agreement and that he relied on that advice). An additional problem with the defendant's argument is that he did not pay the plaintiff *any* portion of his $200,000 workers' compensation payment, regardless of whether he classified part of it as an "award" or a "benefit." If the defendant was uncertain as to whether his $200,000 workers' compensation payment was subject to distribution to the plaintiff, his obligation was to seek the guidance of the court, not to unilaterally withhold all of the funds. See *Becue* v. *Becue*, 185 Conn. App. 812, 827, 198 A.3d 601 (2018) ("'[W]e will not countenance one party's interpreting the term and undertaking unilateral action to the detriment of the other party. In such a circumstance, the party seeking to alter payments must seek the assistance of the court.' "), cert. denied, 331 Conn. 902, 201 A.3d 403 (2019). In fact, the defendant provided the plaintiff with 50 percent of the $10,000 workers' compensation payment that he received after the judgment of dissolution but before the stipulation. On appeal, the defendant offers no explanation as to why he paid the

plaintiff 50 percent of the $10,000 workers' compensation payment but none of the $200,000 workers' compensation payment.

Additionally, the defendant fails to account for the other undisputed evidence supporting the court's wilfulness determination. When the defendant received the $200,000 workers' compensation payment, the defendant did not pay 50 percent to the plaintiff as he was required to do pursuant to § 13 of the agreement. Instead, the defendant used the funds to purchase and to renovate the Kent property, to pay taxes and rent, to purchase a camper, to give his mother a monetary gift, and to pay the plaintiff outstanding alimony and child support. In short, the defendant agreed to pay the plaintiff 50 percent of all of his workers' compensation awards, but, on his receipt of the $200,000 workers' compensation payment, he used the funds for his own purposes instead of complying with the agreement. Accordingly, we conclude that the court's determination that the defendant wilfully violated the agreement was not a "manifest abuse of discretion." (Internal quotation marks omitted.) *L. W.* v. *M. W.*, supra, 208 Conn. App. 511. In sum, we conclude that the court properly granted the plaintiff's motion for contempt.

II

The defendant next claims that the court improperly ordered alternative relief concerning the Kent property. Specifically, the defendant argues that the court lacked the authority to award, as part of its contempt order, alternative relief: requiring the preservation, restricting the transfer, and permitting the imposition of a judgment lien on the Kent property. He argues that the court impermissibly modified the substantive terms of the property distribution as provided by the judgment of dissolution. We disagree.

At the outset, we briefly recount the facts underlying the court's award of relief in its contempt order. In § 10 of the agreement as to the "division of property" and "real property," the parties wrote "none." Nevertheless, the court, in its order granting the plaintiff's motion for contempt, ordered that the defendant pay the plaintiff $108,800 as compensation, which represented approximately 50 percent of the defendant's $200,000 workers' compensation payment and $7500 in attorney's fees. It was apparent from the evidence presented at the contempt hearing that the defendant did not have the liquid funds available to pay $108,800 to the plaintiff. Indeed, the defendant averred, in his January 21, 2021 financial affidavit, that the Kent property he purchased with funds from his $200,000 workers' compensation payment was worth $110,000. As an alternative to the transfer of funds, the court fashioned an alternative award of relief with respect to the Kent property, which had a value approximately equal to the sum owed to the plaintiff. Particularly, the court ordered, by way of alternative relief, that the defendant convey by warranty deed to the plaintiff all of his right, title and interest to the Kent property on or before October 15, 2021, and that the defendant was not to transfer, mortgage or in any way diminish the value of the Kent property prior to his full compliance with the court's contempt order. The court further ordered that "the plaintiff may secure these orders by immediate judgment lien in accordance with Chapter 906 of the General Statutes."

We next set forth the standard of review and legal principles relevant to our resolution of the defendant's second claim. "It is well settled that [t]he court's authority to transfer property appurtenant to a dissolution proceeding rests on [General Statutes] § 46b-81.[11] . . .

[11] General Statutes § 46b-81 provides in relevant part: "(a) At the time of entering a decree annulling or dissolving a marriage or for legal separation . . . the Superior Court may assign to either spouse all or any part of the estate of the other spouse. The court may pass title to real property to either party or to a third person or may order the sale of such real property,

Accordingly, the court's authority to divide the personal property of the parties, pursuant to § 46b-81, must be exercised, if at all, at the time that it renders judgment dissolving the marriage. . . . A court, therefore, does not have the authority to modify the division of property once the dissolution becomes final." (Footnote added; internal quotation marks omitted.) *Walzer* v. *Walzer*, 209 Conn. App. 604, 615, 268 A.3d 1187, cert. denied, 342 Conn. 907, 270 A.3d 693 (2022).

"Although the court does not have the authority to modify a property assignment, a court, after distributing property, which includes assigning the debts and liabilities of the parties, does have the authority to issue postjudgment orders effectuating its judgment. . . . [I]t is . . . within the equitable powers of the trial court to fashion whatever orders [are] required to protect the integrity of [its original] judgment. . . . This court has explained the difference between postjudgment orders that modify a judgment rather than effectuate it. A modification is [a] change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter intact. . . . In contrast, an order effectuating an existing judgment allows the court to protect the integrity of its original ruling by ensuring the parties' timely compliance therewith." (Internal quotation marks omitted.) Id. "If a party's motion can fairly be construed as seeking an effectuation of the judgment rather than a modification of the terms of the property settlement, this court must favor that interpretation." (Internal quotation marks omitted.) Id.

"Similarly, when determining whether the new order is a modification, we examine the practical effect of the ruling on the original order. . . . In order to determine the practical effect of the court's order on the

without any act by either spouse, when in the judgment of the court it is the proper mode to carry the decree into effect."

original judgment, we must examine the terms of the original judgment as well as the subsequent order. [T]he construction of [an order or] judgment is a question of law for the court . . . [and] our review . . . is plenary. As a general rule, [orders and] judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the [order or] judgment. . . . The interpretation of [an order or] judgment may involve the circumstances surrounding [its] making. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The [order or] judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.) Id., 615–16.

It is equally well established that, when "[f]aced with a party in contempt of court, it is within the court's province to fashion appropriate remedial orders. Courts have in general the power to fashion a remedy appropriate to the vindication of a prior . . . judgment. . . . Having found noncompliance, the court, in the exercise of its equitable powers, necessarily ha[s] the authority to fashion whatever orders [are] required to protect the integrity of [its original] judgment." (Internal quotation marks omitted.) Id., 616. "[A] trial court has broad discretion to make whole any party who has suffered as a result of another party's failure to comply with a court order. . . . The court has authority to order additional measures not contained in the original order if they are necessary to effectuate the original judgment." (Citations omitted; internal quotation marks omitted.) *Behrns* v. *Behrns*, 124 Conn. App. 794, 822, 6 A.3d 184 (2010).

We conclude that, after finding the defendant in contempt, the court fashioned a remedy appropriate to protect the integrity of the judgment of dissolution. The plaintiff's motion for contempt did not explicitly seek

to modify the parties' property assignment. Rather, the plaintiff sought to enforce the practical effect of § 13 of the agreement incorporated into the original dissolution judgment, which provided that the plaintiff was to receive 50 percent of all the workers' compensation awards that the defendant received. The defendant, however, failed to pay the plaintiff approximately $100,000 of the $200,000 workers' compensation payment that she was owed pursuant to § 13 of the agreement. The defendant instead spent these funds for his own purposes, including the purchase of the Kent property. The evidence at the contempt hearing shows that the defendant did not have available the liquid funds to pay to the plaintiff. Having transformed those funds intended for the plaintiff into nonliquid assets such as the Kent property, the defendant himself forced the court to consider alternative remedies in order to protect the integrity and the purpose of § 13 of the agreement.

Accordingly, the court had the authority to fashion "an appropriate remedy to protect the integrity of the original judgment." (Internal quotation marks omitted.) *Lawrence* v. *Cords*, 165 Conn. App. 473, 486, 139 A.3d 778, cert. denied, 322 Conn. 907, 140 A.3d 221 (2016). That is precisely what the court did. The court's order of alternative relief—requiring the preservation, restricting the transfer, and permitting the imposition of a judgment lien on the Kent property valued at $110,000—ensured that the plaintiff would be compensated for the $108,800 she was owed pursuant to the agreement. Furthermore, the defendant is not necessarily required to relinquish his Kent property to the plaintiff because the court's order of relief was alternative. The court left open the possibility that the defendant can instead pay to the plaintiff the $108,800 that she is owed. Accordingly, "the court ensured that the plaintiff

would receive the sum owed to her within a specified span of time one way or another." Id., 488.

Contrary to the defendant's argument, the court had the authority to include the Kent property in its contempt order despite the fact that the Kent property was not contemplated by the agreement incorporated into the judgment of dissolution.[12] The court did not modify the terms of the property distribution because the Kent property was not part of the agreement. Rather, the Kent property was purchased by the defendant with the funds from the $200,000 workers' compensation payment that was contemplated by § 13 of the agreement. A trial court "has authority to order additional measures not contained in the original order if they are necessary to effectuate the original judgment." (Internal quotation marks omitted.) *Behrns* v. *Behrns*, supra, 124 Conn. App. 822. The court's order of relief in the present case was a proper exercise of its remedial contempt authority to effectuate the terms of the judgment of dissolution. See, e.g., *Walzer* v. *Walzer*, supra, 209 Conn. App. 617 (affirming court's contempt order requiring sale of property to satisfy deficiency in defendant's default on installment payments "to protect the integrity of the court-ordered dissolution agreement"); *Cunningham* v. *Cunningham*, 204 Conn. App. 366, 377–78, 254 A.3d 330 (2021) (affirming court's contempt order requiring plaintiff to assign portion of pension as "a mechanism to ensure, as required by the dissolution judgment, that the increased value of the pension benefit . . . 'belong[ed] to the defendant' "); *Lawrence* v. *Cords*, supra, 165 Conn. App. 485–87 (affirming court's

[12] Taken to its logical conclusion, the defendant's position is untenable. It would frustrate our existing family law system if a party could avoid an obligation to remit funds to his former spouse by instead using those funds to purchase real property for the party's own use. See *O'Brien* v. *O'Brien*, 326 Conn. 81, 96–97, 161 A.3d 1236 (2017) ("[t]he court's enforcement power is necessary to 'preserve its dignity and to protect its proceedings' ").

contempt order requiring defendant either to pay plaintiff lump sum or proceeds from sale of property as "a remedy appropriate to protect the integrity of its original judgment"); *Behrns* v. *Behrns*, supra, 821–22 (affirming court's contempt order prohibiting defendant from encumbering assets without prior approval of court so as to secure defendant's debt to plaintiff).[13] In sum, the defendant's actions rendered strict compliance with the judgment of dissolution impossible, and, thus, the court crafted an appropriate remedy to effectuate the judgment. See *Santoro* v. *Santoro*, 70 Conn. App. 212, 218, 797 A.2d 592 (2002) (" 'noncompliance on the part of the parties made strict adherence to the terms of the [decree] impossible' "). Therefore, we conclude that the court properly ordered alternative relief concerning the Kent property.

The judgment is affirmed.

In this opinion the other judges concurred.

CHRISTINE DOWNING *v.* EMMANUEL DRAGONE ET AL.
(AC 44416)

Prescott, Cradle and Suarez, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, a used car dealer, D Co., and one of its owners, E, for breach of contract and unjust enrichment. The plaintiff claimed that E and G, D Co.'s other owner,

[13] To support his argument that the court's award of relief was improper, the defendant primarily relies on *Blaisdell* v. *Blaisdell*, Superior Court, judicial district of New London, Docket No. FA-000121221-S (October 3, 2001) (30 Conn. L. Rptr. 543, 544) (denying "motion to transfer by statute" because relief requested improperly sought to modify property settlement in dissolution judgment). Even if we were to conclude that *Blaisdell* supports the defendant's argument, we recognize that it is not binding on this court. See *Rider* v. *Rider*, 210 Conn. App. 278, 287 n.13, 270 A.3d 206 (2022) (Superior Court decisions not binding on Appellate Court).

agreed to retain her as an auctioneer for a classic car auction. She further claimed that, at a meeting with E and G, she agreed to provide substantial additional services to assist them in running their first such auction and, in return, they agreed to pay her 1 percent of the gross proceeds of the auction, with a minimum payment in the amount of $30,000. The plaintiff prepared a written agreement memorializing the agreed upon terms, told E that she had done so, and, at his instruction, left it on his desk. The agreement did not contain signature blocks, but it included a provision indicating that, unless rejected, it was to become effective ten days after receipt. Neither E nor G rejected the agreement or attempted to make any changes to it, and the plaintiff performed the services required of her thereunder. After D Co. failed to pay the plaintiff the contracted amount, she initiated the underlying action. At trial, E testified that the plaintiff was hired only to call the auction in exchange for a fee of $2500 plus expenses and claimed that he did not find the written agreement on his desk until several months after the auction was held. The trial court rendered judgment for the plaintiff on her breach of contract claim and for the defendants on the claim of unjust enrichment. On the defendants' appeal, this court reversed in part the judgment of the trial court and remanded the case for a new trial solely on the plaintiff's breach of contract claim. On remand, following a bench trial, the trial court rendered judgment for the plaintiff, and D Co. appealed to this court. *Held*:

1. The trial court's finding that the written agreement was an enforceable contract was not improper:

a. The trial court properly found that D Co. assented to the written agreement by accepting the plaintiff's services thereunder and by failing to object to its terms: the trial court credited the plaintiff's testimony that she discussed with G and E the services that she would perform for the auction, that they agreed her fee would be 1 percent of the gross auction proceeds, with a minimum payment of $30,000, and that she delivered to E a copy of the agreement setting forth those terms; moreover, the trial court found that neither E nor G ever rejected the agreement or attempted to make any changes to it and that they instead accepted the plaintiff's services as outlined in the agreement; furthermore, contrary to D Co.'s arguments, the trial court's findings did not depend on whether the parties discussed the specific terms of the agreement but, rather, on the parties' conduct after the plaintiff delivered the agreement, as evidenced by the plaintiff's testimony, numerous emails between the plaintiff and D Co.'s principals and employees, and the minutes from several weekly meetings held by D Co. in preparation for the auction; accordingly, there was evidence in the record to support the trial court's finding that D Co. had assented to the written agreement.

b. The doctrine of judicial estoppel was inapplicable to D Co.'s claim that the trial court should not have credited the plaintiff's allegedly perjurious testimony: although the plaintiff's responses to the trial court's

questioning were equivocal on broad questions, this court disagreed with D Co.'s characterization of her testimony; moreover, D Co. alerted the trial court to the alleged inconsistencies, and, despite this, the trial court credited the plaintiff's testimony that the parties had agreed to the essential terms of the contract and that the plaintiff had memorialized those terms in the written agreement that she delivered to E, and this court declined to second-guess those credibility determinations.

c. This court declined to review D Co.'s claim that the written agreement contained terms that were too ambiguous to meet the certainty requirements of an enforceable contract because D Co. failed to raise such claim before the trial court: on appeal, D Co. claimed that the term "gross auction proceeds" as used in the agreement was ambiguous and that expert testimony was necessary for the court to resolve the ambiguity, however, although D Co.'s counsel had questioned the plaintiff at trial regarding her interpretation of the term, D Co. neither requested that the trial court make a determination as to whether the term was ambiguous nor advanced an alternative interpretation of the term and, instead, merely denied that it had agreed to that term in any sense.

d. D Co. could not prevail on its claim that the trial court's finding that the plaintiff testified that she told E she had prepared the written agreement was a gross mischaracterization of the plaintiff's testimony and was clearly erroneous: the trial court's finding was supported by evidence in the record, namely, the plaintiff's testimony and the rational inferences drawn therefrom; moreover, that finding did not depend on whether the plaintiff used the word "agreement" to describe the document that she delivered to E but, rather, on her testimony that she delivered the document to E and told him that it reflected the parties' agreement.

e. Contrary to D Co.'s claim, the trial court did not improperly shift the burden of proof to D Co. to prove that it had not assented to the written agreement but, rather, properly applied the law: although D Co. purported to challenge the burden of proof applied by the trial court, its claim effectively challenged the trial court's factual findings and credibility determinations, and the evidence presented was sufficient to support the court's finding that D Co. had assented to the agreement.

f. D Co. could not prevail on its claim that, because the parties attached different meanings to the plaintiff's actions, there was a legal misunderstanding that precluded enforcement of the written agreement: the trial court found that D Co. had assented to the agreement on the basis of findings that this court held were supported by evidence in the record; moreover, the trial court determined that the plaintiff's version of the events was more credible than D Co.'s version, and this court would not second-guess such credibility determination.

