CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* BLAIR BILLINGS
(AC 44149)

Alvord, Elgo and Clark, Js.

Syllabus

Convicted of criminal violation of a restraining order, stalking in the second degree and harassment in the second degree, the defendant appealed to this court. The defendant had been in a relationship with A, and, when A ended the relationship, the defendant began posting photographs of her and private details about their affair on social media. A obtained an ex parte restraining order against the defendant, and, a few days after he was served with it, the defendant had a conversation with a third party on his Facebook page relating to the affair. The defendant did not refer to A by name in this conversation, but he referenced A's workplace, details of the affair, his alleged evidence of the same, and his desire to tell A's husband about the affair. A's friend, W, took screenshots of the conversation and sent them to A. On the sole basis of that Facebook conversation, the state charged the defendant. At trial, the state admitted into evidence the screenshots of the Facebook conversation, along with screenshots of posts and messages relating to A and the affair from various other social media accounts that allegedly belonged to the defendant. *Held*:

1. The trial court did not abuse its discretion when it admitted into evidence screenshots of the social media posts and messages attributed to the defendant because the screenshots were properly authenticated: the screenshots were admitted through W and A, who both testified that they knew the defendant and that they were able to directly link the defendant to the posts and messages in the screenshots on the basis of the content and distinctive characteristics of the posts, messages, and

social media accounts, despite that the majority of the posts and messages were not directly received or authored by W or A; moreover, the state was not required to conclusively prove that the defendant wrote and published the posts and messages, and concerns that the social media accounts associated with the defendant were either fake or hacked and concerns regarding the irregularity of the date stamps on the screenshots were not enough to bar their authentication, as such concerns went to the weight of the evidence, not its admissibility.

2. This court concluded that the applicable criminal statutes (§§ 53a-181d and 53a-183) for stalking in the second degree and harassment in the second degree, respectively, as applied to the defendant, violated his rights under the first amendment and, accordingly, reversed the judgment with respect to his conviction of stalking in the second degree and harassment in the second degree:

a. The state's claim that, although the defendant's Facebook conversation did not fall into the unprotected categories of speech of true threats, fighting words or obscenity, the speech in question was unprotected because it fell within the speech integral to criminal conduct exception to the first amendment was unavailing, as the defendant's actions of logging into his Facebook account and posting on his own page did not constitute nonspeech conduct for purposes of the exception, rather, those actions constituted the means by which he spoke, such that the defendant's posts contained in the Facebook conversation were not integral to the criminal conduct but, instead, were the criminal conduct; moreover, because the defendant's conviction was based solely on the Facebook conversation, in the absence of that protected speech, there was insufficient evidence to sustain the defendant's conviction under § 53a-181d.

b. The state could not prevail on its claim that the Facebook conversation consisted of speech and nonspeech elements and that, under the test set forth in *United States* v. *O'Brien* (391 U.S. 367), the government had a sufficient interest in regulating the nonspeech element to justify the incidental limitations on the defendant's first amendment freedoms, as the Facebook conversation consisted solely of speech; moreover, the state did not argue that the speech was unprotected under any exception to the first amendment, and our Supreme Court's decision in *State* v. *Moulton* (310 Conn. 337), made clear that the reach of § 53a-183 was limited to speech that was not protected by the first amendment; furthermore, because the defendant's conviction was based solely on the Facebook conversation, in the absence of that protected speech, there was insufficient evidence to sustain the defendant's conviction under § 53a-183.

3. Contrary to the defendant's claim, he was not deprived of his due process right to a fair trial as a result of alleged prosecutorial improprieties:

a. The state's violations of discovery orders did not constitute prosecutorial improprieties and the trial court did not abuse its discretion in

fashioning its remedies for the state's noncompliance: there was no indication that the state's disclosure of additional discovery on the eve of jury selection was done in bad faith, as the state turned over the information shortly after it had come to its attention, and the trial court did not abuse its discretion in failing to impose a severe sanction on the state for its late disclosure because it granted defense counsel's request for a recess to review the new discovery and then granted his motion for a continuance, which sufficiently protected the defendant's rights by ameliorating any prejudice caused by the late disclosure; moreover, the trial court did not abuse its discretion when it declined to preclude W from testifying as a result of the state's failure to provide the defendant with W's criminal history and address because it determined that such a severe sanction was inappropriate, given the minimal prejudice caused by the state's noncompliance; furthermore, the trial court did not abuse its discretion when it failed to grant a mistrial after the state attempted to offer a statement of a party opponent at trial without previously disclosing such statement to the defendant because the court's ruling precluding the admission of the statement as evidence clearly ameliorated any prejudice stemming from the state's late disclosure of the statement.

b. The defendant could not prevail on his claims that the prosecutor committed prosecutorial impropriety during his closing argument: the prosecutor's use of the term "red herring" in his closing argument was intended to rebut a portion of the defendant's theory of defense, specifically, that A was not credible, and was not directed at defense counsel's character or credibility and did not impugn or disparage him; moreover, the prosecutor's statement that it would have taken effort for the defendant to get to A's home was permissible because it properly referred to facts in evidence, namely, that A lived in a rural area and that the defendant's primary mode of transportation was a bicycle, and then invited the jury to draw a reasonable inference based on those facts.

Argued May 11—officially released December 20, 2022

Procedural History

Substitute information charging the defendant with the crimes of criminal violation of a restraining order, stalking in the second degree, and harassment in the second degree, brought to the Superior Court in the judicial district of Windham, geographical area number eleven, and tried to the jury before *Spellman, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Reversed in part*; *judgment directed.*

James B. Streeto, senior assistant public defender, with whom, on the brief, was *Alison L. Fonseca*, certified legal intern, for the appellant (defendant).

Meryl R. Gersz, deputy assistant state's attorney, with whom, on the brief, were *Anne F. Mahoney*, state's attorney, and *Andrew Slitt* and *Jennifer Barry*, assistant state's attorneys, for the appellee (state).

Opinion

CLARK, J. The defendant, Blair Billings, appeals from the judgment of conviction, rendered after a jury trial, of criminal violation of a restraining order in violation of General Statutes § 53a-223b (a) (2), stalking in the second degree in violation of General Statutes (Supp. 2018) § 53a-181d (b) (1),[1] and harassment in the second degree in violation of General Statutes (Rev. to 2017) § 53a-183 (a) (2).[2] On appeal, the defendant claims that (1) the court abused its discretion by admitting into evidence social media posts and messages that the state failed to properly authenticate, (2) the state committed prosecutorial impropriety by failing to comply with certain discovery requirements and by making improper statements during its closing arguments, (3) the court abused its discretion when it declined to sanction the state for violating a court order regarding discovery, and (4) the evidence was insufficient to sustain his convictions for stalking and harassment because they were predicated on speech protected by the first amendment.[3] Because we agree with the defendant with respect to his first amendment claim, we reverse the judgment of conviction of harassment in the second

[1] Unless otherwise indicated, all references to § 53a-181d in this opinion are to the version appearing in the 2018 supplement to the General Statutes.

[2] Unless otherwise indicated, all references to § 53a-183 in this opinion are to the 2017 revision of the statute.

[3] We note at the outset that we address the defendant's claims in a different order than which he briefed them.

degree and stalking in the second degree. The judgment is affirmed in all other respects.

The following facts, which reasonably could have been found by the jury, and procedural history inform our review of the defendant's claims. The victim, A,[4] lived in Putnam with her husband and worked as a karate instructor at a karate school in Danielson (karate school). She and her husband have six children, some of whom, at the time of the trial, still lived at home. In September, 2017, A attended a party hosted by the owner of the karate school. At the party, A met the defendant for the first time and the two "hit it off." Later that evening, the two talked by themselves "for quite a while just about a lot of personal stuff and general stuff, things."

While at the party, A and the defendant added one another as friends on Facebook. A few days later, A messaged the defendant on the platform. The two also started following each other on Instagram. Over the next few weeks, A and the defendant began communicating frequently and eventually met for drinks. Thereafter, their relationship "became more personal" and A eventually told the defendant that she "wanted to have a relationship, an affair" with him. In early November, 2017, A and the defendant's relationship turned physical and the two began having sexual intercourse and also exchanged intimate photographs of each other. During that same time, A encouraged the defendant to become a student at the karate school, which he did.

In either December, 2017, or January, 2018, A ended the relationship. The defendant became "angry and

[4] 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.

combative," which "terrified" A. Despite ending the relationship, A continued to communicate with the defendant on a daily basis, stating that she "was trying to calm him down and be amicable" because they were adults. She also met with him at a laundromat to give him a set of nunchucks[5] with which he could practice his karate.[6] A then saw the defendant one final time at an event at the karate school.

In February, 2018, A unfriended the defendant on Facebook, which left him unable to see her Facebook page or to message her on that platform. The defendant then began messaging her on Instagram, where the two still followed each other. Thereafter, the defendant resorted to posting photographs of A and private details about their affair and about members of her family on social media.

In light of the defendant's actions, A obtained an ex parte restraining order against the defendant on April 2, 2018, which was served on the defendant on April 3, 2018. Importantly, for purposes of this appeal, the defendant's conduct prior to the issuance of the restraining order does not form the basis of any of the defendant's convictions.