2. D Co. could not prevail on its claim that the trial court improperly admitted hearsay evidence on the issue of damages: to the extent that D Co. claimed that the trial court improperly admitted exhibit 57, a copy of

the auction results as reported on the website that was used to hold the auction online, as inadmissible hearsay, this court declined to review the claim because it was not properly briefed and because D Co. failed to object to the admission of the exhibit on that ground at trial; moreover, the plaintiff's testimony with respect to exhibit 57 constituted a sufficient prima facie showing, pursuant to the applicable Connecticut rule of evidence (§ 9-1 (a)), to overcome D Co.'s challenge to its authenticity; furthermore, even if this court assumed, without deciding, that the admission of exhibit 5, a table prepared by the plaintiff that listed the cars sold at the auction and the prices for which they sold, was improper, that evidentiary ruling was harmless because D Co. failed to demonstrate that the exhibit's admission affected the result of the trial.

Argued February 10—officially released November 1, 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 Stamford-Norwalk, and tried to the court, *Lee*, *J.*; judgment in part for the plaintiff, from which the defendants appealed to this court, *DiPentima*, *C. J.*, and *Lavine* and *Pellegrino*, *Js.*, which reversed in part the judgment and remanded the case for a new trial on the plaintiff's breach of contract claim; thereafter, the case was transferred to the judicial district of Ansonia-Milford; subsequently, the matter was tried to the court, *Hon. Arthur A. Hiller*, judge trial referee; judgment for the plaintiff, from which the defendant Dragone Classic Motorcars, Inc., appealed to this court. *Affirmed.*

Edward T. Murnane, Jr., for the appellant (defendant Dragone Classic Motorcars, Inc.).

Jeffrey Hellman, for the appellee (plaintiff).

Opinion

SUAREZ, J. In this breach of contract action, the defendant Dragone Classic Motorcars, Inc., appeals from the judgment of the trial court, rendered after a

court trial, in favor of the plaintiff, Christine Downing.[1] On appeal, the defendant claims that the court improperly (1) found that a written contract existed between the parties and (2) admitted "hearsay evidence" on the issue of damages. We affirm the judgment of the trial court.

The following facts, as found by the court, and procedural history are relevant to the defendant's claims on appeal. "The plaintiff . . . is an auctioneer who has been engaged in the auction business since 2003. During the course of her work as an auctioneer, the plaintiff regularly encountered George Dragone (George), one of the two co-owners of the defendant . . . .

"In the summer of 2011, at George's request, the plaintiff met with [George and Emanuel Dragone, the other co-owner of the defendant] at [the defendant's] Westport, Connecticut showroom to discuss the possibility of a classic automobile auction.

"In early 2012, the plaintiff received an email from [Emanuel] stating that [the defendant] planned to hold two auctions in 2012 and wished to retain the plaintiff as its auctioneer. The plaintiff, [Emanuel], and George met on January 26, 2012, to discuss the planning of a May, 2012 auction. At this meeting, George and [Emanuel] agreed to retain the plaintiff to be the auctioneer for [the defendant's] first on-site classic car auction. The parties agreed on the tasks that the plaintiff would perform. Because this was [the defendant's] first auction, the plaintiff's work would require her to do everything . . . [including] branding, creating an on-line presence and help[ing] [to] mold [the defendant] into

[1] The named defendant, Emanuel Dragone (Emanuel), is not participating in this appeal. Accordingly, all references to the defendant in this opinion are to Dragone Classic Motorcars, Inc. We note that Emanuel's first name has been spelled inconsistently in various court documents as Emanuel and Emmanuel.

more of an upper echelon type of name and away from a used car, previously owned car dealership. Additionally, the parties agreed that the plaintiff would be paid 1 percent of the gross proceeds of the auction with a minimum [payment] of $30,000. Before leaving the meeting on January 26, 2012, the parties also agreed that the plaintiff would prepare a written agreement to memorialize the agreed upon terms.

"The plaintiff prepared an agreement, which provides that the plaintiff is to receive 1 percent of the gross auction proceeds, plus expenses, as compensation for her services, with a minimum [payment in the amount] of $30,000.[2] The plaintiff brought the agreement with her to the next meeting with George and [Emanuel] on February 2, 2012. The plaintiff made notes of the February 2, 2012 [meeting] immediately after she left and got into her car. . . .

"At the meeting with George and [Emanuel] at their office on February 2, 2012, the plaintiff showed [Emanuel] the agreement describing the terms of her engagement as had been discussed. [Emanuel] told her to leave the agreement on his desk. The plaintiff did so. During the ensuing months leading up to the auction, the plaintiff performed the tasks that the agreement required her to do.[3]

[2] The compensation provision provides: "As compensation for the above duties, I require 1 [percent] of the gross auction proceeds, with a minimum payment of $30,000. I would like [one-third] of the minimum, $10,000, to be paid by April 1st, 2012. The remaining balance is due within [ten] days [after] the auction which is May 22, 2012."

[3] The agreement provided that the plaintiff, as auction consultant, would "provide all of the necessary information, training and support for the auction" and would perform the following tasks and services: (1) "[s]et up [the defendant] with Auction Flex, a comprehensive auction database management system," (2) work with the defendant's technology team to establish data and voice technology for conducting the auction and to create an Internet catalog to run the auction live over the Internet, (3) "[s]pear-head marketing efforts" with the defendant's in-house marketing team, (4) train staff how to use the auction database management system, (5) "[a]dvise, and if requested, create the mandatory forms required to run an auction,"

"[Emanuel] admits that he found the agreement on his desk, although he claimed to have found and read it months after the auction. He also claims that the plaintiff's only responsibility was to conduct the auction. These claims are not credible. From the meeting on February 2, 2012, and continuing thereafter, up to and through the date of the auction, the defendant observed and permitted all of the plaintiff's efforts to prepare for and accomplish this auction.

"Over the next several months after the February 2, 2012 meeting, the plaintiff attended numerous meetings to help plan for the auction. Also, as the auction approached, the plaintiff spent more and more time working on the auction, including a trip to Atlantic City, New Jersey, to watch a car auction and working at [the defendant's] reception desk. Overall, the plaintiff worked some hundreds of hours in connection with the auction, advised [the defendant] on the technology required for the auction, established Auction Flex software on [the defendant's] computers, revised [the defendant's] written history for brochures, and helped prepare advertising and marketing materials, revise the auction documents, [and] establish the technical and physical set up for the auction, thereby accomplishing and performing [her] obligations [pursuant to] the agreement. The auction was held on May 19, 2012, and received in excess of $4 milllion in gross receipts. In connection with the auction, the plaintiff incurred expenses of $1340.83." (Footnotes added; footnote omitted.)

After the defendant failed to pay her contractual fee, the plaintiff, as a self-represented party, initiated the underlying action on June 6, 2013.[4] In the operative two

(6) "[m]ap-out and direct the layout of the physical auction," and (7) "[c]onduct the actual auction . . . ."

[4] In April, 2016, Attorney Jeffrey R. Hellman filed an appearance on behalf of the plaintiff and has continued to represent the plaintiff in this matter since that date.

count complaint, she asserted breach of contract and unjust enrichment claims against the defendant. After a court trial, the court, *Lee*, *J.*, rendered judgment for the plaintiff on the breach of contract count and for the defendant on the unjust enrichment count.[5] The defendant appealed, claiming that the court based its legal conclusions on a clearly erroneous factual finding. See *Downing* v. *Dragone*, 184 Conn. App. 565, 570–71, 195 A.3d 699 (2018).

On appeal, this court agreed with the defendant, holding that the court's conclusion that the defendant breached the parties' contract was based on a clearly erroneous factual finding. Id., 574–75. Accordingly, this court reversed in part the judgment of the trial court and remanded the case for a new trial on the plaintiff's breach of contract claim only. Id., 575.

On remand, the case was tried to the court, *Hon. Arthur A. Hiller*, judge trial referee. After the plaintiff rested her case, the defendant moved to dismiss the action pursuant to Practice Book § 15-8 for failure to make out a prima facie case. After hearing argument on the issue, the court issued an order denying the defendant's motion. The court explained that "the parties may be bound by an unsigned contract where [assent] is otherwise indicated. Here, the testimony from the plaintiff's witnesses, if believed, as required by law, is sufficient to indicate the evidence of [assent]."

The trial proceeded thereafter, concluding on January 29, 2020, and the parties filed posttrial briefs. On October 20, 2020, the court issued its memorandum of decision, rendering judgment for the plaintiff. The court found "that there was a written contract between the plaintiff and the defendant and that the defendant

[5] The plaintiff asserted the same claims against Emanuel, but the court found "no basis for personal liability on the part of [Emanuel] because he acted at all times in his corporate capacity on behalf of the [defendant]."

breached the contract when it failed to pay the plaintiff for her services." The court awarded the plaintiff damages and interest in the amount of $100,570.54, which included $41,673.20 in damages pursuant to the contract, representing 1 percent of the "gross auction proceeds"; $34,727 in prejudgment interest at a rate of 10 percent per annum; and $24,170.34 in offer of compromise interest at a rate of 8 percent per annum. The defendant filed a motion to reargue, which the court denied without comment. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant claims that the court improperly found that the unsigned written agreement drafted by the plaintiff was an enforceable written contract. We disagree.

In its memorandum of decision, the court reasoned: "[T]he plaintiff testified that on January 26, 2012, the plaintiff met with George and [Emanuel], and they discussed the plaintiff's services that she was to perform and that her compensation would include 1 percent of the gross proceeds from the auction with a minimum payment of $30,000. The plaintiff then prepared a written agreement, which was admitted into evidence as plaintiff's exhibit 1. The written agreement is dated February 2, 2012, and provides that it becomes effective unless rejected within ten days. The agreement also provides that: 'If you want to make any amendments or additions to this agreement, please notify us within 10 days of your desire to do so.' The plaintiff testified that at the next meeting between the plaintiff, [Emanuel], and George, the plaintiff brought the written agreement, told [Emanuel] that she prepared an agreement, held it up to show him, and then was told to place it on his desk. The plaintiff also testified that everything that was in the agreement was discussed with George

and [Emanuel] prior to the writing of the agreement. Neither [Emanuel] nor George ever rejected the agreement or attempted to make any changes or additions. Instead, they accepted the plaintiff's services to plan the auction in accordance with exhibit 1 and did not pay her."

Significantly, although Emanuel testified that the plaintiff's only responsibility was to call the auction and that he did not find the agreement on his desk until several months after the auction, the court found Emanuel's testimony was "not credible." The court noted that, beginning with "the meeting on February 2, 2012, and continuing thereafter, up to and through the date of the auction, the defendant observed and permitted all of the plaintiff's efforts to prepare for and accomplish [the] auction." Accordingly, the court found "that [Emanuel] and George knew that the plaintiff was completing significant tasks related to the auction and that she expected to be paid for her services pursuant to the agreement." On the basis of those findings, the court rendered judgment for the plaintiff.

The defendant's claim that the court incorrectly found that the written agreement was an enforceable contract consists of various subclaims. Specifically, the defendant asserts: (1) "there was no evidence presented of a meeting of the minds or of mutual assent to the alleged contract's terms"; (2) "[t]o the extent that the trial court has credited the plaintiff's obviously perjurious testimony, judicial estoppel should operate to prevent this"; (3) "[t]he alleged contract document contains terms that are too ambiguous to meet the certainty requirements of an enforceable contract"; (4) "[t]he court's finding that the plaintiff testified that she 'told [Emanuel] that she prepared an agreement' is a gross mischaracterization of the plaintiff's actual testimony and clearly erroneous"; (5) the court improperly "shifted the burden of proof to the defendant to prove

that the 'written contract' had not been assented to by the defendant"; and (6) because "the parties have attached different meanings to the plaintiff's actions, there has been a legal misunderstanding that precludes enforcement of the document at issue." We address each subclaim in turn.

We begin by setting forth the applicable standard of review. "Whether a contract exists is a question of fact for the court to determine." (Internal quotation marks omitted.) *T & M Building Co.* v. *Hastings*, 194 Conn. App. 532, 538, 221 A.3d 857 (2019), cert. denied, 334 Conn. 926, 224 A.3d 162 (2020).

"In a case tried before the court, the trial judge is the sole arbiter of the credibility of witnesses and the weight to be afforded to specific testimony. . . . [When] the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . In other words, to the extent that the trial court has made findings of fact, our review is limited to deciding whether those findings were clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *Parrott* v. *Colon*, 213 Conn. App. 375, 387, 277 A.3d 821 (2022).

A

The defendant first claims that "there was no evidence presented of a meeting of the minds or of mutual

assent to the alleged contract's terms." The plaintiff responds that the court properly found that the defendant assented to the written agreement by accepting the plaintiff's services under the agreement and by failing to object to its terms. We agree with the plaintiff.

It is axiomatic that "to form a binding and enforceable contract, there must exist an offer and an acceptance based on a mutual understanding by the parties. . . . The mutual understanding must manifest itself by a mutual assent between the parties. . . . In other words, to prove the formation of an enforceable agreement, a plaintiff must establish the existence of a mutual assent, or a meeting of the minds . . . .

"The parties' intentions manifested by their acts and words are essential to the court's determination of whether a contract was entered into and what its terms were. . . . Whether the parties intended to be bound without signing a formal written document is an inference of fact [to be made by] the trial court . . . . [M]utual assent is to be judged only by overt acts and words rather than by the hidden, subjective or secret intention of the parties." (Citations omitted; internal quotation marks omitted.) *Computer Reporting Service, LLC* v. *Lovejoy & Associates, LLC*, 167 Conn. App. 36, 44–45, 145 A.3d 266 (2016).

Indeed, "[a] manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined. . . . Parties are bound to the terms of a contract even though it is not signed if their assent is otherwise indicated." (Citation omitted; internal quotation marks omitted.) *Original Grasso Construction Co.* v. *Shepherd*, 70 Conn. App. 404, 411, 799 A.2d 1083, cert. denied, 261 Conn. 932, 806 A.2d 1065 (2002).

In the present case, the court found that the defendant manifested assent to the unsigned written agreement by accepting the plaintiff's services under the agreement without objecting to its terms.[6] See, e.g., *Ullman, Perlmutter & Sklaver* v. *Byers*, 96 Conn. App. 501, 506, 900 A.2d 602 (2006) ("[o]ne enjoying rights is estopped from repudiating dependent obligations which he has assumed; parties cannot accept benefits under a contract fairly made and at the same time question its validity" (internal quotation marks omitted)). In so finding, the court credited the plaintiff's testimony that she discussed the services she would perform for the auction with George and Emanuel on January 26, 2012, that they agreed that her fee would be 1 percent of the gross auction proceeds, with a minimum payment

[6] The defendant also argues that the court improperly found that a written contract existed between the parties because the plaintiff did not plead that an oral or implied contract existed. The defendant appears to suggest that because the plaintiff alleged the existence of a written contract, the court was foreclosed from finding that an implied contract exists. We are not persuaded.