On or about April 7, 2018, a few days after the defendant was served with the ex parte restraining order, James Walters, a friend of A, sent A screenshots of a Facebook conversation that the defendant had on his own Facebook page with Tracey Hart Field, another Facebook user unknown to A (April 7, 2018 Facebook

[5] Nunchucks are "a martial arts weapon consisting of two short wooden sticks connected by a piece of chain which [can] be whirled with a circular motion and thrown . . . ." 8 American Law of Products Liability (3d Ed. Rev. 2010) § 102:24, p. 100.

[6] The defendant had stopped attending the karate school after A ended their relationship because the school's owner had asked him to take some time off from the school.

conversation). A previously had asked Walters to monitor several of the defendant's social media accounts. Walters checked the defendant's accounts frequently for posts that might interest A, took screenshots of them, and sent the screenshots to A. The screenshots of the April 7, 2018 Facebook conversation read as follows:[7]

"[The Defendant]: I have enough text messages and photos to ruin another human being life. And even more lives. What do I do?"

"[The Defendant]: No one ever cut me slack!!! They just used anything I said against me now It's my turn!. Thanks for the impute."

"[Hart Field]: I would need to know what it's about to answer."[8]

"[The Defendant]: She told me 'targeting her was a very bad idea' I've [since] retrieved that message. She has a lot to lose! I've even taken bedding with her DNA all over it and handed [it] over to a[n] attorney in Maine with all the proof and details."

"[Hart Field]: . . and, of course, you know I'm gonna be 'captain obvious' and now say that being involved with a married person is wrong . . you're a good guy and better than that. ♥."

"[The Defendant]: Your right! But she stalked me on messenger after we met. At the karate owners house.

[7] Exhibit 11 is the only exhibit that detailed a posting on April 7, 2018. The exhibit contains seven pages of Facebook screenshots taken from a cell phone. Because the screenshots do not clearly set forth the chronology of the conversation, we have attempted to put the conversational posts in chronological order. The plaintiff included a copy of exhibit 11 in his appendix filed with this court.

[8] It appears that, following this Facebook post, there were various conversational posts that took place under it. The content of those posts, however, is not visible in exhibit 11 and was not otherwise provided to the jury. The posts that are set forth in this opinion are those visible in exhibit 11.

And I was attracted to her too. So shit happens. But I won't let you lie about me to save your ass. Especially when I have all the proof! The only one that needs to know the truth. Is her husband. And it's not her first time either. That I got confirmation on Friday. That's why it's more of a big deal then people want to believe."

"[The Defendant]: I told [our] karate master. He's trying to cover it up. And I have correspondence between her and him to that fact. And they don't like it! I've been forced out of karate while she gets to continue."

"[Hart Field]: They are pissed that you wouldn't let it go . . . she probably has done this before . . . probably with the karate master . . . lol . . . I don't know why you chose to tell anyone though??"

"[The Defendant]: I chose to tell because I tried to break it off back in January. And she came unglued! All but begging me to stay! And I have those text messages. For once I saved things. If she has to leave her family because of this, the karate school will fall."

"[The Defendant]: I've been harrased by the state police in this area because of it."

"[Hart Field]: I would like to say that I could let it go . . . but . . . in all honesty I think I would send one picture that proves my point and let it go . . . especially if people are thinking you made all this up and it's your imagination or worse. . ."

"[The Defendant]: I have many pictures! And messages that I retrieved from my phone by having it rooted! But I'm prohibited from contact with her or her family. It's her last ditch effort to silence me legally."

"[Hart Field]: I would think the hubby would WANT to see proof . . . I know I would."

"[The Defendant]: But plenty of people in the area know but the one person that doesn't is her husband!"

"[The Defendant]: Exactly Tracy! And I have it ALL!!!!!!"

"[Hart Field]: It's easy for others to say 'let it go' . . . it's different when it's your life."

After receiving the screenshots from Walters, A vomited, had a panic attack, and "was completely and totally terrified that [her] entire life was going to be ruined on social media." A few weeks later, on May 12, 2018, A went to the police and provided a formal written statement. Trooper Howard Smith of the Connecticut State Police was assigned to investigate her allegations and confirmed that she had a valid restraining order against the defendant at the time of some of the Facebook posts.

On the sole basis of the aforementioned April 7, 2018 Facebook conversation, the state charged the defendant with criminal violation of a restraining order in violation of § 53a-223b, stalking in the second degree in violation of § 53a-181d, and harassment in the second degree in violation of § 53a-183.[9]

[9] The defendant was originally charged with a single count of violating a restraining order in violation of § 53a-223b. On the day that jury selection was initially scheduled to begin, the state filed an amended long form information adding seven new criminal charges against the defendant. These charges alleged different statutory violations stemming, at least in part, from acts occurring prior to April 7, 2018. The defendant filed a motion to dismiss, arguing, inter alia, that the additional charges were barred by the statute of limitations. In response, the state filed a new, three count information that removed the time barred charges.

With respect to the violation of a restraining order charge, the operative information states: "Assistant State's Attorney Andrew J. Slitt, for the Judicial District of Windham, accuses BLAIR BILLINGS (D.O.B. February 23, 1968), now or formerly of Killingly, Connecticut of CRIMINAL VIOLATION OF A RESTRAINING ORDER, and charges that on or about April 7, 2018, in the town of PUTNAM, within the judicial district of Windham, the said BLAIR BILLINGS, when a restraining order has been issued against such person, contacted and harassed a person in violation of that order, in violation of . . . § 53a-223b (a) (2)."

A five day jury trial was held in November, 2019. Walters and A both testified. The state also admitted into evidence numerous exhibits that depicted posts and messages from the defendant's social media accounts. In addition to exhibit 11, which contained the screenshots of the April 7, 2018 Facebook conversation that formed the basis of the defendant's convictions, the state was permitted to introduce prior social media posts of the defendant under the uncharged misconduct rule.[10] Those included, among others:

• Plaintiff's exhibit 1, which was a screenshot of a Twitter post containing a picture of A's face and captioned: "Sex scandal rocks [karate school], Danielson ct. Married instructor seeks student out on messenger starts an affair."

• Plaintiff's exhibit 4, which was a screenshot of an Instagram post containing a photograph of A's property and captioned: "Pictures from today's ride."

• Plaintiff's exhibit 5, which was a screenshot of a Facebook post that referred to A as "a cheater and

With respect to the stalking charge, the operative information states: "Said Assistant State's Attorney further accuses BLAIR BILLINGS of STALKING IN THE SECOND DEGREE, and charges that on or about April 7, 2018 in the town of PUTNAM, said BLAIR BILLINGS, knowingly engaged in a course of conduct by harassment on social media directed at a specific person, [A], that would cause a reasonable person to suffer emotional distress in violation of . . . § 53a-181d (b) (1)."

With respect to the harassment charge, the operative information states: "Said Assistant State's Attorney further accuses BLAIR BILLINGS of HARASSMENT IN THE SECOND DEGREE, and charges that on or about April 7, 2018 in the town of PUTNAM, said BLAIR BILLINGS, with the intent to harass, annoy, or alarm [A] he communicates with another person by social media in a manner likely to cause annoyance and alarm in violation of . . . § 53a-183 (a) (2)."

[10] It is well established that those earlier social media posts could not serve as substantive evidence of a violation of the three statutes with which the defendant was charged. See *State* v. *Randolph*, 284 Conn. 328, 340, 933 A.2d 1158 (2007) ("[a]s a general rule, evidence of prior misconduct is inadmissible to prove that a criminal defendant is guilty of the crime of which the defendant is accused" (internal quotation marks omitted)).

pathological li[a]r." The post also included a screenshot of an Instagram post that the defendant had allegedly made, which included a picture of A and was captioned: "2 Dan at [karate school]. Adultery and pathological li[a]r. #givesgoodhead."

• Plaintiff's exhibit 6, which was a screenshot of a Facebook post that was apparently intended for A's daughter, stating, "I got one of your mom's favorite picture[s] of me for you! Daughter is probably like mother?"

• Plaintiff's exhibit 7, which included a screenshot of a Facebook post containing a picture of A and captioned: "Love those lady parts. Lol."

• Plaintiff's exhibit 7, which included a screenshot of a Facebook post containing a picture of A and captioned: "You can shut down all my social media [sites]. But the good pictures will make [their] way [where] they need [to]! I fucking promise!"

• Plaintiff's exhibit 10, which was a screenshot of a conversation on Facebook messenger between the defendant and A in which the defendant told A that she had "lied [her] way out yet again" and asked whether he should expect a visit from A's husband.

After the state rested its case, the defendant moved for a judgment of acquittal, arguing that the state had failed to prove each count beyond a reasonable doubt because it had not established that the defendant had the required intent to violate the criminal restraining order or to harass or stalk A because none of his posts contained in the April 7, 2018 Facebook conversation was directed at her. The defendant also argued, with respect to the stalking charge, that the state had failed to prove that a course of conduct occurred because the charged conduct all happened on a single day. The state responded that it was not required to show that the

defendant's posts had been directed at A in order to prove intent and that a course of conduct could occur on a single day, which it did here, on the basis of the multiple posts that the defendant made. The court denied the defendant's motion for acquittal.

Thereafter, the jury found the defendant guilty on all counts. The court accepted the jury's verdict and sentenced the defendant to a total effective term of five years of incarceration, suspended after nine months, with three years of probation.[11] The court also issued a standing criminal protective order prohibiting any contact with or communications about A and her family.