"The term 'implied contract' . . . often leads to confusion because it can refer to an implied in fact contract or to an implied in law contract. An implied in fact contract is the same as an express contract, except that assent is not expressed in words, but is implied from the conduct of the parties. . . . On the other hand, an implied in law contract is not a contract, but an obligation . . . . It is based on equitable principles to operate whenever justice requires compensation to be made." (Citation omitted.) *Vertex, Inc.* v. *Waterbury*, 278 Conn. 557, 573–74, 898 A.2d 178 (2006).

In the present case, the plaintiff alleged that "[a] written contract outlining [her] obligations and compensation was given to [the defendant and Emanuel]" and that she performed her duties as outlined in the contract. At trial, she argued that the defendant assented to the written agreement by failing to object over the course of several months as the plaintiff performed her obligations under that contract. This is precisely what the court found transpired. Because the court found that the defendant did not express its assent to the written contract in words but, rather, through its conduct, the court found that the written agreement was an implied in fact contract. See *Vertex, Inc.* v. *Waterbury*, supra, 278 Conn. 573–74. Accordingly, because a "written contract" can be either a signed, express contract or an unsigned, implied in fact contract, we disagree with the defendant's contention that the plaintiff's allegations in her complaint precluded the court's finding that an implied in fact contract existed.

of $30,000, and that she delivered to Emanuel a copy of the written agreement setting forth those terms on February 2, 2012. The court found that neither Emanuel nor George ever rejected the agreement nor attempted to make any changes to it and that, instead, they accepted the plaintiff's services as outlined in the agreement. Consequently, the court found that the defendant, acting through its principals, had assented to the written agreement.

The defendant nevertheless argues that, because the plaintiff's testimony establishes that she did not discuss the meaning of "gross auction proceeds" or a $10,000 payment that was due before the scheduled auction, the plaintiff failed to establish a "meeting of the minds necessary to form an enforceable contract."[7]

[7] The defendant relies on two excerpts from the plaintiff's testimony. First, as to the meaning of "gross auction proceeds," the plaintiff testified:

"[The Defendant's Counsel]: . . . I'm asking you for your understanding of what gross auction proceeds means; specifically, when you put it in the exhibit 1 document, what did you mean by gross auction proceeds?

"[The Plaintiff]: I meant the sum of the hammer prices that we sold at the auction.

"[The Defendant's Counsel]: So, not including the buyer's premium?

"[The Plaintiff]: Correct.

"[The Defendant's Counsel]: Not including sales tax?

"[The Plaintiff]: That is also correct.

"[The Defendant's Counsel]: And not including a seller's premium?

"[The Plaintiff]: I'm not sure what that is, but correct; it does not include that.

"[The Defendant's Counsel]: Okay. And did you discuss at your meeting in January of 2012 with [Emanuel] and George prior to preparing exhibit 1 whether the 1 percent of gross auction proceeds that you were to receive was going to include the buyer's premium, or the sales tax, or the seller's premium? Exactly what the specifics of what the gross auction proceeds meant?

"[The Plaintiff]: I do not believe so, because it's an accepted—you couldn't possibly expect to be paid on sales tax collected, because that's never your income; it's passed through to the entity to which it's owed. But I cannot recall having to clarify what that is.

"[The Defendant's Counsel]: So you didn't have a discussion with them about what gross auctions proceeds meant before you wrote up this document?

"[The Plaintiff]: As far as I can recollect, no."

The problem with the defendant's argument is that the court found that the defendant assented to the *written* agreement by accepting the plaintiff's services as set forth in that agreement while failing to object to its terms. Indeed, the court found that, beginning on February 2, 2012, and "continuing thereafter, up to and through the date of the auction, the defendant observed and permitted all of the plaintiff's efforts to prepare for and accomplish [the] auction." Accordingly, the court's finding does not depend on whether every word in the agreement was discussed by the parties but, rather, on the parties' conduct after the plaintiff delivered the written agreement to Emanuel on February 2, 2012. The court's finding in this regard is supported not only by the plaintiff's testimony, but also by the documentary evidence, which included numerous emails between the plaintiff, the defendant's principals, and the defendant's employees, as well as the minutes from several weekly meetings held by the defendant in preparation for the auction. Thus, there is evidence in the record to support the court's finding that the defendant assented to the written agreement. Consequently, because the court found, on the basis of the parties' conduct after February 2, 2012, that the defendant assented to the written

Second, as to the $10,000 payment, the plaintiff testified:

"[The Defendant's Counsel]: It's true, isn't it, that you never discussed the $10,000 minimum payment with [Emanuel] or George, isn't that right?

"[The Plaintiff]: After I—*it was discussed on January 26*, [*2012*], *so I can't say it was never discussed.* It is true that [it] was [not] discussed after that. To the best of my recollection, I don't think we did.

"[The Defendant's Counsel]: But on January 26, [2012], you did discuss the $10,000 minimum payment?

"[The Plaintiff]: I think so. It's seven and a half years now. I cannot say with philosophical certainty that it was discussed, but I imagine it would have been." (Emphasis added.)

We note that, insofar as the plaintiff's testimony is ambiguous on these points, the court, as the trier of fact, was "free to accept or reject, in whole or in part, the testimony offered by either party." (Internal quotation marks omitted.) *Benjamin* v. *Norwalk*, 170 Conn. App. 1, 25, 153 A.3d 669 (2016).

agreement and because that finding is supported by the evidence in the record, the defendant's claim fails.

B

The defendant next claims that, "[t]o the extent that the trial court has credited the plaintiff's obviously perjurious testimony, judicial estoppel should operate to prevent this." We disagree with the defendant's characterization of the plaintiff's testimony and conclude that the doctrine of judicial estoppel is inapplicable.

It is well established that "[t]he function of the appellate court is to review, and not retry, the proceedings of the trial court." (Internal quotation marks omitted.) *Housing Authority* v. *Stevens*, 209 Conn. App. 569, 580–81, 267 A.3d 927, cert. denied, 343 Conn. 907, 273 A.3d 234 (2022). As this court has explained, "[c]redibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Internal quotation marks omitted.) *Bayview Loan Servicing, LLC* v. *Gallant*, 209 Conn. App. 185, 192–93, 268 A.3d 119 (2021).

The defendant directs this court's attention to the following exchange between the court and the plaintiff:

"Q. So let me ask you a question while we are here: Did you discuss every one of the things [in the written agreement] with [Emanuel] before you gave him this document?

"A. I did not take detailed notes.

"Q. Did you tell him every one of these provisions before you gave him that document?

"A. Yes. We discussed in general what my responsibility is with the—

"Q. No, this is not in general. These are specifics, correct?

"A. Yes and no. For example—

"Q. Are there any specifics in here that—specifics as to what you would do? There are, right? There are specific items of what you're going to do, correct?

"A. Yes, there are, Your Honor.

"Q. And did you discuss each one of those with [Emanuel] before you handed him this contract?

"A. To the best of my recollection, yes. We did go over—

"Q. Every one of these?

"A. —how we would be preparing for the auction.

"Q. Every one of these items?

"A. To the best of my recollection, yes."

The defendant argues that "[t]his testimony was false and contrary to the plaintiff's testimony from the first trial. Under cross-examination, the plaintiff admitted that she had not discussed all the terms with the defendant's principals, or anyone else." The defendant claims that the following excerpt of the plaintiff's testimony from the present trial, which includes references to excerpts of her testimony from the first trial, contradicts her responses to the court's questions:

"[The Defendant's Counsel]: You said before that you didn't have a discussion of what gross auction proceeds meant?

"[The Plaintiff]: That is correct.

"[The Defendant's Counsel]: And do you recall this morning, when His Honor Judge Hiller asked you if you had discussed all of the terms in the exhibit 1 document with [Emanuel] and George, and you said you had?

"[The Plaintiff]: I said I believe I had, yes. I do recall.

"[The Defendant's Counsel]: And as you sit here today, do you remember when you testified in Stamford at the earlier trial of this matter that, when I asked you these kinds of questions, you admitted that you hadn't discussed many of the terms in the exhibit 1 document with George or [Emanuel] Dragone?

"[The Plaintiff]: I don't. I don't recall specifically.

"[The Defendant's Counsel]: If I showed you a document, you think it might refresh your recollection about your testimony then?

"[The Plaintiff]: I don't know, because it depends on the document. But I would be happy to look. . . .

"[The Defendant's Counsel]: Take a look at that document. Just take a look at that Ms. Downing, and let me know if that refreshes your memory at all about your prior testimony?

"[The Plaintiff]: I'm sorry, I'm no longer certain what the question is. I see where I say the last time I testified that I don't recall if we discussed the meaning of gross auction proceeds, so therefore I don't think we discussed every term that's in the contract. So I think my testimony is the same.

"[The Defendant's Counsel]: All right. So, as I mentioned, this morning [the court] asked you if you discussed all the terms that you put into the exhibit 1 document with [Emanuel] and George Dragone before you prepared it, and you said you believed you had. I

asked you a few minutes ago if you discussed a certain number of terms, and you said you think you did but you can't recall because it's been seven years. So I said, why don't you take a look at this document and see if it refreshes your memory at all about your prior testimony. . . .

"[The Plaintiff]: Okay.

"[The Defendant's Counsel]: Does it refresh your memory about your prior testimony? . . .

"[The Plaintiff]: Yes, because I'm able to read it.

"[The Defendant's Counsel]: And if you turn to the second page of that document, starting on line 13 . . . . [Question:] 'When you had your meeting with [Emanuel] and George discussing your compensation, you discussed all the terms that you ended up incorporating into this document?' Answer: 'I don't know that we discussed all of the terms; we discussed what [our] plan and vision was for the auction.' Do you recall that testimony?

"[The Plaintiff]: I must have said it. But do I recall specifically verbatim, no. But I certainly trust that these are my words.

"[The Defendant's Counsel]: Do you have a different recollection of the meeting with [Emanuel] and George Dragone now than you did back at the [first trial]?

"[The Plaintiff]: No. I probably have less of one, since it's been another three years. I think I subconsciously am wavering in my head between terms and definitions. Because the terms of the arrangement were gross proceeds, what's going to be sold, who's responsible for what. In my head, I'm thinking definition is what we didn't discuss the—we didn't define the words of all of the terms, and I think that may be why I sound like I

have a discrepancy. Because I did not see a need to define gross auction proceeds.

"The Court: Well, that's not all of the words. I asked you all of the terms in the contract.

"[The Plaintiff]: Right, and I—

"The Court: That means [two] pages of terms. I asked you if you discussed each of them with [George and Emanuel], and you said yes.

"[The Plaintiff]: And I recall the same.

"[The Defendant's Counsel]: Can I ask you to turn to, I think it's the fourth page of what you have there; it starts [on] page 90 at the top. Do you see where I asked you a question, line 6: 'Did you discuss that with them in their meeting,' and I'm referring to the minimum $10,000? Answer: 'We verbally talked on January 26, I should know that date by now.' 'Or thereabouts is the question.' Answer: 'That there would be one payment before the auction.' [Question:] 'Okay, and that payment would be in the amount of $10,000?'; that's my question. And your answer was: 'I don't recall if I specifically said $10,000.' Lines 13 and 14, do you see that?

"[The Plaintiff]: I do see it.

"[The Defendant's Counsel]: So, as you sit here today, you remember whether you specifically discussed a $10,000 minimum payment with George or [Emanuel] Dragone on January 26, 2012?

"[The Plaintiff]: I cannot recall if I said $10,000 or we said the fail stop, or safe gap method. I no longer recall those specifics."

First, we read the plaintiff's testimony in response to the court's questioning as equivocal on the broad questions initially posed by the court and definitive only as to the court's question about "specifics as to what

[the plaintiff] would do" pursuant to the agreement. More importantly, however, the defendant alerted the trial court to these alleged inconsistencies in the plaintiff's testimony, both during its cross-examination and in its posttrial brief, and the court nevertheless credited the plaintiff's testimony that the parties agreed to the essential terms of the contract and that the plaintiff memorialized those terms in the written agreement that she delivered to the defendant. Any alleged inconsistencies were fodder for the court's consideration. As the trier of fact, the court was "free to accept or reject, in whole or in part, the testimony offered by either party." (Internal quotation marks omitted.) *Benjamin* v. *Norwalk*, 170 Conn. App. 1, 25, 153 A.3d 669 (2016).

Accordingly, the doctrine of judicial estoppel simply is not implicated in the present case, and we decline to second-guess the court's credibility determination. See *Bayview Loan Servicing, LLC* v. *Gallant*, supra, 209 Conn. App. 192–93.

C

The defendant next claims that the written agreement "contains terms that are too ambiguous to meet the certainty requirements of an enforceable contract." More specifically, the defendant claims that the term " 'gross auction proceeds' " is ambiguous and "is not a term so common and well-defined as to be within the common knowledge of judges or juries." Therefore, according to the defendant, expert testimony was required to establish the meaning of " 'gross auction proceeds.' " The plaintiff responds that the defendant waived its claim regarding this alleged ambiguity by failing to raise it before the trial court. In its reply brief, the defendant offered no response regarding whether this claim was preserved. We conclude that the defendant did not raise this claim before the trial court and, therefore, we decline to review it.

"It is well established that an appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Canner* v. *Governor's Ridge Assn., Inc.*, 210 Conn. App. 632, 653–54, 270 A.3d 694 (2022).

In the present case, although the defendant's counsel suggested myriad possible meanings of "gross auction proceeds" while cross-examining the plaintiff, the defendant neither requested that the court make a determination as to whether the term "gross auction proceeds" is ambiguous, nor advanced an alternative interpretation of it. Instead, the defendant denied agreeing to that term in any sense. In its posttrial brief, the defendant explained that "Emanuel and George . . . deny that the parties' relationship was governed by exhibit 1, deny that it accurately reflected their understanding of the terms of the plaintiff's engagement, and deny that exhibit 1 was ever even made known to them; both claim not to have ever seen the exhibit 1 document until many months after the plaintiff's engagement was already concluded; and both claim that the plaintiff was engaged at a flat rate of $2500 plus expenses to serve as the auctioneer." (Emphasis omitted.) As to the definition of "gross auction proceeds," the defendant contended that the plaintiff's testimony that she did not recall defining that term with Emanuel and George

undermined her testimony that the defendant had assented to the written agreement.

On appeal, however, the defendant claims that the term "gross auction proceeds" is ambiguous and that expert testimony was necessary for the court to resolve the ambiguity. It argues: "*One possible explanation* for the trial court's imposition of the exhibit 1 compensation provision is that the . . . court simply accepted as fact the plaintiff's passing assertion that 'gross auction proceeds' is an industry term. This is improper." (Emphasis added.) The reason that the defendant is left to speculate as to a possible explanation for the court's construction of the compensation provision is that the defendant never raised this claim before the trial court. Consequently, the court never addressed it.

"Our role is not to guess at possibilities . . . but to review claims based on a complete factual record developed by a trial court." (Internal quotation marks omitted.) *State* v. *Brunetti*, 279 Conn. 39, 63, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007). "This court also has explained that [a]n appellate tribunal cannot render a decision without first fully understanding the disposition being appealed. . . . Without the necessary factual and legal conclusions . . . any decision made by us respecting [the claims raised on appeal] would be entirely speculative." (Internal quotation marks omitted.) *R & P Realty Co.* v. *Peerless Indemnity Ins. Co.*, 193 Conn. App. 374, 379, 219 A.3d 429 (2019). Consequently, because the defendant never raised its claim before the trial court, we decline to review it.

D

Next, the defendant claims that "[t]he court's finding that the plaintiff testified that she 'told [Emanuel] that

she prepared an agreement' is a gross mischaracterization of the plaintiff's actual testimony and clearly erroneous." The defendant argues: "There was no testimony from the plaintiff that she ever—at any point in time—told anyone from the defendant company that she had prepared 'an agreement.' [Because] this testimony does not exist in the record, the court's reliance on it is a mistake." We are not persuaded.

In its decision, the court stated that the plaintiff testified that, on February 2, 2012, "the plaintiff brought the written agreement, told [Emanuel] that she prepared an agreement, held it up to show him, and then was told to place it on his desk." At trial, the plaintiff testified:

"[The Plaintiff's Counsel]: . . . Where did you meet on February 2?

"[The Plaintiff]: At the Westport office . . . .

"[The Plaintiff's Counsel]: . . . Did you present exhibit 1 to anyone at [the meeting]?

"[The Plaintiff]: I did. I mentioned to [Emanuel] that I had written down what we had discussed, and he said that I should put it on his desk in his office.

"[The Plaintiff's Counsel]: And did you do that?

"[The Plaintiff]: I did. . . .

"[The Defendant's Counsel]: And you say you prepared this for that meeting and [Emanuel] told you to put it on his desk. Did you hand it to him? Did he take it into his hands?

"[The Plaintiff]: I had tried, and he said to put it on his desk.

"[The Defendant's Counsel]: Okay. So, at the time, did you hold it up in front of him so he could read it?

"[The Plaintiff]: I believe, instead of how you displayed it, I think I said, 'Here is what I created. I wrote down what we discussed,' and he said, 'Put it on my desk in my office.' . . .

"[The Defendant's Counsel]: . . . So it's your testimony that from about four feet away, you held up this note and said: '[Emanuel], I wrote out what we discussed'; and he said, 'Put it on my desk?'

"[The Plaintiff]: That is correct."

The plaintiff's testimony and the rational inferences drawn therefrom unquestionably support the court's statement, and we discern no error in the court's paraphrasing of the plaintiff's testimony. Simply put, the defendant ascribes undue significance to the court's choice of words and ignores the significance of the court's finding that the plaintiff delivered a copy of the written agreement to Emanuel on February 2, 2012. This finding did not depend on whether the plaintiff used the word "agreement" to describe the document she delivered to Emanuel but, rather, on her testimony that she delivered the document to him and communicated that the document reflected what they had discussed on January 26, 2012, i.e., the parties' agreement. Accordingly, the court's findings are supported by evidence in the record.

E

The defendant next claims that the court improperly "shifted the burden of proof to the defendant to prove that the 'written contract' had not been assented to by the defendant." We are not persuaded.

We begin with the applicable standard of review. "When a party contests the burden of proof applied by the trial court, the standard of review is de novo because the matter is a question of law." *Cadle Co.* v. *D'Addario*, 268 Conn. 441, 455, 844 A.2d 836 (2004). "It is well

settled that the party seeking to establish the existence of an enforceable contract bears the burden of proving a meeting of the minds between the parties." *LeBlanc* v. *New England Raceway, LLC*, 116 Conn. App. 267, 271, 976 A.2d 750 (2009).

Although purporting to challenge the burden of proof applied by the trial court, the defendant's claim effectively challenges the court's factual findings and credibility determinations. The defendant argues that "the plaintiff has failed to provide the court with credible evidence to establish the formation of a written contract between the parties. She chose to call herself, the defendant's principals, and offer the transcript testimony of a former employee to establish her case. She produced multiple documents that have nothing at all to do with the issue of the terms of her compensation. There is not one person other than the plaintiff herself who had any knowledge of the [unsigned written agreement]. . . . Based on the total dearth of evidence presented by the plaintiff, it is clear that the trial court . . . impermissibly shifted the burden from requiring the plaintiff to prove a meeting of the minds to requiring the defendant to disprove a meeting of the minds." (Citation omitted.) In response, the plaintiff argues that the evidence that she presented at trial "is sufficient to prove the existence of a written contract" and that "[t]here is nothing in the [memorandum of] decision to indicate that [the court] ever shifted the burden of proof." We agree with the plaintiff.

As we have already concluded in part I A of this opinion, the evidence presented to the trial court was sufficient to support the court's finding that the defendant assented to the written agreement. Although the defendant takes issue with the probative force of the evidence, "[t]his court will not reweigh the evidence or resolve questions of credibility . . . . It is within the province of the [trial court] to draw reasonable and

logical inferences from the facts proven." (Citation omitted; internal quotation marks omitted.) *State* v. *Glenn*, 30 Conn. App. 783, 791, 622 A.2d 1024 (1993). Accordingly, we conclude that the court properly applied the law.

F

Finally, the defendant claims that, because "the parties have attached different meanings to the plaintiff's actions, there has been a legal misunderstanding that precludes enforcement of the document at issue." It argues that "there are no words or acts by the defendant . . . that indicate assent to the terms of [the written contract]." The defendant further argues that "the mere act of the plaintiff carrying out some work with respect to the auction cannot itself be viewed as evidence of assent by the defendant to the terms of the [written contract], since such acts could reasonably be viewed as work pursuant to the defendant's understanding of the terms of the plaintiff's engagement." We are not persuaded.

As noted previously in this opinion, "[w]hether the parties intended to be bound without signing a formal written document is an inference of fact [to be made by] the trial court . . . . [M]utual assent is to be judged only by overt acts and words rather than by the hidden, subjective or secret intention of the parties." (Citation omitted; internal quotation marks omitted.) *Computer Reporting Service, LLC* v. *Lovejoy & Associates, LLC*, supra, 167 Conn. App. 45. Also, as previously stated in this opinion, the court found that the defendant had assented to the written agreement on the basis of its findings that (1) the parties discussed the terms of the written agreement, (2) the plaintiff delivered to Emanuel a copy of the written agreement, (3) the plaintiff performed pursuant to that written agreement, and (4) the co-owners of the defendant observed and permitted

all of the work performed by the plaintiff as set forth in the written agreement. As we held in part I A of this opinion, these findings are supported by the evidence in the record.

In support of its claim to the contrary, the defendant again characterizes the evidence presented as not "credible" and posits that the parties' conduct after February 2, 2012, is consistent with the defendant's understanding of the arrangement. The court, however, found otherwise. The parties offered two very different accounts of the underlying events, and the court determined that the plaintiff's version of events was more credible than the defendant's version. Specifically, the court found that the defendant's claim that it agreed to pay the plaintiff $2500 plus expenses to call the auction was not credible. See, e.g., *Computer Reporting Service, LLC* v. *Lovejoy & Associates, LLC*, supra, 167 Conn. App. 46–47 ("[t]he existence of a hidden or subjective intent on the part of one party to a contract does not render a finding of mutual assent clearly erroneous"). Again, we reiterate what has become a tired refrain: "Because it is the sole province of the trier of fact to assess the credibility of witnesses, it is not our role to second-guess such credibility determinations." *State* v. *Franklin*, 115 Conn. App. 290, 292, 972 A.2d 741, cert. denied, 293 Conn. 929, 980 A.2d 915 (2009). In sum, we conclude that the court's finding that the written agreement was an enforceable contract is supported by the evidence in the record.

II

Last, the defendant claims that the court improperly admitted "hearsay evidence" on the issue of damages. Specifically, the defendant claims that exhibits 5 and 57 "are inadmissible hearsay . . . ." The following additional facts are relevant to the defendant's claim.

At trial, the plaintiff offered exhibit 5, a table prepared by the plaintiff that listed the cars sold at the auction and the prices for which they sold. The plaintiff testified that she obtained that information from the defendant's website. The defendant objected, claiming that the document was inadmissible hearsay. When the court inquired whether the information constituted a statement of a party opponent, the defendant's counsel questioned whether the information was accurate or could be identified as coming from the defendant's website. In response, the plaintiff's counsel stated that he would authenticate the document through the testimony of Emanuel. After Emanuel testified that the auction results had been reported on the defendant's website, the court admitted exhibit 5 as a full exhibit.

The plaintiff also offered exhibit 57, a copy of the auction results as reported on the website www.liveauctioneers.com. The plaintiff testified that the website is "a platform to hold an auction concurrently on the Internet, so your bidding is [open] to anybody in the world while the auction is physically happening at a location." After the plaintiff testified that the results of the auction are reported on the website after each item is sold and that she had printed the document from the website on September 25, 2019, the plaintiff's counsel offered the document as a full exhibit. The defendant's counsel then interjected and proceeded to question the plaintiff:

"[The Defendant's Counsel]: I would like to examine her, Your Honor.

"The Court: You bet.

"[The Defendant's Counsel]: Ms. Downing, can you look at the—when you print[ed] that document off the Internet . . . last night, you were at a certain website?

"[The Plaintiff]: Liveauctioneers.com.

"[The Defendant's Counsel]: Yes or no—

"[The Plaintiff]: Yes.

"[The Defendant's Counsel]: —you were at a certain website?

"[The Plaintiff]: Yes.

"[The Defendant's Counsel]: Okay. And that website, when you print the document that you have there in front of you, does it get printed, the website you were at, on the document?

"[The Plaintiff]: Yes.

"[The Defendant's Counsel]: Okay. And what is the web address for that document?

"[The Plaintiff]: www.liveauctioneers.com.

"[The Defendant's Counsel]: And then there's a strain of other information?

"[The Plaintiff]: Yes.

"[The Defendant's Counsel]: Okay. That's not Dragoneclassicmotorcars.com, or anything like that, is it?

"[The Plaintiff]: This document, no. This document is from [www.liveauctioneers.com].

"[The Defendant's Counsel]: Is it your testimony that [the defendant] controls [www.liveauctioneers.com]?

"[The Plaintiff]: No, of course not.

"[The Defendant's Counsel]: Okay. Is it your testimony that—well, let me ask you this. For that auction, who was in charge of putting information—giving information to liveauctioneers.com?

"[The Plaintiff]: A woman named Tammy Sikowsky was hired, because she—a woman named Tammy Sikowsky.

"[The Defendant's Counsel]: Okay. Who hired her?

"[The Plaintiff]: I did.

"[The Defendant's Counsel]: Okay. And are you telling us that she put that information into [www.liveauctioneers.com]?

"[The Plaintiff]: Yes.

"[The Defendant's Counsel]: You're aware of that?

"[The Plaintiff]: Yes. She did it during the auction on May 19, 2012.

"[The Defendant's Counsel]: Okay. You had access to the liveauctioneers.com service, didn't you?

"[The Plaintiff]: Anybody does. It's a free service.

"[The Defendant's Counsel]: Okay. Anybody can go in there and put what they think the auction results were, isn't that right?

"[The Plaintiff]: No, that's not what I was saying. Anybody can buy—you can participate in a Live Auctioneer—in a live auction through [www.liveauctioneers.com], but you have to be [registered] with the company in order to run a live auction.

"[The Defendant's Counsel]: Okay. But you didn't put the information into [www.liveauctioneers.com] as reported on that website, did you?

"[The Plaintiff]: No, I was calling the auction.

"[The Defendant's Counsel]: I understand that. The information that is reproduced in . . . that exhibit, you didn't prepare that information and put it on that website?

"[The Plaintiff]: Other than print it last night, no.

"The Court: Now, let me ask a question. The person you hired to call those numbers in, she was working for you?

"[The Plaintiff]: She was paid by [the defendant].

"The Court: Paid by [the defendant].

"[The Plaintiff]: She came the day of the auction to do this.

"The Court: So, she became—she became an agent of [the defendant] working to put that information in?

"[The Plaintiff]: Yeah. She was hired to be the Live Auctioneers' person at the auction.

"The Court: And she was paid by [the defendant]?

"[The Plaintiff]: Yes.

"[The Defendant's Counsel]: She was paid by [the defendant], but you picked her, isn't that right?

"[The Plaintiff]: She is a person that I and other auctioneers throughout Connecticut use when we run a sale on [www.liveauctioneers.com].

"[The Defendant's Counsel]: Okay. Let me ask you—never mind. . . . I object, Your Honor. She—

"The Court: You might as well forget it, because it's coming in. . . .

"[The Defendant's Counsel]: Well, that's fine.

"The Court: All right.

"[The Defendant's Counsel]: I mean isn't it—I just want to put an objection on the record, Your Honor.

"The Court: Yeah, your objection is heard and overruled, okay. It's on the record.

"[The Defendant's Counsel]: Just lack of foundation is all—

"The Court: You got it.

"[The Defendant's Counsel]: —I would like to say.

"The Court: You got it. No problem. Okay. Go ahead.

"[The Plaintiff's Counsel]: Thank you. With that, Your Honor, the plaintiff rests.

"The Court: All right. Do you have questions for [the plaintiff]?

"[The Defendant's Counsel]: I don't have any questions for her, Your Honor.

"The Court: Okay. You may step down. We want [exhibit 57 marked as a full exhibit]. All right. Did you want to tell me what is important in here that you offered it for?

"[The Plaintiff's Counsel]: Your Honor, there was some discussion about the prices that were listed on the exhibit 5 and the fact that they . . . include the buyer's premium, as opposed to just the hammer price. These, Your Honor, are just the hammer price.

"The Court: Okay. Hammer price. And have you added those up?

"[The Plaintiff's Counsel]: I have not, Your Honor, but I will.

"The Court: Okay.

"[The Plaintiff's Counsel]: It also includes the memorabilia, which are not listed on exhibit 5.

"The Court: Gotcha. Okay. Thank you."

On appeal, the defendant challenges the admission of both exhibits 5 and 57. We conclude that the court properly admitted exhibit 57 into evidence and that, assuming, without deciding, that the court improperly admitted exhibit 5 into evidence, the defendant has

failed to demonstrate that the court's ruling was harmful.

Before considering the court's ruling as to exhibit 57, we first clarify the defendant's claim on appeal. Although the defendant refers to both exhibits 5 and 57 as inadmissible hearsay, its argument on appeal focuses on authentication. Specifically, the defendant argues that the "plaintiff testified that she knows the third party who put the information on that website, and named the person, but that person was never produced by the plaintiff *to authenticate the website* nor to explain the source of the information contained within the printout and/or the origin of the figures reported as the auction sales. . . . To support the admission of [exhibit 57], the plaintiff did not produce a witness from the defendant *to authenticate* the website.

"Simply put, the plaintiff's naked submission of information from third-party websites *without any authentication* is contrary to the Code of Evidence." (Citation omitted; emphasis added.) The defendant then sets forth two quotations about authentication pursuant to § 9-1 (a) of the Connecticut Code of Evidence, before stating that "the plaintiff failed to offer evidence *to authenticate the information* she claims to have obtained from the Internet and offered no evidence to overcome the exhibits' hearsay nature. Other than these hearsay exhibits, the plaintiff produced no evidence to prove the amount of her damages. The *trial court's rulings allowing these unauthenticated exhibits are erroneous*." (Emphasis added; footnote omitted.)

Because the substance of the defendant's argument on appeal focuses on the authentication, or lack thereof, of exhibit 57, we construe its claim as challenging the admission of exhibit 57 on the ground that the plaintiff failed to make an adequate prima facie showing of the authenticity of the document. Nevertheless, because its

brief is not a model of clarity as to this claim, to the extent the defendant claims that the court improperly admitted exhibit 57 because it is inadmissible hearsay, we conclude that this aspect of the defendant's claim is not adequately preserved and decline to review it.

At trial, the defendant's counsel did not assert hearsay as a ground for the objection to exhibit 57. Instead, as previously set forth in this opinion, counsel noted that he wanted to make his objection for the record and stated: "Just lack of foundation is all . . . I would like to say." It is well established that "[t]his court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted. . . .

"These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . Assigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush." (Internal quotation marks omitted.) *State* v. *Calabrese*, 279 Conn. 393, 408 n.18, 902 A.2d 1044 (2006). Consequently, because the defendant did not object to the admission of exhibit 57 on the grounds that it is inadmissible hearsay, we decline to review that claim on appeal.