On December 3, 2019, the defendant filed a motion for a new trial, wherein he argued, in relevant part, that he was entitled to a new trial because (1) the court had erred in admitting into evidence screenshots of his social media posts and messages because they were not properly authenticated and (2) the state had repeatedly violated applicable discovery rules. The court denied the motion, and this appeal followed. Additional facts and procedural history will be set forth as needed.

I

The defendant first claims that the court abused its discretion when it admitted into evidence screenshots of his social media posts and messages because the screenshots were not properly authenticated. We disagree.

We first set forth the following additional facts and procedural history. At trial, the state sought to introduce

[11] On the charge of violation of a restraining order, the court sentenced the defendant to a period of five years of incarceration, execution suspended after nine months, followed by three years of probation. The defendant also was sentenced to ninety days of incarceration on the second degree stalking charge and sixty days of incarceration on the second degree harassment charge, with those sentences to run concurrently with the sentence for the violation of a restraining order charge.

screenshots of the defendant's posts and messages, summarized previously in this opinion, from his various social media accounts. The defendant objected to the admission of the screenshots, arguing that they could not be properly authenticated because neither A nor Walters could prove definitively that the posts and messages had been made by the defendant. Before the court ruled on admissibility, Walters testified outside of the presence of the jury regarding the screenshots.

Walters first testified about how he searched for and located the defendant's social media pages. To find the defendant's Facebook page, Walters searched the defendant's name in Facebook's search bar. That search pulled up two profiles associated with the defendant, an active account that the defendant was currently using and an older, inactive account. Walters then testified that the accounts had a number of distinctive characteristics that led him to believe that they both belonged to the defendant. Specifically, both accounts included the defendant's name and numerous pictures of the defendant, the accounts had previously liked or commented on posts that A had made and she had responded back, "[t]here were also other people from the karate school that [the accounts] had friended," and the content of the posts on both accounts often referenced private details about A. Walters also noted that, although he was not Facebook friends with the defendant, he was able to see everything that the defendant posted because the defendant's Facebook pages were publicly available.

Walters also explained that he had located the defendant's Instagram account by searching for the defendant's name and then confirming that the username for the resulting account matched the unique username that A had given him for the defendant's Instagram account. A previously had exchanged messages with

the defendant on this account. Walters further concluded that the account belonged to the defendant because it included pictures of the defendant and posts that again referred to private details about A. Last, Walters testified that he located the defendant's Twitter account by searching Twitter for the defendant's name and then identifying the defendant's account on the basis of his profile picture and the content of the page. Walters believed that the Twitter account associated with the defendant's name belonged to the defendant because the account included a picture of the defendant at a gym, where Walters knew that the defendant was a member, and again included posts that referenced private details about A.

Walters further testified that his searches for the defendant's social media accounts had brought up other accounts that were associated with individuals who had the same name as the defendant but that he was able to determine that those other accounts did not belong to the defendant because some of the accounts belonged to women and the other accounts belonged to younger men.

Walters then testified about how he took screenshots and shared the defendant's posts. According to Walters, he used either buttons or swipes on his cell phone to screenshot pictures of the defendant's social media posts and then saved those screenshots to his device. Walters then time stamped the screenshots, although he admitted that the format of the time stamps was not consistent because sometimes the time stamps were in the American format (month/day/year) and other times they were in the European format (day/month/year). After Walters time stamped the screenshots, he sent them to A. Walters also testified that all of the screenshots that the state intended to admit had come from the defendant's social media accounts.

After Walters testified, the court ruled that exhibits 1, 2a, 5, 6a, 7, 12 and 13 had been properly authenticated and could be admitted into evidence through Walters on the following day. On November 5, 2019, Walters testified in the presence of the jury, and the state admitted exhibits 1, 2a, 5, 6a, 7 and 13 into evidence. During his testimony, Walters largely reiterated the testimony that he had given the day before outside the presence of the jury.

On November 6, 2019, the state introduced several additional screenshots—exhibits 4, 10 and 11—through A. Of those screenshots, exhibits 4 and 11 had been taken by Walters, and exhibit 10 was the sole screenshot taken by A. Although exhibits 4 and 10 were not admitted into evidence through Walters' testimony, he did testify that the screenshots in both exhibits had come from the social media accounts he had linked to the defendant.

With respect to exhibit 4, A testified that it was a screenshot that Walters had taken from the defendant's Instagram account and that the screenshot fairly and accurately represented the way it looked when Walters sent it to her. A further stated that she believed the post was from the defendant's Instagram account because the account's profile picture was of the defendant and the username associated with the account matched the defendant's username for his Instagram account. She also testified that she was familiar with the defendant's Instagram because she and the defendant had previously followed each other on Instagram and used it to exchange messages. With respect to exhibit 10, A testified that it showed a private Facebook conversation between her and the defendant and that she had taken a screenshot of the conversation herself. A stated that the screenshot fairly and accurately represented her Facebook conversation with the defendant and that she had not edited the screenshot. Last, A

testified that exhibit 11 was sent to her as a screenshot by Walters and that the screenshot showed a series of public Facebook posts that the defendant had made about her. She confirmed that the screenshot fairly and accurately represented the way it looked when Walters sent it to her.

We next set forth the standard of review and relevant legal principles that govern our resolution of this claim. The standard of review applicable to a claim regarding authentication is well established. "We review the trial court's decision to admit evidence, if premised on a correct view of the law[12] . . . for an abuse of discretion. . . . Under the abuse of discretion standard [an appellate court] make[s] every reasonable presumption in favor of upholding the trial court's rulings, considering only whether the court reasonably could have concluded as it did." (Citation omitted; footnote added; internal quotation marks omitted.) *State* v. *Rivera*, 343 Conn. 745, 759, 275 A.3d 1195 (2022).

"Authentication . . . is viewed as a subset of relevancy, because evidence cannot have a tendency to make the existence of a disputed fact more or less likely if the evidence is not that which its proponent claims. . . . Our Code of Evidence provides that [t]he requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be. . . . [A] writing may be authenticated by a number of methods, including direct testimony or circumstantial evidence. . . .

"[T]he showing of authenticity is not on a 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

[12] On appeal, the defendant does not claim that the court's admission of the challenged exhibits was based on an incorrect view of the law.

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 jury, which will ultimately determine its authenticity. . . .

"It is widely recognized that a prima facie showing of authenticity is a low burden. . . . This is because [a] proponent of evidence is not required to *conclusively prove the genuineness* of the evidence *or to rule out all possibilities inconsistent with authenticity*. . . .

"[E]lectronic communications, such as text messages, are subject to the same standard of authentication and the same methods of authentication as other forms of evidence: As with any other 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 its proponent claims it to be, to authenticate any particular item of electronically stored information. . . .

"One such appropriate method of authentication . . . is that [a] witness with personal knowledge may testify that the offered evidence is what its proponent claims it to be. . . .

"[Moreover] [t]he distinctive characteristics of an object, writing or other communication, when considered in conjunction with the surrounding circumstances, may provide sufficient circumstantial evidence of authenticity." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *State* v. *Manuel T.*, 337 Conn. 429, 453–56, 254 A.3d 278 (2020).

Further, "[t]he government may authenticate a document solely through the use of circumstantial evidence, including the document's own distinctive characteristics and the circumstances surrounding its discovery."

(Internal quotation marks omitted.) *State* v. *John L.*, 85 Conn. App. 291, 301, 856 A.2d 1032, cert. denied, 272 Conn. 903, 863 A.2d 695 (2004). Finally, "[c]onclusive proof of authenticity is not required," and the government "can also rely on the contents of the [document] to establish the identity of the declarant." (Internal quotation marks omitted.) Id., 302.

On appeal, the defendant claims that the screenshots the state entered into evidence through Walters and A were not properly authenticated because neither witness had personal knowledge to testify that the evidence was what they claimed it to be and neither witness could prove that the defendant had authored the contents of the screenshots. The state, on the other hand, argues that the screenshots that were admitted through Walters and A were properly authenticated because both witnesses knew the defendant and were able to identify numerous distinctive characteristics in the exhibits. We agree with the state.

Walters testified that he knew the defendant from the karate school, that he was good friends with A, and that he was aware of the affair. He also testified as to how he found the defendant's social media accounts and described the steps that he took to verify which accounts belonged to the defendant and which accounts belonged to other individuals who happened to have the same name as the defendant. Specifically, Walters used his knowledge of what the defendant looked like, his sex, and his age to determine that social media accounts associated with younger men and women likely did not belong to the defendant.

With regard to all of the screenshots of Facebook posts that were admitted into evidence, Walters testified that he believed the defendant was the author of those posts because the Facebook accounts that the posts came from contained the defendant's name and

pictures of the defendant, including the accounts' profile pictures; the accounts were Facebook friends with other students and instructors at the karate school and shared mutual Facebook friends with A; and the posts contained private information about A, as well as pictures of A and a reference to her daughter. Importantly, Walters testified that he observed that the accounts previously interacted with A's Facebook account, in that the defendant previously had liked or commented on A's posts and A had responded back to the accounts. As to the screenshot of a Twitter post that the state admitted into evidence, Walters testified that he believed the defendant had authored the post because the Twitter account in question included the defendant's name, a profile picture of the defendant, and a picture of the defendant at a gym, where Walters knew that the defendant was a member. Additionally, the post contained a picture of A and referenced a "sex scandal" involving her that had occurred at the karate school. Finally, with respect to the Instagram posts that the state admitted into evidence, Walters testified that he believed the defendant had authored the posts because the Instagram account's unique username matched the username that A had given him for the defendant's Instagram account, the account included pictures of the defendant, and the content of the posts again contained pictures of A, references to the karate school, and a reference to A's daughter.