Having clarified the defendant's preserved claim, we now set forth the applicable standard of review and relevant legal principles. "To the extent [that] a trial

court's admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Internal quotation marks omitted.) *Customers Bank* v. *Tomonto Industries, LLC*, 156 Conn. App. 441, 445, 112 A.3d 853 (2015).

"The requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be." Conn. Code Evid. § 9-1 (a).

"The requirement of authentication applies to all types of evidence, including . . . electronically stored information . . . . The category of evidence known as electronically stored information can take various forms. It includes, by way of example only, e-mails, Internet website postings, text messages and chat room content, computer stored records and data, and computer generated or enhanced animations and simulations. As with any form of evidence, a party may use any appropriate method, or combination of methods . . . or any other proof to demonstrate that the proffer is what the proponent claims it to be, to authenticate any . . . electronically stored information. . . .

"Both courts and commentators have noted that the showing of authenticity is not on par with the more technical evidentiary rules that govern admissibility, such as hearsay exceptions, competency and privilege. . . . Rather, there need only be a prima facie showing of authenticity to the court. . . . Once a prima facie

showing of authorship is made to the court, the evidence, as long as it is otherwise admissible, goes to the [fact finder], [who] will ultimately determine its authenticity. . . .

"[T]he bar for authentication of evidence is not particularly high. . . . [T]he proponent need not rule out all possibilities inconsistent with authenticity, or . . . prove beyond any doubt that the evidence is what it purports to be . . . . In addition, [a]n electronic document may . . . be authenticated by traditional means such as direct testimony of the purported author or circumstantial evidence of distinctive characteristics in the document that identify the author." (Internal quotation marks omitted.) *State* v. *Papineau*, 182 Conn. App. 756, 788–89, 190 A.3d 913, cert. denied, 330 Conn. 916, 193 A.3d 1212 (2018).

In the present case, the plaintiff's testimony tends to demonstrate that (1) the website www.liveauctioneers.com provides a platform for hosting auctions over the Internet, (2) the defendant paid a third party to report the results of the defendant's auction on www.liveauctioneers.com, (3) the third party in fact reported the results of the auction as it occurred on May 19, 2012, (4) exhibit 57 is a copy of the results as reported on www.liveauctioneers.com that the plaintiff printed the night before she testified, and (5) the name of the website was printed on the document. Thus, the plaintiff's testimony constituted a sufficient prima facie showing that exhibit 57 was what the plaintiff claimed it to be. See Conn. Code Evid. § 9-1 (a). Accordingly, we conclude that the court properly admitted it into evidence over the defendant's challenge to it.

Finally, as to the admission of exhibit 5, which, like exhibit 57, identified the cars sold at the auction and the prices for which they sold, we conclude that, even

if we assume that exhibit 5 improperly was admitted, that evidentiary ruling was harmless.

It is well established that, "[b]efore a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful. . . . [A]n [improper] evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful. . . . Moreover, an evidentiary impropriety in a civil case is harmless only if we have a fair assurance that it did not affect the [result]. . . . A determination of harm requires [the reviewing court] to evaluate the effect of the evidentiary impropriety in the context of the totality of the evidence adduced at trial." (Citation omitted; internal quotation marks omitted.) *Klein* v. *Norwalk Hospital*, 299 Conn. 241, 254–55, 9 A.3d 364 (2010).

In the present case, the defendant does not address expressly the harmfulness of the court's evidentiary rulings and, instead, claims that, "[o]ther than these hearsay exhibits, the plaintiff produced no evidence to prove the amount of her damages." Importantly, although both exhibits include a list of the cars sold at the auction and the prices for which they sold, the defendant fails to address whether one exhibit has greater significance than the other. We note, however, that the plaintiff, in her posttrial brief, relied on exhibit 57—not exhibit 5—to establish her damages under the contract. Specifically, in her principal posttrial brief, the plaintiff argued that, "[a]s to the proceeds of the auction, [the plaintiff] maintains that exhibit 57, which represents [the defendant's] report to the classic car community, *is the most trustworthy evidence of the auction's proceeds*." (Emphasis added.) The plaintiff again relied on exhibit 57 in calculating her damages, stating that "[t]he damages to which the plaintiff is entitled are as follows: $41,673.20 per the contract (See exhibits 1 and 57)," and the court awarded the plaintiff

damages in that amount. Indeed, the plaintiff never referenced exhibit 5 in either of her posttrial briefs, and the court made no reference to that exhibit in its decision.

Consequently, because we have concluded that exhibit 57 properly was admitted into evidence and because the plaintiff relied on exhibit 57 to establish her damages, we have a fair assurance that the allegedly improper admission of exhibit 5 did not affect the result of the trial, and the defendant has failed to demonstrate otherwise. See, e.g., *State* v. *Durdek*, 184 Conn. App. 492, 504–505, 195 A.3d 388 (before being entitled to new trial, appellant must prove existence of both erroneous ruling and resulting harm), cert. denied, 330 Conn. 934, 194 A.3d 1197 (2018). Accordingly, assuming, without deciding, that exhibit 5 improperly was admitted, we conclude that its admission was harmless.

The judgment is affirmed.

In this opinion the other judges concurred.

PAUL LAIUPPA *v.* MARY MORITZ
(AC 44506)

Elgo, Cradle and Flynn, Js.

Syllabus

The plaintiff sought to recover damages from the defendant as a result of a motor vehicle collision that allegedly was caused by the defendant's negligence. The plaintiff had sought to commence a previous action against the defendant prior to the expiration of the two year statute of limitations (§ 52-584) applicable to negligence actions. After a state marshal left a copy of the writ of summons and complaint at the defendant's last known address on file with the Department of Motor Vehicles, the plaintiff's counsel sent a copy of the summons and complaint to the defendant's insurance company, and the defendant's counsel, who had been appointed by the insurance company, thereafter filed an appearance and certain discovery motions on the defendant's behalf. The defendant subsequently filed a motion to dismiss the plaintiff's action, which was accompanied by an affidavit from V, her attorney-in-fact, who

averred that, prior to the time the marshal attempted abode service at the defendant's last known address, the defendant's property at that address had been sold and the defendant had relocated to Rhode Island. V further averred that she first learned of the action through a reservation of rights letter that was sent to her by the defendant's insurance carrier several weeks after the marshal attempted abode service. The trial court granted the motion to dismiss and dismissed the action for lack of personal jurisdiction over the defendant due to insufficient service of process. After the plaintiff commenced the second action, which he claimed was saved by the accidental failure of suit statute (§ 52-592), the defendant filed a motion for summary judgment, alleging that the court lacked subject matter jurisdiction on the ground that § 52-592 was inapplicable because the original action had not been commenced within the two year limitation period set forth in § 52-584. The court denied the defendant's motion for summary judgment, concluding that a genuine issue of material fact existed as to whether the prior action was commenced within the statutory time period. The court reasoned that, although the defendant was not properly served, V was on notice of the prior action because she received the reservation of rights letter before the statute of limitations expired. In a motion to reargue, the defendant contended, inter alia, that the court had failed to consider the uncontroverted averments set forth in a supplemental affidavit V had provided that clarified that she had not been provided with a copy of the summons and complaint until two days after the statute of limitations period expired. The court granted both the motion to reargue and the defendant's motion for summary judgment, concluding that it had overlooked V's supplemental affidavit when it initially denied the summary judgment motion and that the undisputed facts supported the defendant's claim that neither she nor V had received effective, timely notice of the prior action. On appeal to this court, the plaintiff claimed, inter alia, that the court improperly concluded that § 52-592 did not operate to save his action because a genuine issue of material fact existed as to whether the prior action was timely commenced under § 52-592. *Held*:

1. The trial court properly determined that § 52-592 was inapplicable and could not save the plaintiff's action, as no genuine issue of material fact existed as to whether the defendant received actual or effective notice of the prior action within the time limited by law: the plaintiff's contention that it was of no consequence that the defendant did not have notice of the original action until after the statute of limitations expired could not be reconciled with the requirement of *Rocco* v. *Garrison* (268 Conn. 541), *Dorry* v. *Garden* (313 Conn. 516) and *Kinity* v. *US Bancorp* (212 Conn. App. 791) that a defendant have actual or effective notice of the action by way of receipt of the summons and complaint within the time limited by law so as to bring the action within the confines of § 52-592, as it was undisputed that the defendant herself never received the summons and complaint in the prior action, and, as V stated in her

affidavits, the plaintiff never provided V with the summons and complaint until the attorney for the defendant's insurance company emailed them to her two days after the statute of limitations expired; moreover, the filing of an appearance and discovery motions by counsel appointed by the defendant's insurance company, and V's awareness of the prior action, prior to the expiration of the limitation period, by way of the reservation of rights letter, which did not include a copy of the summons and complaint, did not provide the defendant with actual or effective notice of the plaintiff's action, as nothing in the reservation of rights letter communicated to her the identity of the party bringing the action against her or the gravamen of the complaint; furthermore, neither the defendant's insurance company nor its appointed counsel were agents of the defendant for the purpose of receiving service of process such that notice to them could be imputed to the defendant, as the plaintiff failed to provide any authority to support that contention, which was improper under both the statute (§ 52-57) governing service of process on individuals and the statute (§ 52-62) permitting service of process on the Commissioner of Motor Vehicles.

2. The plaintiff could not prevail on his claim that the trial court abused its discretion in granting the defendant's motion to reargue because the court failed to identify a legitimate ground for reargument: although the plaintiff contended that the court could not have misapprehended the facts concerning V's receipt of the summons and complaint because it was in possession of her supplemental affidavit prior to denying the defendant's motion for summary judgment, this court interpreted the trial court's admission that it overlooked V's supplemental affidavit to mean that it initially misapprehended the legal significance of V's statement that she did not receive a copy of the summons and complaint until after the statute of limitations expired, as the court was aware of the facts alleged in the supplemental affidavit when it denied the motion for summary judgment but only upon reconsideration did it appreciate the import of her uncontroverted averments and correctly determine that they were dispositive of the legal question of whether V had received actual or effective notice of the prior action within the time limited by law, as required by § 52-592.

(*One judge concurring separately*)

Argued February 7—officially released November 1, 2022

Procedural History

Action to recover damages for the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Hon. A. Susan Peck*, judge trial referee, denied

the defendant's motion for summary judgment; thereafter, the court granted the defendant's motion for reargument; subsequently, the court, *Hon. A. Susan Peck*, judge trial referee, vacated its denial of the defendant's motion for summary judgment, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court; thereafter, the court, *Hon. A. Susan Peck*, judge trial referee, denied the defendant's motion to dismiss. *Affirmed.*

John L. Bonee III, with whom were *Jesse A. Mangiardi* and, on the brief, *Eric H. Rothauser* and *Jay B. Weintraub*, for the appellant (plaintiff).

Bridget M. Ciarlo, for the appellee (defendant).

Opinion

ELGO, J. In this motor vehicle negligence action, the plaintiff, Paul Laiuppa, appeals from the summary judgment rendered by the trial court in favor of the defendant, Mary Moritz. On appeal, the plaintiff claims that the court (1) improperly determined that no genuine issue of material fact existed as to the applicability of the accidental failure of suit statute, General Statutes § 52-592, and (2) abused its discretion in granting the defendant's motion to reargue. We affirm the judgment of the trial court.

The record, viewed in a light most favorable to the plaintiff; see *Martinelli* v. *Fusi*, 290 Conn. 347, 350, 963 A.2d 640 (2009); reveals the following facts and procedural history. On June 21, 2016, the parties were involved in a motor vehicle collision allegedly caused by the defendant's negligence. The defendant at that time presented the investigating police officer with her driver's license and motor vehicle registration, both of which listed 168 Turkey Hills Road in East Granby

(property) as her address. For eighteen months following that accident, the defendant continued to reside at the property. It is undisputed that she relocated to a nursing home facility in Windsor in December, 2017, and ceased being a Connecticut resident in January, 2018.

In June, 2018, the plaintiff sought to commence a civil action against the defendant (first action). On June 14, 2018, the plaintiff's counsel delivered the writ of summons and complaint to a Connecticut state marshal with direction to serve the defendant at the property. The plaintiff's counsel also notified the defendant's insurance company about the pending lawsuit sometime prior to July 3, 2018, and forwarded to the insurance company a "courtesy copy" of the summons and complaint.[1]

On June 18, 2018, the marshal attempted abode service on the defendant by leaving the summons and complaint at the property. The marshal later testified at a deposition that the property appeared to be inhabited and that there were no obvious signs that it had been abandoned or recently sold. In addition, the marshal noted in his return of service that he had "checked with the East Granby [t]own [a]ssessor's [o]ffice [and] found [that] the defendant own[ed] the [property]."[2] At

[1] The record includes the affidavit of David Nielsen, who was employed by the law firm that represented the plaintiff in the first action. Nielsen averred in relevant part that he "was employed by the law firm . . . from approximately June 2017 through August 2018," that "[o]ne of [his] responsibilities was to work on the personal injury file" of the plaintiff, and that, as part of those responsibilities, he "communicated . . . with [a] Claims Representative for Central Insurance Companies [who] represented . . . that his company insured the defendant . . . ." Although he averred that he "sent a courtesy copy of the [s]ummons and [c]omplaint" to the insurance company, Nielsen did not specify when he did so. Because an appearance was filed by an attorney retained by the insurance company to represent the defendant in the first action on July 3, 2018, that insurance company necessarily received notice of the pendency of the action sometime prior thereto.

[2] In his deposition testimony, the marshal clarified that he did so by conducting a search on the website of the East Granby assessor's office.

that time, the property was the defendant's "last known address" on file with the Department of Motor Vehicles (department). The summons and complaint thereafter were filed with the Hartford Superior Court.

On July 3, 2018, the defendant's counsel, who was appointed by the defendant's insurance company, filed an appearance on behalf of the defendant. Two days later, the defendant's counsel filed interrogatories, requests for production, and a motion for permission to serve supplemental discovery on the plaintiff.

On July 31, 2018, the defendant filed a motion to dismiss on the ground that the trial court lacked personal jurisdiction over her due to insufficient service of process. Specifically, the defendant argued that (1) the abode service was defective because she did not reside at the property and (2) she never received the summons and complaint. In support of her motion to dismiss, the defendant submitted the affidavit of Patricia A. M. Vinci, her attorney-in-fact. In her affidavit, Vinci averred that, at the time the marshal attempted service, the defendant neither owned nor resided at the property. Vinci explained that, after being hospitalized on December 19, 2017, "due to a health condition," the defendant relocated to a nursing home facility in Windsor on December 22, 2017. The defendant then moved to an assisted living residence in Rhode Island on January 26, 2018, and has not "returned to Connecticut since that date."[3] Vinci also averred that the property was sold on June 4, 2018, and the sale closed on June 8, 2018.[4] Vinci initially learned of the first action on July 13, 2018, through a reservation of rights letter sent by

[3] Vinci further averred that the defendant "has not physically resided at [the property] since December 19, 2017."

[4] The defendant also submitted a certified copy of the warranty deed in support of its motion to dismiss evidencing the sale of the property. The deed was recorded on the East Granby land records on June 11, 2018, one week before the marshal attempted abode service at the property.

the defendant's insurance carrier. In response, the plaintiff filed a memorandum of law in opposition to the defendant's motion to dismiss, contending that the court did not lack personal jurisdiction because the defendant received notice of the action before the statute of limitations period expired.

The trial court granted the defendant's motion to dismiss on January 14, 2019. In its memorandum of decision, the court found that abode service was the only manner of service attempted. The court further found that "the marshal failed to make proper service upon the defendant when he left a copy of the [writ of] summons and complaint at the [property] because the defendant had not resided at that property since at least January 26, 2018, when she moved to Rhode Island." Citing *Jimenez* v. *DeRosa*, 109 Conn. App. 332, 341, 951 A.2d 632 (2008),[5] the court held that the attempted abode service was insufficient to vest the court with jurisdiction because "the defendant was no longer residing at the [property] at the time of the attempted service and was no longer a Connecticut resident." As the court stated: "The evidence presented demonstrates that the defendant had been a resident of the state of Rhode Island for approximately six months prior to the attempted abode service, and, had the plaintiff searched the land records, he would have discovered that the defendant sold the [property] on June 8, 2018, ten days before the attempted service."[6] Because "the plaintiff's

[5] In *Jimenez* v. *DeRosa*, supra, 109 Conn. App. 338, this court held that abode service is not effective unless the property in question "is the defendant's home *at the time when service is made*." (Emphasis added.) In so stating, this court rejected the plaintiff's claim that "abode service was proper in light of the defendant's failure to inform government agencies that he was no longer a resident" at the property on which service was made. Id., 337.

[6] In its memorandum of decision, the court noted that, "[a]t oral argument [on] the defendant's motion to dismiss, the court granted the plaintiff's request for additional time to engage in further discovery regarding the facts and circumstances surrounding the plaintiff's attempted service of process. The court also indicated that the plaintiff would be afforded the opportunity

attempted service over the defendant was legally defective," the court concluded that it lacked personal jurisdiction over the defendant and dismissed the action.[7]

Days later, the plaintiff commenced the present action pursuant to § 52-592.[8] In response, the defendant filed an answer and, by way of special defense, asserted that the plaintiff's action was barred by the statute of limitations set forth in General Statutes § 52-584.[9] The

to present any evidence gleaned through discovery at an evidentiary hearing to address the jurisdictional issues presently before the court. The plaintiff subsequently contacted the court and indicated . . . that an evidentiary hearing was not required or requested, and that the court should proceed to rule on the defendant's motion to dismiss based on the evidence already submitted."

[7] The plaintiff did not appeal from that judgment of dismissal. Accordingly, the propriety of the court's determinations in the first action is not properly before this court.

[8] The marshal's January 17, 2019 return of service indicates that process was served in numerous ways, including service on the Commissioner of Motor Vehicles pursuant to General Statutes § 52-62.

[9] General Statutes § 52-584 provides in relevant part that "[n]o action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct . . . shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered . . . ."

The plaintiff's injury accrued on June 21, 2016, the date of the motor vehicle accident. As such, the limitation period initially was set to expire on June 21, 2018.

General Statutes § 52-593a, however, operates to render an action timely commenced so long as process is delivered to a marshal prior to the expiration of the applicable statute of limitations and the marshal serves such process within thirty days, even when the thirty day grace period extends beyond the initial expiration date. See *Doe* v. *West Hartford*, 328 Conn. 172, 175, 177 A.3d 1128 (2018). Likewise, our Supreme Court has held that §§ 52-592 and 52-593a work in conjunction so that an action may be "saved" for the purposes of § 52-592 as long as the defendant received "actual notice" of the action within the thirty day grace period during which a marshal is permitted to effectuate service. See *Dorry* v. *Garden*, 313 Conn. 516, 533–34, 98 A.3d 55 (2014). In the present case, the plaintiff delivered process to the marshal on June 14, 2018, within the limitation period of § 52-584. Accordingly, the final day by which the plaintiff could provide service of process to the defendant in accordance with § 52-593a was July 15, 2018.

defendant thereafter filed a motion for summary judgment on the ground that the plaintiff's action was time barred because the plaintiff had failed to commence the first action "within the time limited by law," as required by § 52-592. Relying on our Supreme Court's decision in *Rocco* v. *Garrison*, 268 Conn. 541, 848 A.2d 352 (2004), the defendant argued that she did not have actual notice of the first action sufficient to bring the action under the protection of § 52-592.[10]

In a memorandum of law filed in opposition to the defendant's motion for summary judgment, the plaintiff contended that § 52-592 is remedial in nature and should be broadly construed. Because the marshal made a good faith and diligent effort to serve process at the property, and because Vinci was made aware of the first action before the limitation period expired, the plaintiff maintained that § 52-592 operated to preserve his action.

On February 10, 2020, the trial court heard oral argument on the defendant's motion for summary judgment. The defendant contended that the plaintiff's attempt to serve process was insufficient to commence the action for the purpose of § 52-592. Specifically, the defendant argued that (1) the attempted abode service did not commence the action because the defendant no longer lived at the property, (2) the insurance company's receipt of the summons and complaint did not provide

[10] In support of her motion for summary judgment, the defendant submitted several exhibits, including Vinci's July 30, 2018 affidavit, in which Vinci averred that she "first learned" of the first action on July 13, 2018, by way of a letter sent from the defendant's insurance carrier. The defendant also submitted Vinci's February 5, 2020 supplemental affidavit, in which Vinci clarified that the letter that she received from the defendant's insurance carrier on July 13, 2018, "pertained to [its] reservation of rights with respect to one of the claims made against [the defendant]," which was that "[a] copy of the [s]ummons and [c]omplaint was not enclosed with [that] letter," and that Vinci "was first provided a copy of the [s]ummons and [c]omplaint on July 17, 2018, via email from counsel retained by the auto insurance carrier to represent [the defendant]."

the defendant with "actual notice" of the first action, and (3) Vinci was not provided with the summons and complaint until after the limitation period had expired. In response, the plaintiff argued that the marshal attempted to serve the defendant at the address listed on the police report, the department's records, and the records of the East Granby town assessor, and that there was no indication that the defendant had recently sold the property and no longer resided there. The plaintiff also asserted that the defendant's counsel, by filing an appearance, and Vinci, by receiving the notice of rights letter from the insurance company, both were provided with notice of the first action before the limitation period expired.

On May 6, 2020, the court denied the defendant's motion for summary judgment. In its memorandum of decision, the court determined that a genuine issue of material fact existed as to whether the first action was commenced within the statutory time period. The court reasoned that, although the defendant was not properly served, Vinci was "on notice" of the first action because she had received the reservation of rights letter from the defendant's insurance company before the statute of limitations expired.

On May 22, 2020, the defendant filed a motion to reargue with respect to the court's ruling on her motion for summary judgment.[11] The defendant contended that whether Vinci was "on notice" of the first action was irrelevant to the question of whether that action had been "commenced within the time limited by law" pursuant to § 52-592. Rather, citing *Dorry* v. *Garden*, 313

[11] The defendant also filed a motion to dismiss on May 29, 2020, arguing that, because the plaintiff's action was time barred and could not be saved by § 52-592, the court was without subject matter jurisdiction to hear the plaintiff's claim. The court rejected the defendant's motion, holding that the failure to comply with § 52-592 cannot deprive the court of subject matter jurisdiction because § 52-592 does not confer jurisdiction.

Conn. 516, 98 A.3d 55 (2014), and *Rocco* v. *Garrison*, supra, 268 Conn. 541, the defendant claimed that an action is "commenced," despite insufficient service of process, only when the defendant receives actual notice before the limitation period expires. The defendant then asserted that the Supreme Court in both *Dorry* and *Rocco* had equated "actual notice" with receipt of the summons and complaint by the defendant. The defendant further submitted that the court had failed to consider the uncontroverted averments set forth in the supplemental affidavit provided by Vinci, in which Vinci clarified that she was not provided with a copy of the summons and complaint until two days *after* the statute of limitations had expired. See footnote 10 of this opinion.

After hearing argument from both parties, the court granted the defendant's motion to reargue, vacated its prior ruling and rendered summary judgment in favor of the defendant on January 4, 2021. In its memorandum of decision, the court stated that, "[u]pon review of all the motion papers and arguments of counsel in support of the motion to reargue, as well as all the motion papers filed in connection with the motion for summary judgment, it became apparent that this court overlooked [Vinci's] second affidavit. . . . Therefore, the court finds that undisputed facts exist to support the defendant's argument that the defendant or her agent did not receive effective, timely notice of the [first action]." (Citation omitted.) The court then noted that "[e]ffective notice [for purposes of § 52-592] appears to require at a minimum that the defendant somehow received a copy of the complaint prior to the expiration of the statute of limitations." (Internal quotation marks omitted.) The court continued: "The uncontested facts show that [Vinci] received a copy of the summons and complaint on July 17, 2018, which is outside the thirty day period granted by § 52-593a." For that reason, the

court concluded that the notice provided by the plaintiff "was not sufficient to commence the action within the meaning of § 52-592." The court thus vacated its prior ruling denying the defendant's summary judgment motion and rendered summary judgment in favor of the defendant, after which the plaintiff appealed.

I

The plaintiff first claims that the court improperly concluded that § 52-592 did not operate to save his action. He submits that a genuine issue of material fact exists as to whether the first action was "commenced within the time limited by law," as required by § 52-592. The defendant, by contrast, contends that the court properly rendered summary judgment in her favor because the record lacks an evidentiary basis for a necessary factual predicate to the operation of § 52-592—namely, that she received actual or effective notice of the first action prior to the expiration of the limitation period. We agree with the defendant.

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

fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Buehler* v. *Newtown*, 206 Conn. App. 472, 480–81, 262 A.3d 170 (2021).

In addition, we note that, "[i]n the context of a motion for summary judgment based on a statute of limitations special defense, [the defendants] typically [meet their] initial burden of showing the absence of a genuine issue of material fact by demonstrating that the action had commenced outside of the statutory limitation period. . . . When the plaintiff asserts that the limitations period has been tolled by an equitable exception to the statute of limitations, the burden normally shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute. . . . Put differently, it is then incumbent upon the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists." (Citation omitted; internal quotation marks omitted.) *Iacurci* v. *Sax*, 313 Conn. 786, 799, 99 A.3d 1145 (2014).

On appeal, the plaintiff claims that the first action was "commenced within the time limited by law" pursuant to § 52-592 because the defendant's agents had notice of the action before the statute of limitations expired. Specifically, the plaintiff argues that (1) Vinci was aware of the first action within the limitation period, and (2) the defendant's insurance company and appointed counsel each had actual notice of the first

action before the statute of limitations had expired. The plaintiff contends that such awareness was sufficient to bring the first action within the protection of § 52-592. We disagree.

As our Supreme Court has explained in resolving a related claim, "the plaintiff's claim requires us to interpret the phrase commenced within the time limited by law contained in § 52-592 (a). The proper interpretation of § 52-592 (a) is a question of statutory construction over which our review is plenary. . . . That review is guided by well established principles of statutory interpretation . . . . As with all issues of statutory interpretation, we look first to the language of the statute. . . . In construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended. . . . Furthermore, [i]t is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions. . . . [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous. . . .

"Section 52-592 (a) provides in relevant part: If any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the action has been dismissed for want of jurisdiction, or the action has been otherwise avoided or defeated by the death of a party or for any matter of form . . . the plaintiff . . . may commence a new action . . . for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment." (Citations omitted; internal quotation marks omitted.) *Dorry* v. *Garden*, supra, 313 Conn. 525–26.

"When a suit has been started seasonably, the statute extends the [s]tatute of [l]imitations for a period of one year after the determination of the original action." *Ross Realty Corp.* v. *Surkis*, 163 Conn. 388, 393, 311 A.2d 74 (1972). Section 52-592 "is a savings statute that is intended to promote the strong policy favoring the adjudication of cases on their merits rather than the disposal of them on the grounds enumerated in § 52-592 (a). . . . [H]owever . . . this policy is not without limits. If it were, there would be no statutes of limitations. Even the saving[s] statute does not guarantee that all plaintiffs have the opportunity to have their cases decided on the merits. It merely allows them a limited opportunity to correct certain defects in their actions within a certain period of time." (Internal quotation marks omitted.) *Riccio* v. *Bristol Hospital, Inc.*, 341 Conn. 772, 780, 267 A.3d 799 (2022); see also *Pintavalle* v. *Valkanos*, 216 Conn. 412, 417, 581 A.2d 1050 (1990) ("[a]lthough § 52-592 is a remedial statute . . . it should not be construed so liberally as to render statutes of limitation virtually meaningless" (citation omitted)).

"In interpreting the language of § 52-592 (a) . . . we do not write on a clean slate, but are bound by our previous judicial interpretations of the language and the purpose of the statute." *Dorry* v. *Garden*, supra, 313 Conn. 526. Our Supreme Court has twice addressed the issue of when insufficient service of process nonetheless may be deemed to have "commenced" an action "within the time limited by law" pursuant to § 52-592.

In *Rocco* v. *Garrison*, supra, 268 Conn. 545, the plaintiffs filed their initial complaint with the United States District Court for the District of Connecticut, after which the clerk of that court returned the summons and complaint to the plaintiffs for service on the defendant. Pursuant to rule 4 (d) (1) of the Federal Rules of Civil

Procedure,[12] the plaintiffs sent the summons and complaint, and two copies of notice and request for waiver of formal service to the defendant's home address via certified mail. Id., 545–46. Thereafter, the plaintiffs' counsel received a return receipt from the United States Postal Service indicating that the items had been delivered to the defendant four days before the statute of limitations expired. Id., 546. The defendant, however, did not sign and return the waiver of service form, and the statute of limitations expired before the plaintiffs' counsel could effect formal service of process. Id. The District Court subsequently dismissed the plaintiffs' claim for insufficient service of process. Id.

The plaintiffs thereafter filed a second action in the Superior Court pursuant to § 52-592. Id. In response, the defendant moved for summary judgment "on the

[12] Rule 4 (d) (1) of the Federal Rules of Civil Procedure provides in relevant part: "An individual . . . [who] is subject to service . . . has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

"(A) be in writing and be addressed:

"(i) to the individual defendant; or

"(ii) for a defendant subject to service under Rule 4 (h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;

"(B) name the court where the complaint was filed;

"(C) be accompanied by a copy of the complaint, 2 copies of the waiver form appended to this Rule 4, and a prepaid means for returning the form;

"(D) inform the defendant, using the form appended to this Rule 4, of the consequences of waiving and not waiving service;

"(E) state the date when the request is sent;

"(F) give the defendant a reasonable time of at least 30 days after the request was sent—or at least 60 days if sent to the defendant outside any judicial district of the United States—to return the waiver; and

"(G) be sent by first-class mail or other reliable means."

The rule is "intended to encourage parties to save the cost of formal service of a summons and complaint by providing that an individual who is subject to service and who receives notice of an action in the prescribed manner has a 'duty' to avoid the unnecessary costs of service of the summons by complying with a request to waive formal service." *Rocco* v. *Garrison*, supra, 268 Conn. 545–46.

ground that the plaintiffs' federal action had not been commenced within the meaning of the savings statute due to a lack of proper service and that [§ 52-592] was inapplicable and could not save the plaintiffs' second action." Id., 547. The trial court agreed and rendered summary judgment in favor of the defendant. Id. On appeal, our Supreme Court noted that "the language of § 52-592 distinguishes between the commencement of an action and insufficient service of process by providing that the action may fail *following* its commencement *because* of insufficient service." (Emphasis in original.) Id., 550. The court then clarified that an action is "commenced," as that term is used in § 52-592, when a defendant receives "effective notice" of the action within the time period prescribed by the statute of limitations. Id., 551. Because "the summons, a copy of the complaint and a notice of the action were delivered to the defendant by certified mail four days before the expiration of the statute of limitations"; id., 553; the court concluded that "the defendant received actual notice of the action" within the limitation period, thereby bringing it within the protection of § 52-592. Id., 552–53.