A testified that she had been friends with the defendant on Facebook and Instagram and had interacted with him on both platforms. With respect to two of the exhibits that she authenticated, exhibits 4 and 11, A testified that the screenshots had been sent to her by Walters, that the screenshots fairly and accurately represented the way they looked when Walters sent them to her, and that she had not edited the screenshots. A further testified that she believed that exhibit 4, a

screenshot of an Instagram post, had come from the defendant's Instagram account because she was familiar with the defendant's Instagram username and profile picture and both matched the information associated with the account that had posted the screenshot in exhibit 4. Exhibit 10, the only exhibit that A took screenshots of, was a private Facebook conversation between her and the defendant. A testified that the exhibit fairly and accurately reflected the conversation she had with the defendant and that she did not edit or alter that screenshot. Last, with respect to exhibit 11—screenshots of the April 7, 2018 Facebook conversation—A testified that the posts included references to private details about her and her family, the affair, and the karate school.

As summarized in the preceding paragraphs, the distinctive characteristics that Walters and A relied on to establish that the social media posts and messages in question were written and published by the defendant—including that (1) the content of the posts repeatedly referenced A, the affair, and the karate school, (2) the social media accounts in question included the defendant's name, his unique social media usernames, and multiple pictures of the defendant, (3) the Facebook accounts, in particular, were friends with other members of the karate school and mutual friends of A, and (4) the Facebook accounts and Instagram account previously had interacted with A—were sufficient to properly authenticate the exhibits. See *State* v. *Manuel T.*, supra, 337 Conn. 456, 461 (content of text messages, which included information about victim's age, job, family, and boyfriend, was sufficient to authenticate messages); *State* v. *John L.*, supra, 85 Conn. App. 302 (documents were properly authenticated on basis of circumstantial evidence that linked defendant to documents). Moreover, with respect to exhibit 10, A's testimony that the exhibit accurately represented the conversation she had with the defendant over Facebook

was sufficient on its own to authenticate the exhibit. See *State* v. *Smith*, 179 Conn. App. 734, 764–65, 181 A.3d 118 (Facebook message was properly authenticated because proponent of message testified that she had received message and had personal knowledge of defendant and that content of message led her to believe it was sent by defendant), cert. denied, 328 Conn. 927, 182 A.3d 637 (2018).

The defendant argues that Walters' and A's authentications were insufficient because they could not prove that the defendant authored the social media posts in question and the primary identifying features that both witnesses relied on were the accounts' names and profile pictures. We disagree. First, the state was not required to conclusively prove that the defendant wrote and published the posts. See *State* v. *Manuel T.*, supra, 337 Conn. 454 (for purposes of authentication, "[a] proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity" (emphasis omitted; internal quotation marks omitted)). Second, as summarized previously in this opinion, Walters and A both relied on more than just the accounts' names and photographs to authenticate the screenshots, including the fact that the Facebook accounts were friends with other members of the karate school and shared mutual friends with A, the specific content of the screenshots, and that previous interactions between the defendant and A had occurred on his social media accounts.

We similarly disagree with the defendant's argument that Walters and A could not properly authenticate the screenshots of the posts contained in exhibit 11 because neither was the author or the recipient of the defendant's social media posts. Although Walters and A did not author or directly receive any of the defendant's posts, they both viewed the posts, either on the defendant's social media accounts or via screenshots that

had been taken of those accounts, and were able to directly link the defendant to the posts on the basis of the content and distinctive characteristics of the posts and the accounts. That is sufficient for authentication. See *United States* v. *Bradley*, United States District Court, Docket No. 3:21-CR-00087 (VAB) (D. Conn. May 27, 2022) ("[a]ssuming the [g]overnment offers testimony from a witness who visited [the defendant's] Facebook page and observed the Facebook posts, this testimony is sufficient to authenticate the exhibits as [the defendant's] Facebook posts").

We also are unpersuaded by the defendant's argument that the social media accounts from which the screenshots were taken may have either been fake accounts or accounts that were hacked and, thus, the posts could not have been properly authenticated. As support for this assertion, the defendant points to A's testimony at trial that the defendant had previously shut down his Facebook page and that the defendant had told Trooper Smith that his Facebook account had been hacked. "[Q]uestions about the integrity of electronic data [however] generally go to the *weight* of electronically based evidence, *not its admissibility*." (Emphasis in original; internal quotation marks omitted.) *State* v. *Manuel T.*, supra, 337 Conn. 461. Moreover, as previously stated in this opinion, "the bar for a finding of authenticity is not high. . . . A party proffering evidence does not have the burden to disprove all possible inconsistencies with authenticity, or prove beyond all doubt that the [exhibits] are what the party purports them to be." (Citation omitted.) *Gagliardi* v. *Commissioner of Children & Families*, 155 Conn. App. 610, 621, 110 A.3d 512, cert. denied, 316 Conn 917, 113 A.3d 70 (2015). Accordingly, concerns that the social media accounts associated with the defendant were either fake or hacked, even when there is perhaps some evidence to support those concerns, are not enough to bar

authentication of the screenshots here. For these same reasons, we also disagree with the defendant's argument that the exhibits could not have been properly authenticated because "the 'date stamps' on the postings were erratic," and, thus, it was "impossible to say when any given screenshot was actually taken." See id.; see also *State* v. *Manuel T.*, supra, 456 (screenshots could properly be authenticated without date of communication listed on exhibit).[13]

Accordingly, for the reasons set forth herein, the screenshots were properly authenticated by Walters and A, and the court, therefore, did not abuse its discretion in admitting those screenshots into evidence.

II

The defendant next argues that there was insufficient evidence to convict him of stalking in the second degree in violation of § 53a-181d and harassment in the second degree in violation of § 53a-183.[14] He contends that both statutes are unconstitutional as applied to him because he "was prosecuted on the content of his communication, not on the conduct of it." In his view, absent

[13] To the extent that the defendant contends on appeal that the screenshots also should not have been admitted because they "were not in the sole custody of the witness[es], the state took no investigative acts which could have properly authenticated the evidence, and the documents were not complete," those arguments are inadequately briefed given that they were mentioned only briefly and never were analyzed in the defendant's briefs. See *C. B.* v. *S. B.*, 211 Conn. App. 628, 630, 273 A.3d 271 (2022) ("[W]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . For a reviewing court to judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs." (Internal quotation marks omitted.)).

[14] The defendant does not make this argument as to the charge of violation of a restraining order. He "acknowledges that in the light most favorable, [the] jury could have found that he talked about [A] on social media on April 7, 2018, despite not using any names, and was therefore guilty of violating the restraining order, as charged and argued to the jury."

protected speech, there is insufficient evidence to support his convictions.

The state takes a different view. With respect to the defendant's stalking conviction, it argues that it "did not punish the content of his speech, but rather a course of conduct that was, in part, informed by speech." The state thus contends that the speech contained in the defendant's April 7, 2018 Facebook conversation is unprotected under the "speech integral to criminal conduct exception" to the first amendment. At the same time, the state argues that the defendant's harassment conviction "was based on speech and nonspeech" components. Although it does not argue that the speech integral to criminal conduct exception applies to the harassment conviction, the state nevertheless argues that, in accordance with *United States* v. *O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), it "has a sufficient interest in regulating the nonspeech element, which justifies the incidental limitations on [the defendant's] first amendment freedoms." The state argues that the evidence presented was sufficient for the jury to reasonably infer that the defendant had the necessary mental states and that the posts were likely to come to A's attention. For the reasons discussed herein, we conclude that the defendant's stalking and harassment convictions cannot stand because the statutes as applied to the defendant violate his rights under the first amendment.[15]

A

Legal Principles

The legal principles at the heart of this claim are foundational. The first amendment, applicable to the

[15] We note that the defendant's claim is unpreserved and that he seeks review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). "The record is adequate for review, and the claim, asserting a violation of the defendant's right to freedom of speech, is of constitutional magnitude."

states through the fourteenth amendment, provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const., amend. I. "[A]s a general matter, the [f]irst [a]mendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (Internal quotation marks omitted.) *Ashcroft* v. *American Civil Liberties Union*, 535 U.S. 564, 573, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002). The state may violate this mandate in various ways, "but a law imposing criminal penalties on protected speech is a stark example of speech suppression." *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 244, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

There can be little dispute that the first amendment extends to an individual's posts on social media. See *Mahanoy Area School District* v. *B. L.*, U.S. , 141 S. Ct. 2038, 2042–43, 210 L. Ed. 2d 403 (2021) (student's social media posts, which included vulgar and crude speech, were protected by first amendment); *Packingham* v. *North Carolina*, U.S. , 137 S. Ct. 1730, 1735–36, 198 L. Ed. 2d 273 (2017) ("[i]n short, social media users employ these websites to engage in a wide array of protected [f]irst [a]mendment activity on topics 'as diverse as human thought' ").

The first amendment's protections, however, are not absolute. There are various "well-defined and narrowly limited classes of speech" that are not protected, including, among others, obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571–72, 62 S. Ct. 766, 86 L. Ed. 1031 (1942); see also *United States* v. *Stevens*, 559 U.S. 460, 468–69, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010). Speech that does not fall into these

State v. *Moulton*, 120 Conn. App. 330, 335, 991 A.2d 728 (2010), aff'd in part, 310 Conn. 337, 78 A.3d 55 (2013).

exceptions remains protected. See *United States* v. *Stevens*, supra, 468–69; *Chaplinsky* v. *New Hampshire*, supra, 571–72. But just because speech may be considered crude or in bad taste does not necessarily bring that speech outside the protection of the first amendment. See *Mahanoy Area School District* v. *B. L.*, supra, 141 S. Ct. 2048 ("sometimes it is necessary to protect the superfluous in order to preserve the necessary"). The United States "Supreme Court has consistently classified emotionally distressing or outrageous speech as protected, especially where that speech touches on matters of political, religious or public concern." *United States* v. *Cassidy*, 814 F. Supp. 2d 574, 582 (D. Md. 2011), appeal dismissed, Docket No. 12-4048, 2012 WL 13228525 (4th Cir. April 11, 2012).

"When assessing the constitutionality of a statute, we exercise de novo review and make every presumption in favor of the statute's validity. . . . We are also mindful that legislative enactments carry with them a strong presumption of constitutionality, and that a party challenging the constitutionality of a validly enacted statute bears the heavy burden of proving the statute unconstitutional beyond a reasonable doubt . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Nowacki*, 155 Conn. App. 758, 780, 111 A.3d 911 (2015).

B

Criminal Stalking

The operative language of the second degree criminal stalking statute provides in relevant part: "A person is guilty of stalking in the second degree when: (1) Such person knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to (A) fear for such person's physical safety or the physical safety of a third person, or (B) suffer emotional distress . . . ." General Statutes (Supp. 2018) § 53a-181d (b). A "course of conduct" means "two

or more acts, including, but not limited to, acts in which a person directly, indirectly or through a third party, by any action, method, device or means, including, but not limited to, electronic or social media, (1) follows, lies in wait for, monitors, observes, surveils, threatens, harasses, communicates with or sends unwanted gifts to, a person, or (2) interferes with a person's property . . . ." General Statutes (Supp. 2018) § 53a-181d (a).[16]

Although it is clear from the language of the stalking statute that it is directed at conduct, specifically, a "course of conduct," it is apparent that a "course of conduct" under § 53a-181d can be established through conduct and unprotected speech alike, similar to that

[16] In 2021, the legislature made substantial substantive changes to the second degree stalking statute. See Public Acts 2021, No. 21-56, § 2. The new version of the statute, effective October 1, 2021, provides in relevant part: "(b) A person is guilty of stalking in the second degree when:

"(1) Such person knowingly engages in a course of conduct directed at or concerning a specific person that would cause a reasonable person to (A) fear for such specific person's physical safety or the physical safety of a third person; (B) suffer emotional distress; or (C) fear injury to or the death of an animal owned by or in possession and control of such specific person;

"(2) Such person with intent to harass, terrorize or alarm, and for no legitimate purpose, engages in a course of conduct directed at or concerning a specific person that would cause a reasonable person to fear that such person's employment, business or career is threatened, where (A) such conduct consists of the actor telephoning to, appearing at or initiating communication or contact to such other person's place of employment or business, including electronically, through video-teleconferencing or by digital media, provided the actor was previously and clearly informed to cease such conduct, and (B) such conduct does not consist of constitutionally protected activity; or

"(3) Such person, for no legitimate purpose and with intent to harass, terrorize or alarm, by means of electronic communication, including, but not limited to, electronic or social media, discloses a specific person's personally identifiable information without consent of the person, knowing, that under the circumstances, such disclosure would cause a reasonable person to:

"(A) Fear for such person's physical safety or the physical safety of a third person; or

"(B) Suffer emotional distress." General Statutes (Supp. 2022) § 53a-181d (b).

of the criminal harassment statute. See *State* v. *Moulton*, 310 Conn. 337, 342, 78 A.3d 55 (2013) (both conduct and unprotected speech can form basis for harassment conviction); see also *United States* v. *Osinger*, 753 F.3d 939, 944, 946 (9th Cir. 2014) ("course of conduct" required to establish violation of federal interstate stalking statute may be established by conduct and speech components).

The defendant argues that his stalking conviction was not based on any conduct but was based exclusively on the April 7, 2018 Facebook conversation—a constitutionally protected conversation that he had with a third party on his own Facebook page—and, thus, his conviction violates his first amendment rights. The state disagrees and argues that the defendant's first amendment rights were not violated because the speech contained in his April 7, 2018 Facebook conversation was not protected and the defendant's conviction was based on nonspeech conduct. Although the state concedes that the defendant's speech contained in the April 7, 2018 Facebook conversation, which forms the sole basis for the defendant's convictions, "does not fall into the unprotected categories of speech of true threats, fighting words, or obscenity," it contends that the speech in question is unprotected because it falls within the speech integral to criminal conduct exception to the first amendment. We are not persuaded.

The United States Supreme Court case from which the speech integral to criminal conduct exception mainly emerged, *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 69 S. Ct. 684, 93 L. Ed. 834 (1949), established that the first amendment extends no protection to "speech or writing used as an integral part of conduct in violation of a valid criminal statute." Id., 498. The speech in question in *Giboney* was a labor union's picketing in an effort to pressure all nonunion peddlers to join. Id., 492. In furtherance of this goal, the union set

out to obtain agreements from all of the wholesale ice distributors in the area to not sell ice to nonunion peddlers. Id. All of the distributors agreed with the exception of Empire Storage and Ice Company, and, thus, the picketing was aimed at this last holdout company. Id. Empire Storage and Ice Company, relying on a Missouri statute that made it illegal to refuse to sell to nonunion peddlers, sought an injunction to stop the picketing, which it obtained. Id., 492–93. The Missouri Supreme Court upheld the injunction. Id., 494. The petitioners appealed to the United States Supreme Court, arguing that the statute at issue in that case, as applied to them, violated their first amendment rights. Id., 495. The court was not persuaded. Id., 501. It noted that refusal to sell to nonunion peddlers was illegal under the Missouri law, and, thus, picketing was aimed at compelling another entity to break the law. Id., 501–502. The court stated that "it has never been deemed an abridgement of freedom of speech or press to make *a course of conduct* illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." (Emphasis added.) Id., 502.

The contours of the *Giboney* exception have yet to be clearly defined and have been subject to considerable criticism, especially in light of more recent United States Supreme Court precedent, such as *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 27–28, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010), which appears incongruent with *Giboney*'s rationale. See, e.g., *King* v. *Governor of New Jersey*, 767 F.3d 216, 225–26 (3d Cir. 2014), cert. denied sub nom. *King* v. *Christie*, 575 U.S. 996, 135 S. Ct. 2047, 191 L. Ed. 2d 955 (2015); *United States* v. *Matusiewicz*, 84 F. Supp. 3d 363, 369 (D. Del. 2015), aff'd sub nom. *United States* v. *Gonzalez*, 905 F.3d 165 (3d Cir. 2018), cert. denied, U.S. , 139 S. Ct. 2727, 204 L. Ed. 2d 1120 (2019); E. Volokh, "The 'Speech

Integral to Criminal Conduct' Exception," 101 Cornell L. Rev. 981, 988 (2016). Nevertheless, for the speech integral to criminal conduct exception to apply, the speech in question must, at a minimum, be *integral* to criminal conduct other than protected speech. See, e.g., *United States* v. *Petrovic*, 701 F.3d 849, 855 (8th Cir. 2012) ("[t]he communications for which [the defendant] was convicted under [18 U.S.C.] § 2261A (2) (A) were integral to this criminal conduct as they constituted the means of carrying out his extortionate threats"). It does not apply if a defendant is doing nothing more than speaking.

Here, the state contends that the defendant's conviction was based, in part, on nonspeech conduct. Specifically, the state argues that "the defendant's course of conduct [was] comprised of nonspeech components of logging into his social media account, creating a digital billboard, and choosing to repeatedly post messages, as well as a speech component of the content of the posts." It contends that "[t]he repetitive, cumulative nature of the defendant's posting created something more than the content of the words in the posts, and that is a course of conduct." The state therefore argues that "the speech associated with the defendant's Facebook posts was integral to the criminal conduct of posting approximately thirteen times" on his own Facebook page.

We are not persuaded that the defendant engaged in any nonspeech conduct for which the speech in question could be integral. The record reflects that the defendant engaged in a single Facebook conversation with a third party on his own Facebook page, which occurred after A already had unfriended him on Facebook. It is undisputed that, on the day in question, the defendant did not send any messages directly to A or her family, show up at A's home or place of employment, or cause others to do so. The state argues that, by logging into

his own Facebook account and posting on his own Facebook page, the defendant somehow engaged in nonspeech conduct for which the speech in question was integral. Those actions, in and of themselves, however, cannot constitute nonspeech "conduct" for purposes of the speech integral to criminal conduct exception. Rather, they constitute the means by which the defendant spoke in this case. If the very act of posting a message on one's own Facebook page "implicates conduct . . . then a newspaper article likewise implicates conduct in the sense that a printing press or a computer printer has to put ink on paper . . . ." (Internal quotation marks omitted.) E. Volokh, supra, 101 Cornell L. Rev. 1039.