The Supreme Court further refined its interpretation of the "commenced within the time limited by law" language of § 52-592 in *Dorry* v. *Garden*, supra, 313 Conn. 516. *Dorry* involved a wrongful death action against medical practitioners in which the plaintiff sent a summons and complaint to a marshal by overnight delivery and requested that the defendants be served "in hand." Id., 520. The marshal then attempted to serve the defendants by leaving copies of the summons and complaint at various professional or hospital offices. Id. Because the marshal erroneously indicated on the return of service that each defendant was served "in hand," however, the trial court dismissed the initial claims against the defendant for insufficient service of process. Id. The plaintiff subsequently commenced an

action in the Superior Court pursuant to § 52-592. Id. The defendants moved for summary judgment on the ground that the wrongful death action had not been "commenced" for purposes of that statute; the trial court agreed and rendered summary judgment in their favor. Id., 520–21.

On appeal, our Supreme Court explained that "in *Rocco*, this court recognized that the phrase 'commenced within the time limited by law' [in § 52-592] cannot mean effectuating proper service, and that effective notice to a defendant is sufficient." Id., 529. The court first noted that, because "the plaintiff produced evidence demonstrating that [two of the defendants] became aware of the first action and received a copy of the writ, summons and complaint"; id.; within the limitation period, the trial court "improperly determined that [§ 52-592] did not save the plaintiff's second action against those defendants." Id., 530.

The court then addressed the question of "whether the additional thirty days for a marshal to serve process under § 52-593a is part of the 'time limited by law' contained in [§ 52-592]." Id., 531. The court answered that query in the affirmative, stating: "[I]f a defendant *has effective notice* within the thirty day period allowed for a marshal to make service of the writ, summons and complaint, the action will be considered commenced for purposes of the savings statute." (Emphasis added.) Id., 533. Five sentences later in its decision, the court similarly stated: "[W]e conclude that, applying the principles of *Rocco*, if a defendant *has actual notice* within the thirty days . . . for a marshal to make service, the savings statute would operate to save the claim."[13]

[13] In neither *Rocco* nor *Dorry* did the Supreme Court define the term "effective notice" or articulate any distinction between "actual notice" and "effective notice." Rather, the terms are used interchangeably in those decisions.

(Emphasis added.) Id., 534. Because two additional defendants had confirmed in deposition testimony that they received copies of the summons and complaint within the thirty day period of § 52-593a, the court held that the trial court improperly determined that § 52-592 did not operate to save the plaintiff's action against them as well.[14] Id., 534–35.

More recently, in considering when insufficient service of process may be deemed to have "commenced" an action pursuant to § 52-592, this court addressed the issue of whether something short of "notice by way of receipt of the summons and complaint" could satisfy the "actual or effective notice" standard articulated by our Supreme Court in *Rocco* and *Dorry*. (Emphasis omitted.) See *Kinity* v. *US Bancorp*, 212 Conn. App. 791, 848, 277 A.3d 200 (2022). This court began its analysis with an extensive review of the *Rocco* and *Dorry* decisions; see id., 840–46; and emphasized that, "[i]n both *Rocco* and *Dorry*, [our Supreme Court] determined that the original action had commenced for purposes of § 52-592 because, even though service of the summons and complaint was defective, the defendants *actually received the summons and complaint*, and thereby got actual or effective notice of the action within the time period prescribed by the applicable statute of limitations." (Emphasis in original.) Id., 848.

[14] A fifth defendant testified in a deposition that, after the marshal left process for him with a risk management employee at New Milford Hospital, that employee had "called him and notified him that a writ, summons and complaint were delivered for him and that he received them several days later." *Dorry* v. *Garden*, supra, 313 Conn. 534. That defendant, however, could not testify "as to the exact date" on which the employee had contacted him. Id. For that reason, the Supreme Court concluded that " 'a critical factual dispute' " existed as to whether that defendant received notice within the thirty day period of § 52-593a that "cannot be resolved in the absence of an evidentiary hearing." Id., 535. The court thus concluded that the trial court improperly dismissed the plaintiff's action against that defendant and remanded the case to the trial court for further proceedings. Id.

The court then noted that the plaintiff in *Kinity* had presented no evidence that the defendant bank had "*actually received* the summons and complaint in the original action." (Emphasis in original.) Id.

In opposing the defendant's motion for summary judgment, the plaintiff in *Kinity* maintained that a genuine issue of material fact existed as to whether the defendant had actual notice of the original action due to (1) certain communications between the plaintiff and the defendant, and (2) the fact that counsel for the defendant had filed an appearance in the original action. Id., 849. This court rejected that contention, stating in relevant part: "[T]he communications between the plaintiff and the [defendant], and the [defendant's] belated appearance in the original action were insufficient to create a genuine issue of material fact that the [defendant] had actually received the summons and complaint, and thereby got actual or effective notice of the original action." Id., 850. Section 52-592 requires that the original action must "have been commenced. Pursuant to § 52-592, the original action may be commenced by way of insufficient or defective service rather than good, complete, and sufficient service of process. . . . However, [a]n action is commenced not when the writ is returned but when it is served upon the defendant. . . . In other words, the action is commenced in a timely manner for purposes of § 52-592 when the defendant receive[s] clear and unmistakable notice of that action upon delivery of the summons, complaint and related materials . . . . Pursuant to our Supreme Court's decisions in *Rocco* and *Dorry*, an action is commenced within the meaning of § 52-592 when a defendant receives actual or effective notice of the action, within the time period prescribed by law, by way of receipt of the summons and complaint." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 851; see also id., 850 ("the June,

2016 communications [between the parties] and the [defendant's] appearance were not sufficient to create a genuine issue of material fact as to whether the [defendant] had actual or effective notice of the original action *by way of receipt of the summons and complaint*, as required by *Rocco* and *Dorry*" (emphasis in original)).

In affirming the propriety of the summary judgment rendered in favor of the defendant, this court then held that "the plaintiff failed to provide the [trial] court with any evidence that the [defendant] itself had actual or effective notice of the original action *by way of receipt of the summons and complaint* . . . ." (Emphasis in original.) Id., 852. The court thus concluded that the plaintiff had "failed to demonstrate the existence of a genuine issue of material fact as to whether the defendant had actual or effective notice of the original action by way of receipt of the summons and complaint. As a result, the [trial] court properly determined that § 52-592 could not operate to save the plaintiff's untimely claims." Id.

We are bound by the judicial construction of the "actual or effective notice" standard set forth in *Kinity*, which was decided only months ago. See, e.g., *First Connecticut Capital, LLC* v. *Homes of Westport, LLC*, 112 Conn. App. 750, 759, 966 A.2d 239 (2009) ("this court's policy dictates that one panel should not, on its own, reverse the ruling of a previous panel" (internal quotation marks omitted)); see also *State* v. *Houghtaling*, 326 Conn. 330, 343, 163 A.3d 563 (2017) (Appellate Court panel appropriately recognized it was bound by that court's own precedent), cert. denied, U.S. , 138 S. Ct. 1593, 200 L. Ed. 2d 776 (2018). Whether to revisit the "actual or effective notice" standard articulated in *Rocco* and *Dorry* properly is the prerogative of

this state's highest court. See *Devine* v. *Fusaro*, 205 Conn. App. 554, 582 n.20, 259 A.3d 655 (noting that Appellate Court panel cannot overrule decision of another panel and expressly inviting Supreme Court, "if provided an appropriate opportunity, to discuss more fully and definitively the proper application" of legal standard articulated in Supreme Court precedent), cert. granted, 339 Conn. 904, 260 A.3d 1224 (2021).

The critical question, then, is whether the plaintiff in the present case provided the court with any evidence "to demonstrate the existence of a genuine issue of material fact as to whether the defendant had actual or effective notice of the original action by way of receipt of the summons and complaint" within the applicable limitation period. *Kinity* v. *US Bancorp*, supra, 212 Conn. App. 852.

In its memorandum of law in opposition to the defendant's motion for summary judgment, the plaintiff argued that "[t]he fact that the defendant did not have notice until after the original statute of limitations is of no consequence." We disagree. That contention simply cannot be reconciled with the precedent set in *Rocco*, *Dorry*, and *Kinity*, which all require "actual or effective notice" to a defendant within the time limited by law to bring an action within the confines of § 52-592.

It is undisputed that the defendant herself never received the summons and complaint in the first action within "the time limited by law," as required by § 52-592. The court also was presented with uncontroverted evidence, in the form of two sworn affidavits, demonstrating that (1) the plaintiff never provided a copy of the summons and complaint to Vinci, and (2) Vinci did not receive a copy of those materials until the attorney retained by the defendant's insurance company emailed

them to her on July 17, 2018, two days *after* the statute of limitations had expired.[15]

Furthermore, although Vinci received a reservation of rights letter from the defendant's insurance company before the limitation period expired, such a letter does not suffice for actual or effective notice of the plaintiff's action. Unlike the summons and complaint, which apprise a defendant of the parties to the lawsuit and the specific allegations made against her; see, e.g., *Consolidated Motor Lines, Inc.* v. *M & M Transportation Co.*, 128 Conn. 107, 109, 20 A.2d 621 (1941) ("[I]n this state, the time when the action is regarded as having been brought is the date of service of the writ upon the defendant. . . . That, in our judgment, is the sounder rule, because only thus is the defendant put upon notice of the purpose of the plaintiff to call upon [the defendant] to answer to the claim in court." (Citations omitted.)); an insurance company's reservation of rights letter is merely an insurer's offer to defend the insured policyholder while preserving the right to later litigate and disclaim the coverage.[16] There is nothing in the

[15] For the purposes of the present analysis, we assume, without deciding, that notice provided to a defendant's attorney-in-fact may be imputed to the defendant so as to constitute the commencement of an action pursuant to § 52-592.

[16] See, e.g., *United States* v. *Hebshie*, 549 F.3d 30, 37 n.7 (1st Cir. 2008) ("[a] reservation-of-rights letter is a notice of an insurer's intention not to waive its contractual rights to contest coverage or to apply an exclusion that negates an insured's claim" (internal quotation marks omitted)); *Sonson* v. *United Services Automobile Assn.*, 152 Conn. App. 832, 837, 100 A.3d 1 (2014) (insurer provided reservation of rights letter that "expressly informed the [insured policyholder] of the possibility of denial of coverage on the basis" of certain exclusions); 14A S. Plitt et al., Couch on Insurance (3d Ed. Rev. 2020) § 202:39, pp. 202-143 through 202-145 ("A reservation of rights is a term of art designed to allow a liability insurer to provide a defense while still preserving the option to later litigate and ultimately deny coverage. . . . In modern times . . . it is more likely that such a reservation of rights will be encountered in the form of a letter which the insurer sends . . . stating the insurer's willingness to commence the defense, but explicitly stating that it does so with full reservation of specific rights." (Footnotes omitted.)).

record to indicate that the reservation of rights letter communicated to the defendant the identity of the party bringing suit against her or the gravamen of the complaint alleged.[17] Moreover, as Vinci averred in her February 5, 2020 affidavit, "[a] copy of the [s]ummons and [c]omplaint was not enclosed with the [reservation of rights] letter" that she received from the defendant's insurance company. Accordingly, Vinci cannot be said to have received actual or effective notice within "the time limited by law," as required by § 52-592.

The plaintiff alternatively contends that the defendant's insurance company and appointed counsel were her "agents" for the purpose of receiving service of process, such that any notice provided to the insurance company or the attorney that it retained to represent the defendant would be imputed to the defendant and commence the action for the purposes of § 52-592. The plaintiff thus argues that the defendant received actual or effective notice of the first action because, prior to the expiration of the limitation period, (1) her insurance company received a copy of the summons and complaint, and (2) the attorney retained by the insurance company filed an appearance and discovery motions in the Superior Court. We do not agree.

[17] Although the defendant's counsel repeatedly referenced the reservation of rights letter in her pleadings and stated that the letter was attached to certain pleadings, the electronic record before us does not include a copy of that letter. In discussing the substance of the reservation of rights letter in its May 29, 2020 motion to dismiss, the defendant explained that it "contains almost no information regarding the subject incident or the action. It does not identify the plaintiff, it does not set forth the time and location of the alleged incident, it does not set forth the claims alleged against the defendant and/or the nature and/or extent of the plaintiff's alleged injuries and/or damages." The plaintiff did not dispute the accuracy of that characterization of the reservation of rights letter in its opposition to the defendant's motion to dismiss or any other pleading, and neither party submitted the reservation of rights letter in support of their respective pleadings on the motion for summary judgment.

As an initial matter, we note that the plaintiff has not provided any legal authority to support his contention that the defendant's insurance company was her "agent" for the purpose of receiving service of process.[18] Even if we were to assume, arguendo, that the insurance company was her agent, our statutory framework for effecting service of process nonetheless establishes that service provided to the insurance company, in lieu of service provided to the defendant, would be improper. General Statutes § 52-57 (a) specifies the proper manner of service on individuals, providing in relevant part that "process in any civil action shall be served by leaving a true and attested copy of it, including the declaration or complaint, *with the defendant*, *or at his usual place of abode*, in this state." (Emphasis added.) That language prescribes two proper methods of service on an individual—personal service or abode service. Section 52-57 (a) does *not* provide for service on the individual's "agent," as do other statutory provisions pertaining to service of process on municipalities, corporations, partnerships, and voluntary associations.[19] See General Statutes § 52-57 (b) through (e).

[18] The only authority cited by the plaintiff in his appellate brief concerns the general proposition that an agent's knowledge is imputed to the principal. See *Sousa* v. *Sousa*, 173 Conn. App. 755, 773 n.6, 164 A.3d 702 ("[n]otice to, or knowledge of, an agent, while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to, or knowledge of, the principal"), cert. denied, 327 Conn. 906, 170 A.3d 2 (2017). He has provided no authority regarding the situation in which a defendant's alleged agent receives service of process purportedly on the defendant's behalf.

[19] We note that rule 4 (e) (2) (C) of the Federal Rules of Civil Procedure provides that an individual may be served by "delivering a copy of [the summons and complaint] to an *agent authorized by appointment or by law to receive service of process*." (Emphasis added.)

Connecticut law contains no similar provision. "[I]t is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so." (Citation omitted.) *Scholastic Book Clubs, Inc.* v. *Commissioner of Revenue Services*, 304 Conn. 204, 219, 38 A.3d 1183, cert. denied, 568 U.S. 940, 133 S. Ct. 425, 184 L. Ed. 2d 255 (2012). Accordingly, we adhere to the

Our legislature has provided an exception to that general rule in motor vehicle negligence actions in which either (1) the defendant is a nonresident or (2) the defendant's last known address is located within the state. See General Statutes §§ 52-62[20] and 52-63.[21] In

plain language of § 52-57 (a), which limits service of process on an individual to either in-person or abode service.

[20] General Statutes § 52-62 provides in relevant part: "(a) Any nonresident of this state who causes a motor vehicle to be used or operated upon any public highway or elsewhere in this state shall be deemed to have appointed the Commissioner of Motor Vehicles as his attorney and to have agreed that any process in any civil action brought against him on account of any claim for damages resulting from the alleged negligence of the nonresident or his agent or servant in the use or operation of any motor vehicle upon any public highway or elsewhere in this state may be served upon the commissioner and shall have the same validity as if served upon the nonresident personally. . . .

"(c) Process in such a civil action against a nonresident shall be served by the officer to whom the process is directed upon the Commissioner of Motor Vehicles by leaving with or at the office of the commissioner, at least twelve days before the return day of the process, a true and attested copy thereof, and by sending to the defendant or his administrator, executor or other legal representative, by registered or certified mail, postage prepaid, a like true and attested copy, with an endorsement thereon of the service upon the commissioner, addressed to the defendant or representative at his last-known address. . . ."