In this case, it is clear that the defendant's Facebook posts were not integral to criminal conduct; they *were* the criminal conduct. See *People* v. *Relerford*, 104 N.E.3d 341, 352 (Ill. 2017) (concluding that speech integral to criminal conduct exception was not applicable because there was not some other criminal act; content of Facebook posts was criminal act); *State* v. *Shackelford*, 264 N.C. App. 542, 556, 825 S.E.2d 689 (2019) (speech integral to criminal conduct exception was inapplicable because "speech itself was the crime"); see also *United States* v. *Osinger*, supra, 753 F.3d 954 (Watford, J., concurring) ("The [c]ourt in *Giboney* made clear that the union's picketing lost its [f]irst [a]mendment protection only because the union was 'doing more than exercising a right of free speech or press. . . .' If a defendant is doing nothing but exercising a right of free speech, without engaging in any non-speech conduct, the exception for speech integral to criminal conduct shouldn't apply." (Citation omitted.)); *United States* v. *Cook*, 472 F. Supp. 3d 326, 332 (N.D. Miss. 2020) ("[T]he government has not alleged that [the defendant] ever directly contacted any of the subjects of his Facebook posts. Rather, [the defendant] is being prosecuted

solely on the content of his public posts—not the act of posting." (Emphasis omitted.)). If one were to remove the content of the speech altogether in the present case, one would be left only with the defendant sending a few Facebook posts back and forth with a third party, unrelated to the only identified victim, A. That alone would not, and could not, serve as a basis for violating the statute. It is clear that "[t]he only 'conduct' which the [s]tate sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon 'speech' . . . ." (Citation omitted.) *Cohen* v. *California*, 403 U.S. 15, 18, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971).

The state relies, in large part, on a number of federal court decisions that upheld convictions under the federal cyberstalking statute. See 18 U.S.C. § 2261A (2018). Those cases, however, are materially different from the present case. The key distinction between those cases and the present case is that the defendants in those cases engaged in unprotected nonspeech conduct, in addition to speech, and the speech in question was integral to some criminal offense. Unlike in the present case, the defendants in those cases were not convicted solely on the basis of their speech. See *United States* v. *Osinger*, supra, 753 F.3d 952–53 (Watford, J., concurring) (The defendant's course of conduct "began in Illinois when he harassed [the victim] by repeatedly showing up at her home and workplace, despite her efforts to avoid him. It continued after she moved to California, initially through a string of unwelcome and implicitly threatening text messages, and then through a fake Facebook page and emails sent to [the victim's] co-workers. . . . What makes this a straightforward case is the fact that [the defendant] committed the offense by engaging in both speech and unprotected non-speech conduct." (Citations omitted.)); *United*

States v. *Sayer*, 748 F.3d 425, 434 (1st Cir. 2014) (defendant's conduct included creating false online advertisements and accounts in Jane Doe's name or impersonating Jane Doe on Internet and enticing men to show up at her house for sexual encounters); *United States* v. *Petrovic*, supra, 701 F.3d 855 (defendant's harassing and distressing communications were integral to criminal conduct of extortion).

The reason why courts require something more than otherwise protected speech in order for the speech integral to criminal conduct exception to apply is clear. Without such a requirement, states could criminalize traditionally protected forms of speech and then prosecute individuals under that exception on the basis of the theory that the individual's speech constitutes the conduct integral to the commission of the offense. See *United States* v. *Matusiewicz*, supra, 84 F. Supp. 3d 369 ("[u]nder the broadest interpretation, if the government criminalized any type of speech, then anyone engaging in that speech could be punished because the speech would automatically be integral to committing the offense"). A number of courts that have applied the speech integral to criminal conduct exception, including cases on which the state principally relies, have recognized this danger and cautioned against interpreting the exception too broadly. See id. ("it is important that [courts] avoid interpreting *Giboney*'s exception too broadly"); see also *United States* v. *Osinger*, supra, 753 F.3d 954 (Watford, J., concurring) ("[i]f a defendant is doing nothing but exercising a right of free speech, without engaging in any non-speech conduct, the exception for speech integral to criminal conduct shouldn't apply"). Accepting the state's argument in this case would be a "recipe for clandestinely denying full [f]irst [a]mendment protection to all speech in all media." E. Volokh, supra, 101 Cornell L. Rev. 1039.

Because it is clear that the defendant's stalking conviction was predicated solely on constitutionally protected speech, his conviction cannot stand. See *State* v. *Parnoff*, 329 Conn. 386, 394, 186 A.3d 640 (2018) ("[t]he first amendment bars the states from criminalizing pure speech, unless that speech falls into one of a few constitutionally unprotected categories" (emphasis omitted)); *State* v. *Moulton*, supra, 310 Conn. 362 ("[W]e recognize that our interpretation of § 53a-183 (a) (3) permitting a jury to consider the caller's speech in determining whether the call was alarming or harassing potentially gives rise to first amendment concerns. Such constitutional concerns, however, readily may be eliminated by limiting the reach of the statute to speech, like true threats, that is not protected by the first amendment."). Taking the protected speech out of the equation, the remaining evidence in the present case is insufficient to sustain a conviction under the stalking statute. See *State* v. *Nowacki*, supra, 155 Conn. App. 788–89 (after removing protected speech from consideration, remaining evidence was insufficient to sustain conviction). Accordingly, the judgment with respect to the defendant's stalking in the second degree conviction must be reversed.

C

Criminal Harassment

The operative language of the second degree harassment statute provides in relevant part: "A person is guilty of harassment in the second degree when: (1) By telephone, he addresses another in or uses indecent or obscene language; or (2) with intent to harass, annoy or alarm another person, he communicates with a person by telegraph or mail, by electronically transmitting a facsimile through connection with a telephone network, by computer network, as defined in section 53a-250, or

by any other form of written communication, in a manner likely to cause annoyance or alarm; or (3) with intent to harass, annoy or alarm another person, he makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm." General Statutes (Rev. to 2017) § 53a-183 (a).[17]

On appeal, as he did with his stalking conviction, the defendant argues that his harassment conviction was based exclusively on the April 7, 2018 Facebook conversation—a constitutionally protected conversation that he had with a third party on his own Facebook page—and, thus, his conviction violates his first amendment rights. The state disagrees. Instead of arguing that the defendant's posts contained in the April 7, 2018 Facebook conversation were unprotected speech, the state argues that "[t]he defendant's conviction of harassment in the second degree, under § 53-183, did not infringe upon his first amendment rights because the defendant's Facebook posts consisted of speech and nonspeech, and under the test set forth in [*United States* v. *O'Brien*, supra, 391 U.S. 377], the government has a sufficient interest in regulating the nonspeech element

[17] In 2021, the legislature substantially revised the elements of the offense. See Public Acts 2021, No. 21-56, § 5. Effective October 1, 2021, the statute now provides in relevant part: "(a) A person is guilty of harassment in the second degree when with intent to harass, terrorize or alarm another person, and for no legitimate purpose, such person: (1) Communicates with a person by telegraph or mail, electronically transmitting a facsimile through connection with a telephone network, electronic mail or text message or any other electronically sent message, whether by digital media account, messaging program or application, or otherwise by computer, computer service or computer network, as defined in section 53a-250, or any other form of communication, in a manner likely to cause terror, intimidation or alarm; (2) makes a telephone call or engages in any other form of communication, whether or not a conversation ensues, in a manner likely to cause terror, intimidation or alarm; or (3) communicates or shares a photograph, video or words or engages in any other form of communication to a digital, electronic, online or other meeting space, in a manner likely to cause terror, intimidation or alarm. . . ." General Statutes (Supp. 2022) § 53a-183.

to justify the incidental limitations on first amendment freedoms." We disagree with the state.

Here, the harassment statute is unconstitutional as applied to the defendant for largely the same reasons that the criminal stalking statute is unconstitutional. That conviction, like the stalking conviction, rested solely on the content of the defendant's April 7, 2018 Facebook conversation with a third party. Although the state contends that the less demanding standard of review utilized in *United States* v. *O'Brien*, supra, 391 U.S. 377, is applicable, and that it can satisfy that standard, its argument is misplaced. In *O'Brien*, the United States Supreme Court applied what is now commonly known as "intermediate scrutiny," under which a "content-neutral regulation will be sustained under the [f]irst [a]mendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broadcasting System, Inc.* v. *Federal Communications Commission*, 520 U.S. 180, 189, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997). *O'Brien*, however, "does not provide the applicable standard for reviewing a content-based regulation of speech," which is the type of regulation at issue in the present case. *Holder* v. *Humanitarian Law Project*, supra, 561 U.S. 27; see id. ("The [g]overnment is wrong that the only thing actually at issue in this litigation is conduct, and therefore wrong to argue that *O'Brien* provides the correct standard of review. . . . [Title 18 of the United States Code, § 2339B] regulates speech on the basis of its content." (Citations omitted; footnote omitted.)). The United States Supreme Court has made clear that, if a statute "generally functions as a regulation of conduct"; (emphasis omitted) id.; but, "as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message," a court " 'must [apply] a more

demanding standard' " than the one described in *O'Brien*. Id., 28, quoting *Texas* v. *Johnson*, 491 U.S. 397, 403, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989). The state's *O'Brien* argument is therefore misplaced.

Furthermore, the state's argument entirely ignores our Supreme Court's decision in *State* v. *Moulton*, supra, 310 Conn. 362. In *Moulton*, our Supreme Court made clear that the reach of the second degree criminal harassment statute is limited to speech "not protected by the first amendment." Id.; see also *State* v. *Nowacki*, supra, 155 Conn. App. 783 (observing that *Moulton* allows "consideration of the content of communication when that content falls outside protected speech; for example, when it contains obscenities, true threats, or fighting words"). In the present case, the state does not argue that the speech in question that supported the defendant's harassment conviction is unprotected under any exception to the first amendment. As a result, and because the defendant's harassment conviction was predicated on speech protected by the first amendment, the defendant's harassment conviction similarly cannot stand.[18] See *State* v. *Nowacki*, supra, 783–84.

The remaining evidence, absent the protected speech, is insufficient to sustain a conviction under the harassment statute. See id., 788–89 (after removing protected speech from consideration, remaining evidence was insufficient to sustain harassment conviction). Accordingly, the judgment with respect to the defendant's harassment in the second degree conviction also must be reversed.

[18] To the extent the state's brief can be interpreted as arguing that the defendant's posts contained in the April 7, 2018 Facebook conversation were unprotected under the speech integral to criminal conduct exception to the first amendment as it pertains to the defendant's harassment conviction, that argument fails for the same reasons as discussed in part II B of this opinion.

III

The defendant next claims that the prosecutor committed prosecutorial impropriety by failing to comply with certain discovery requirements and by making improper statements during closing arguments. In his view, he was deprived of his right to a fair trial. We are not persuaded.[19]

We begin by setting forth the applicable legal principles and standard of review that govern our resolution of this claim. "In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry." (Internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 560–61, 34 A.3d 370 (2012).

"To determine whether the defendant was deprived of his due process right to a fair trial, we must determine 'whether the sum total of [the prosecutor's] improprieties rendered the defendant's [trial] fundamentally unfair, in violation of his right to due process. . . . The question of whether the defendant has been prejudiced

[19] Although not all of the defendant's claims of prosecutorial impropriety are preserved, "under settled law, a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test." (Internal quotation marks omitted.) *State* v. *Ortiz*, 343 Conn. 566, 579, 275 A.3d 578 (2022). Accordingly, we review all of the defendant's prosecutorial impropriety claims regardless of whether those claims were properly preserved at trial. See id.

by prosecutorial [impropriety], therefore, depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties.' . . . *State* v. *Thompson*, 266 Conn. 440, 460, 832 A.2d 626 (2003)." *State* v. *Spencer*, 275 Conn. 171, 180, 881 A.2d 209 (2005).

A

In the first instance, we must determine whether the defendant's claimed prosecutorial improprieties were, in fact, improprieties. The defendant's first set of alleged improprieties pertain to the state's alleged failure to comply with its discovery obligations. He argues that the state committed prosecutorial impropriety when it (1) disclosed 121 pages of discovery to the defendant immediately prior to the scheduled start of jury selection, (2) failed to provide the defendant with Walters' address and criminal history, and (3) attempted to offer a statement of the defendant as a statement of a party opponent despite not disclosing that statement to the defense.

The following additional facts and procedural history are relevant to our disposition of the defendant's claim. On September 18, 2019, the defendant filed a motion requesting that the state disclose the names and addresses of the witnesses it intended to call, as well as their statements and criminal records. The court granted the motion and ordered the state to provide the requested materials within one week. On September 24, 2019, the day jury selection was scheduled to begin, the state provided the defendant with its list of witnesses and also provided the defendant with 121 pages of previously undisclosed discovery. The addresses and criminal records of the state's witnesses were not provided at that time. Defense counsel then argued before the court that the state's disclosure of the additional discovery was untimely and in violation of our rules of

practice. Defense counsel further stated that, given this untimely disclosure, he was not ready to proceed with jury selection because he did not know what was in the new discovery.

When the court asked the state to explain, the prosecutor responded: "[W]ith respect to the hundred and twenty some odd pages, those are materials that were received within—most of them within the last week, some of them yesterday, from the victim as we're preparing for trial. . . . They're in the form of Facebook messages, Instagram, Twitter, Snapchat, that sort of thing that—that the state became aware of very recently. . . . But most of that is—and, again, just recovered within the last week or so from the victim and most of that I think is not related to the charged offenses—the time periods . . . are different—but there might be some exculpatory value in there; that's really why I'm turning it over . . . to [the] defense." The prosecutor also stated that the state would not object to a continuance for defense counsel to review the new discovery.

Defense counsel then asked the court to "dismiss the information or complaint and discharge the defendant," as a sanction for the state's untimely discovery disclosure. The court denied defense counsel's request for sanctions and instead ordered a forty-five minute recess, during which defense counsel could review the new discovery. After the court proceedings resumed, defense counsel stated that he did not want to proceed with jury selection that day, given the new documents. The court then continued jury selection until September 30, 2019, and agreed to hear the parties' outstanding motions on September 26, 2019.

On September 26, 2019, the defendant noted that he had not yet received the criminal histories or addresses for the state's witnesses, despite such disclosures being

due the day before. The state then stated that it did not plan to call most of the witnesses on its list but that, for any witnesses it planned to call, it would provide the requested information to the defendant. The court then ordered the state to provide the defendant with the criminal histories and addresses for the witnesses it intended to call within one week.

By the start of trial on November 4, 2019, however, the state had not provided the defendant with criminal histories and addresses for most of its listed witnesses. Specifically, the state had provided such information for A and her husband but had not provided that information for Walters, whom it intended to call.[20] After the defendant raised this lack of disclosure with the court, the state again promised to provide Walters' criminal history and address before he testified but also noted that it did not believe Walters had any criminal history.

On November 5, 2019, the second day of trial, the state had not provided Walters' address or criminal history. Defense counsel then asked the court to find that the state had not complied with the court's order and requested that the state be sanctioned for its noncompliance. Defense counsel proposed that "an appropriate sanction is that Mr. Walters not be allowed to testify in this matter. The alternative . . . obviously the most drastic request would be for a mistrial." Thereafter, the court asked the state to respond, to which the state remarked that the defendant could have located Walters on his own, given that Walters was a local witness whom the defendant knew. The court denied defense counsel's request for sanctions, concluding that any prejudice to the defendant from the state's failure

[20] Although the state also planned to call several state troopers, the clerk of the Putnam Superior Court, and a state marshal as witnesses, the defendant did not request the criminal histories or address for any of those individuals.

to provide Walters' information was minimal because the defense almost certainly could have located Walters on its own, given that the defendant knew Walters and that the case involved "a relatively small community in terms of the people attending this karate school."

Thereafter, during A's testimony, the state attempted to offer into evidence a statement by the defendant that he had made during a conversation with her. Defense counsel objected, arguing that the state had never disclosed the statement that it now sought to admit. The court sustained the objection and ruled that the statement was inadmissible. The state proceeded with its case without offering the undisclosed statement.

In reviewing the defendant's claims of prosecutorial impropriety, it is manifest that the aforementioned claims amount to alleged violations of discovery orders. As this court has held, a defendant's claim that the state failed to comply sufficiently with a discovery obligation generally will not "provide a proper basis for a claim of prosecutorial [impropriety] on appeal." *State* v. *Bermudez*, 94 Conn. App. 155, 158–59, 891 A.2d 984, cert. denied, 277 Conn. 933, 896 A.2d 102 (2006). Rather, "a party seeking a remedy for the opposing party's failure to comply with required disclosures may move the trial court for an appropriate order pursuant to Practice Book § 40-5."[21] Id., 159. "Practice Book § 40-5 [grants] broad discretion to the trial judge to fashion an appropriate remedy for noncompliance with discovery." (Internal quotation marks omitted.) *State* v. *Hargett*, 343 Conn. 604, 631, 275 A.3d 601 (2022). We therefore conclude that the alleged discovery violations in the present case do not amount to prosecutorial impropriety. We instead interpret the defendant's arguments as

[21] Practice Book § 40-5 provides in relevant part: "If a party fails to comply with disclosure as required under these rules, the opposing party may move the judicial authority for an appropriate order. . . ."

claims that the trial court did not properly sanction the state for alleged violations of its discovery obligations. See *State* v. *Bermudez*, supra, 159 ("[w]e . . . interpret the defendant's claim regarding [her codefendant's] statement not as a prosecutorial [impropriety] claim, but as a claim that the court should have sanctioned the prosecution by prohibiting the introduction of [her codefendant's] statement through [the police officer's] testimony"). We address these arguments in turn.