[21] General Statutes § 52-63 provides in relevant part: "(a) Any person whose last-known address is located in this state and who owns or operates a motor vehicle, at the time of issuance of such person's license or registration shall be deemed to have appointed the Commissioner of Motor Vehicles as his or her attorney and to have agreed that any process in any civil action against such person on account of any claim for damages resulting from his or her alleged negligence or the alleged negligence of his or her servant or agent in the operation of any motor vehicle in this state may be served upon the commissioner as provided in this section and shall have the same validity as if served upon the owner or operator personally, even though the person sought to be served has left the state prior to commencement of the action or his or her present whereabouts is unknown.

"(b) Service of civil process may be made on a motor vehicle operator who (1) is licensed under the provisions of chapter 246, or (2) is unlicensed and has a last-known address in this state by leaving a true and attested copy of the writ, summons and complaint at the office of the Commissioner of Motor Vehicles at least twelve days before the return day and by sending such a true and attested copy at least twelve days before the return day, by registered or certified mail, postage prepaid and return receipt requested,

such situations, §§ 52-62 and 52-63 allow the plaintiff to effectuate service of process by leaving a true and attested copy of the summons and complaint at the office of the Commissioner of Motor Vehicles (commissioner), and by sending the same via certified or registered mail to the defendant's last known address.

Although formal service of process under both statutes requires the plaintiff to deliver the summons and complaint to the commissioner, and to mail the same to the defendant, this court has held that an action *commences* for the purposes of § 52-592 when, pursuant to § 52-62, a plaintiff serves the commissioner with process but fails to properly mail a copy of the summons and complaint to the defendant's last known address. See *Megos* v. *Ranta*, 179 Conn. App. 546, 551, 554–55, 180 A.3d 645, cert. denied, 328 Conn. 917, 180 A.3d 961 (2018). In so holding, this court explained that the legislature explicitly intended to provide individuals involved in motor vehicle accidents with an alternative to in-person or abode service. See id., 554 (plain language of § 52-62 (a) "provides that service on the commissioner *has the same validity as service on the defendant personally*" (emphasis altered)). By contrast, our

to the defendant at his or her last address on file in the [department] if (A) it is impossible to make service of process at the operator's last address on file in the [department], and (B) the operator has caused injury to the person or property of another.

"(c) Service of civil process may be made on the owner of a motor vehicle who (1) has registered such motor vehicle in this state under the provisions of chapter 246, or (2) has not registered such motor vehicle in this state and whose last-known address is located in this state by leaving a true and attested copy of the writ, summons and complaint at the office of the Commissioner of Motor Vehicles at least twelve days before the return day and by sending such a true and attested copy at least twelve days before the return day, by registered or certified mail, postage prepaid and return receipt requested, to the defendant at his or her last address on file in the [department] if (A) it is impossible to make service of process at the owner's last address on file in the [department], (B) the owner has loaned or permitted his motor vehicle to be driven by another, and (C) the motor vehicle has caused injury to the person or property of another. . . ."

legislature has not provided any exception that authorizes a plaintiff to serve process upon a defendant's insurance company. We, therefore, cannot accept the plaintiff's unfounded contention that an action commences for the purposes of § 52-592 when the defendant's insurance company, rather than the defendant, receives actual notice of the action.

Finally, we conclude that the filing of an appearance and certain discovery motions within the limitation period by the attorney appointed by the insurance company to represent the defendant was not sufficient to impute actual notice to the defendant, such that the action was commenced pursuant to § 52-592. It is well established that a party may file an appearance without waiving the claim of insufficient service of process. See, e.g., *Morgan* v. *Hartford Hospital*, 301 Conn. 388, 395–96, 21 A.3d 451 (2011); cf. *Foster* v. *Smith*, 91 Conn. App. 528, 537, 881 A.2d 497 (2005). Moreover, there is nothing in the record to indicate that the attorney retained by the insurance company had any communication whatsoever with either the defendant or Vinci prior to entering the appearance on July 3, 2018, or filing discovery motions on July 5, 2018. To the contrary, Vinci's sworn affidavits indicate that she "first learned of the [first action] on July 13, 2018," when she received the reservation of rights letter from the defendant's insurance company and did not learn the identity of the plaintiff or the gravamen of his complaint until she received an email from the attorney appointed by the insurance company *after* the limitation period had expired.

To the extent that Vinci became "aware" of the first action prior to the expiration of that limitation period, such general awareness does not suffice for the actual or effective notice required to commence an action under our law. The plaintiff has provided no legal

authority for his contention that mere awareness suffices to constitute the commencement of a legal action.[22] The precedent of our Supreme Court, as well as this court, instructs that only when a defendant is provided notice of an action by way of receipt of a summons and complaint does § 52-592 operate to save the plaintiff's claim.[23] See *Dorry* v. *Garden*, supra, 313 Conn. 533–35; *Rocco* v. *Garrison*, supra, 268 Conn. 551–53; *Kinity* v. *US Bancorp*, supra, 212 Conn. App. 847–53. To the extent that the plaintiff invites this court to depart from that precedent and relax the actual or effective notice standard articulated therein, we decline that invitation.[24] As an intermediate appellate court, we are not at liberty to modify that authority. See, e.g., *Hartford Steam Boiler Inspection & Ins. Co.* v. *Underwriters at Lloyd's & Cos. Collective*, 121 Conn. App. 31, 48–49, 994 A.2d 262, cert. denied, 297 Conn. 918, 996 A.2d 277 (2010), and case law cited therein.

[22] As one court aptly noted, "[s]imply hearing . . . that a suit has been brought against you cannot be effective notice to a defendant. . . . The court knows of no case where an action has been determined to have been commenced against a defendant [pursuant to § 52-592] based simply on the fact that the defendant heard about it, but had not received or been served a copy of the complaint." *Berlin* v. *Israel*, Superior Court, judicial district of Hartford, Docket No. CV-14-6055525-S (June 2, 2015) (60 Conn. L. Rptr. 463, 465).

[23] We reiterate that the record before us unequivocally indicates that neither the defendant nor Vinci received copies of the summons and complaint prior to the expiration of the limitation period.

[24] For that reason, we likewise reject the plaintiff's contention that his failure to provide actual or effective notice to the defendant should be excused in light of the "diligent, good faith effort [that] was attempted to serve the defendant." *Rocco*, *Dorry*, and *Kinity* instruct that the salient inquiry when considering the commencement of an action for purposes of § 52-592 concerns the adequacy of the notice provided to a defendant, rather than the sincerity of a plaintiff's efforts in attempting service. As this court has observed, "[a]n attempt to serve a person affected improperly by making abode service at a place where that party does not reside . . . will not suffice to give actual or constructive notice." *Bove* v. *Bove*, 77 Conn. App. 355, 363, 823 A.2d 383 (2003); see also *Capers* v. *Lee*, 239 Conn. 265, 271, 684 A.2d 696 (1996) (explaining that, although it is "remedial in its character," § 52-592 "applies only when there has been an original action that had been commenced in a timely fashion" (internal quotation marks omitted)).

In light of the foregoing, we conclude that the trial court properly determined that no genuine issue of material fact exists as to whether the defendant received actual or effective notice of the first action within the time limited by law. The court, therefore, properly concluded that § 52-592 did not apply.

II

The plaintiff also claims that the court abused its discretion in granting the defendant's motion to reargue. He contends that the court failed to identify a legitimate ground for reargument, thereby providing the defendant with an impermissible second bite at the proverbial apple. We disagree.

The following legal principles and standard of review guide our resolution of that claim. "We review the adjudication of a motion to reargue . . . for an abuse of discretion . . . which means that every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done. . . .

"[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. . . . It 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] . . . ." (Citations omitted; internal quotation marks omitted.) *Klass* v. *Liberty Mutual Ins. Co.*, 341 Conn. 735, 740–41, 267 A.3d 847 (2022).

In its memorandum of decision granting the defendant's motion to reargue, the court clarified that, in originally denying the defendant's motion for summary judgment, it had overlooked the supplemental affidavit submitted by Vinci. In that affidavit, Vinci averred that she did not receive a copy of the summons and complaint until after the limitation period had expired. Specifically, the court stated that, "[o]n February 13, 2020, without seeking permission of the court to do so, or otherwise notifying the court of her intention, the defendant filed a supplemental reply . . . to the plaintiff's objection to which she appended a second affidavit [from Vinci], which [Vinci] executed on February 11, 2020 . . . the day after oral argument on the motion. The second affidavit clarified her first affidavit by stating for the first and only time that, although she learned of the [first action] on July 13, 2018, at the time she received a July 5, 2018 reservation of rights letter from the insurance company, she did not receive a copy of the summons and complaint until July 17, 2018, when she received a copy of those documents from the defendant's counsel. Thus, on February 10, 2020, at the time of oral argument, it was not clear to the court that undisputed evidence had actually been submitted by the defendant in support of the motion for summary judgment to demonstrate that [Vinci] did not receive the summons and complaint until after the statute of limitations had expired.

"Upon review of all the motion papers and arguments of counsel in support of the motion to reargue, as well as all the motion papers filed in connection with the motion for summary judgment, it became apparent that this court overlooked the second affidavit. . . . Therefore, the court finds that undisputed facts exist to support the defendant's argument that the defendant or [Vinci] did not receive effective, timely notice of the [first action]." (Citations omitted.) Concluding that no

genuine issue of fact existed as to whether Vinci received actual or effective notice of the first action within the limitation period, the court determined that the defendant was entitled to summary judgment.

On appeal, the plaintiff claims that the court could not have "misapprehended the facts" concerning Vinci's receipt of the summons and complaint because the court (1) received the supplemental affidavit prior to issuing its initial memorandum of decision denying the defendant's motion for summary judgment and (2) found that Vinci had received the summons and complaint after the statute of limitations had lapsed in the initial memorandum of decision, indicating that the court was aware of the facts contained in the supplemental affidavit when rendering its decision.

Although we agree with the plaintiff that the court was in possession of the supplemental affidavit prior to rendering its initial decision denying the defendant's motion for summary judgment, we cannot conclude that the court abused its discretion in granting the defendant's motion to reargue. Rather, we interpret the court's admission that it "overlooked the [supplemental] affidavit" to mean that it initially misapprehended the *legal significance* of Vinci's statement that she did not receive a copy of the summons and complaint until July 17, 2018. Indeed, the court was aware of the facts alleged in the supplemental affidavit when it initially denied the defendant's motion for summary judgment. Only upon reconsideration, however, did the court appreciate the import of those uncontroverted averments and correctly determine that they were dispositive of the legal question as to whether Vinci received actual or effective notice of the first action "within the time limited by law," as required by § 52-592. Indulging every reasonable presumption in favor of the correctness of the court's ruling, we conclude that the court

did not abuse its discretion in granting the defendant's motion for reargument.

The judgment is affirmed.

In this opinion FLYNN, J., concurred.

CRADLE, J., concurring in the result. Because we are bound by this court's holding in *Kinity* v. *US Bancorp*, 212 Conn. App. 791, 277 A.3d 200 (2022), which was argued before this court on January 20, 2022, only eighteen days prior to argument in this case, I am obligated to concur with the result reached by the majority in this case. Although we are bound by an interpretation of Supreme Court precedent regarding the accidental failure of suit statute, also referred to as "the savings statute," General Statutes § 52-592, as articulated by this court in *Kinity*, it is my opinion that that interpretation is unnecessarily narrow and restrictive.

Although the majority aptly recites the applicable legal principles, I nevertheless write separately to emphasize that "[o]ur Supreme Court has long held that § 52-592 is remedial and is to be liberally interpreted." (Internal quotation marks omitted.) *Tellar* v. *Abbott Laboratories, Inc.*, 114 Conn. App. 244, 250, 969 A.2d 210 (2009). "[B]y its plain language, [§ 52-592] is designed to prevent a miscarriage of justice if the [plaintiff fails] to get a proper day in court due to the various enumerated procedural problems. . . . It was adopted to avoid hardships arising from an unbending enforcement of limitation statutes. . . . Its purpose is to aid the diligent suitor. . . . Its broad and liberal purpose is not to be frittered away by any narrow construction. The important consideration is that by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts." (Internal quotation marks omitted.) *Davis* v. *Family Dollar Store*, 78 Conn. App. 235, 240, 826 A.2d

262 (2003), appeal dismissed, 271 Conn. 655, 859 A.2d 25 (2004). Ultimately, "looming behind § 52-592 is the overarching policy of the law to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant [his or her] day in court." (Internal quotation marks omitted.) *Larmel* v. *Metro North Commuter Railroad Co.*, 200 Conn. App. 660, 678, 240 A.3d 1056 (2020), aff'd, 341 Conn. 332, 267 A.3d 162 (2021). "In interpreting the language of § 52-592 (a) . . . we do not write on a clean slate, but are bound by our previous judicial interpretations of the language and the purpose of the statute." *Dorry* v. *Garden*, 313 Conn. 516, 526, 98 A.3d 55 (2014).

The majority thoroughly discusses the two cases in which our Supreme Court has considered the issue of when insufficient service of process may be deemed to have "commenced" an action "within the time limited by law" pursuant to § 52-592. In both of those cases, *Rocco* v. *Garrison*, 268 Conn. 541, 848 A.2d 352 (2004), and *Dorry* v. *Garden*, supra, 313 Conn. 516, our Supreme Court noted the remedial nature of § 52-592 and explained that § 52-592 distinguishes between the "commencement" of an action, on the one hand, and insufficient service of process, on the other, "by providing that the action may fail *following* its commencement *because* of insufficient service." (Emphasis altered.) *Rocco* v. *Garrison*, supra, 550. In both cases, our Supreme Court held that "commenced within the time limited by law" cannot "be construed to mean good, complete and sufficient service of process . . . ." *Rocco* v. *Garrison*, supra, 551; see also *Dorry* v. *Garden*, supra, 529.

In *those cases*, the court held that the actions were "commenced" within the meaning of § 52-592 because the defendants received the writ of summons and complaint within the applicable statute of limitations. In neither case, however, did the court hold that the

receipt of a copy of the summons and complaint was *required* to commence an action pursuant to the savings statute. In other words, although our Supreme Court's decisions in *Rocco* and *Dorry* hold that actual notice by way of receipt of a copy of the summons and complaint is *sufficient* to commence an action within the meaning of § 52-592, neither case establishes that receipt of the summons and complaint is the *exclusive* manner by which an action may commence under the statute. This court did just that, however, in *Kinity*.

In *Kinity*, this court held: "Pursuant to our Supreme Court's decisions in *Rocco* and *Dorry*, an action is commenced within the meaning of § 52-592 when a defendant receives actual or effective notice of the action, within the time period prescribed by law, by way of receipt of the summons and complaint." *Kinity* v. *US Bancorp*, supra, 212 Conn. App. 851. In my view, neither *Rocco* nor *Dorry* concluded that a defendant must have "actual or effective notice of the original action by way of receipt of the summons and complaint"; (emphasis omitted) id., 850; in order to fall within the protection of § 52-592. Rather, in *Rocco* and *Dorry*, the court held that the actions were commenced *in those cases* because the defendants had received the summons and complaint prior to the expiration of the statute of limitations.

In my opinion, to interpret § 52-592 as narrowly as this court did in *Kinity* contradicts the "broad and liberal purpose" of the statute. If the legislature had intended to limit the savings statute to those cases in which a defendant receives a copy of the summons and complaint within the applicable statute of limitations, it easily could have done so.

As the majority notes, "as a matter of policy, one panel of this court will not overrule another panel's decision in the absence of en banc consideration."

Devine v. *Fusaro*, 205 Conn. App. 554, 581–82 n.20, 259 A.3d 655, cert. granted, 339 Conn. 904, 260 A.3d 1224 (2021). Accordingly, I acknowledge that we are bound by this court's interpretation, in *Kinity*, of *Rocco* and *Dorry*, and, for that reason, I must concur with the result reached by the majority.