As noted, "Practice Book § 40-5 [grants] broad discretion to the trial judge to fashion an appropriate remedy for noncompliance with discovery." (Internal quotation marks omitted.) *State* v. *Hargett*, supra, 343 Conn. 631. A trial court may enter such orders as it deems appropriate, including "(1) [r]equiring the noncomplying party to comply; (2) [g]ranting the moving party additional time or a continuance; (3) [r]elieving the moving party from making a disclosure required by these rules; (4) [p]rohibiting the noncomplying party from introducing specified evidence; (5) [d]eclaring a mistrial; (6) [d]ismissing the charges; (7) [i]mposing appropriate sanctions on the counsel or party, or both, responsible for the noncompliance; or (8) [e]ntering such other order as it deems proper." Practice Book § 40-5. "[T]he primary purpose of a sanction for violation of a discovery order is to ensure that the defendant's rights are protected, not to exact punishment on the state for its allegedly improper conduct. As we have indicated, the formulation of an appropriate sanction is a matter within the sound discretion of the trial court. . . . In determining what sanction is appropriate for failure to comply with court ordered discovery, the trial court should consider the reason why disclosure was not made, the extent of prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances." (Internal quotation marks omitted.) *State* v. *Respass*,

256 Conn. 164, 186, 770 A.2d 471, cert. denied, 534 U.S. 1002, 122 S. Ct. 478, 151 L. Ed. 2d 392 (2001).

Appellate review of a trial court's remedy for noncompliance with discovery, "[a]s with any discretionary action of the trial court . . . requires every reasonable presumption in favor of the action, and the ultimate issue is whether the trial court could reasonably conclude as it did. . . . In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." (Citation omitted; internal quotation marks omitted.) *State* v. *Jackson*, 334 Conn. 793, 811, 224 A.3d 886 (2020).

With respect to the defendant's first alleged violation, he claims that the state improperly waited until the eve of jury selection to provide 121 additional records it should have produced earlier during discovery. To that end, Practice Brook § 40-11 provides in relevant part: "(a) Upon written request by a defendant filed in accordance with Section 41-5 and without requiring any order of the judicial authority, the prosecuting authority, subject to Section 40-40 et seq., shall promptly, but no later than forty-five days from the filing of the request, unless such time is extended by the judicial authority for good cause shown, disclose in writing the existence of, provide photocopies of, and allow the defendant in accordance with Section 40-7, to inspect, copy, photograph and have reasonable tests made on any of the following items: (1) Any book, tangible objects, papers, photographs, or documents within the possession, custody or control of any governmental agency, which the prosecuting authority intends to offer in evidence in chief at trial or which are material to the preparation of the defense or which were obtained from or purportedly belong to the defendant . . . .

* * *

"(b) In addition to the foregoing, the prosecuting authority shall disclose to the defendant, in accordance with any applicable constitutional and statutory provisions, any exculpatory information or materials that the prosecuting authority may have, whether or not a request has been made therefor."

There is no dispute that the 121 records at issue were provided to the defendant on the eve of jury selection. The record reflects, however, that the state received additional materials from the victim just prior to trial and that, pursuant to the state's continuing duty to disclose evidence, it turned over that information after it came to its attention. There was no indication that the late disclosure was done in bad faith. To the extent the defendant's argument can be interpreted as an argument that a more severe sanction should have been imposed, we are not persuaded. On learning about this late disclosure, the court reasonably gave defense counsel a forty-five minute recess during which he could review the new discovery. The court then granted defense counsel's motion for a continuance. The court's continuance sufficiently protected the defendant's rights by ameliorating the prejudice caused by the late disclosure. We therefore conclude that the court did not abuse its discretion. See *State* v. *Festo*, 181 Conn. 254, 266, 435 A.2d 38 (1980) ("trial court did not abuse its discretion by affording the defendants more time to examine and analyze the evidence in lieu of granting their motions for a mistrial and motions for suppression of evidence").

We similarly conclude that the court did not abuse its discretion when it declined to sanction the state for the state's failure to provide the defendant with Walters' criminal history and address. At trial, after the state still had not provided that information, defense counsel

asked the court to sanction the state, either by barring Walters from testifying or declaring a mistrial. The court, however, declined to order a sanction, stating: "It's, like, apparent from the record that there was noncompliance. The question is what the sanction is. The opinion of the court is that the fact situation of this matter involved a relatively small community in terms of the people attending this karate school. I think it's highly likely that your client knew who this person was. With your investigators, I think you could have found out who he was. I'm not disputing that there was failure to comply by the state, but the question is what the sanction is, and I am not going to preclude this gentleman from testifying. . . . I don't think that there is sufficient damage here to justify a sanction of precluding him from testifying, so, therefore, your request in that regard is denied."

In considering, but ultimately declining, to sanction the state for its failure to provide the defendant with Walters' criminal history and address, the court took appropriate action, as required by *State* v. *Jackson*, supra, 334 Conn. 810–11. As explained, our rules of practice give trial courts "broad discretion to . . . fashion an appropriate remedy for noncompliance with discovery." Id. In the present case, the court concluded that the severe sanction of precluding Walters from testifying was inappropriate given the minimal prejudice from the state's noncompliance. The court aptly noted that it was likely that the defendant knew who Walters was and could have obtained that information if he had chosen to do so. Additionally, the record reflects that Walters' name had been included in the list of potential witnesses at jury selection as early as October 16, 2019, and on a witness list as early as September 24, 2019, at least two weeks before the trial began on November 4, 2019. The court was well within

its discretion in reaching the result that it did, particularly because the record supports the court's finding that the defendant was not sufficiently prejudiced.

Moreover, defense counsel's two requested sanctions—the suppression of relevant, material and otherwise admissible evidence or the declaration of a mistrial—are both "severe sanction[s] which should not be invoked lightly." (Internal quotation marks omitted.) *State* v. *Hargett*, supra, 343 Conn. 632; see id., 633 ("suppression of the evidence, dismissal of all charges, or a mistrial is a severe sanction that courts should invoke only when absolutely necessary"). We conclude that the trial court did not abuse its discretion because, given the specific facts at hand and the harmlessness of the state's discovery violation, the violation did not necessitate the severe sanctions defense counsel requested.

To the extent that the defendant is arguing the court was *required* to sanction the state pursuant to *State* v. *Jackson*, supra, 334 Conn. 793, we disagree. *Jackson* does not state that a court *must* order sanctions in every case in which a party fails to comply with the rules of discovery. To the contrary, *Jackson* speaks in terms of the broad discretion that trial courts have in fashioning an *appropriate* remedy. Id., 810–11. What is appropriate in a given case will vary. This includes whether to sanction a party in the first instance. For the reasons explained, we conclude that the court was well within its discretion in not imposing the sanctions requested by defense counsel.

Finally, the defendant claims that the state failed to disclose one of the defendant's statements that it intended to introduce at trial and then tried to admit that statement at trial. In response to defense counsel's objection, the court sustained it and ruled that the statement was inadmissible. To the extent the defendant is

arguing that the court should have imposed a more severe sanction, such as a mistrial, we are not persuaded. The court's ruling precluding that statement as evidence clearly ameliorated any prejudice stemming from the late disclosure of that statement. On the record before us, we cannot conclude that the court abused its discretion when it precluded the admission of the statement.

B

The defendant also makes additional claims of prosecutorial impropriety pertaining to statements made by the prosecutor during closing arguments. He claims that the prosecutor improperly (1) used the term "red herring" in advancing his argument and (2) referenced facts not in evidence. We disagree.

It is well known that "[p]rosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . In determining whether such [impropriety] has occurred, the reviewing court must give due deference to the fact that [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based [on] the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . . Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case." (Internal quotation marks omitted.) *State* v. *Weaving*, 125 Conn. App. 41,

46–47, 6 A.3d 203 (2010), cert. denied, 299 Conn. 929, 12 A.3d 569 (2011).

During closing argument, the prosecutor remarked: "Now, there was some cross-examination by defense counsel about when [A's] husband knew . . . [about the affair] and when he didn't know. That's . . . a red herring . . . that was a distracting bit of information. Whether . . . [A's] husband . . . knew about the affair . . . that's not relevant." According to the defendant, the state's use of the term "red herring" was improper because it questioned the credibility of and disparaged defense counsel. The state argues that the phrase "red herring" was proper because it was used to respond to the defendant's theory of defense, not to disparage defense counsel. We agree with the state.

"[T]here is ample room, in the heat of argument, for the prosecutor to challenge vigorously the arguments made by defense counsel. . . . Furthermore, [t]here is a distinction between argument that disparages the integrity or role of defense counsel and argument that disparages a theory of defense." (Citation omitted; internal quotation marks omitted.) *State* v. *Maner*, 147 Conn. App. 761, 789, 83 A.3d 1182, cert. denied, 311 Conn. 935, 88 A.3d 550 (2014). The former is improper, but the latter is permitted. Id.

In the present case, the state's use of the term "red herring" was not improper. During his cross-examination of A, defense counsel was able to elicit from her conflicting testimony regarding when she told her husband about the affair. When the state's closing argument is considered within this context, it becomes clear that the state's use of the term "red herring" was intended to rebut a portion of the defendant's theory of defense, specifically that A was not credible. Contrary to the defendant's argument, the state's use of "red herring"

was not directed at defense counsel's character or credibility and did not impugn or disparage him. Thus, because the state used the phrase "red herring" to respond to the defendant's theory of the case, the use of that phrase did not constitute prosecutorial impropriety. See *State* v. *Fauci*, 282 Conn. 23, 39–40, 917 A.2d 978 (2007) (state's use of term "red herring" in closing argument did not constitute prosecutorial impropriety because prosecutor used term only to rebut defense counsel's argument).

Furthermore, the prosecutor stated: "[Y]ou heard [A] testify that she lives kind of out in the middle of nowhere in rural Putnam, not like the downtown area of Putnam, and [*it*] *would take . . . kind of an effort to get to this particular house*, especially on a bicycle. And [there was] no evidence that the defendant had a car; the evidence is that the defendant gets around by a bicycle . . . ." (Emphasis added.) According to the defendant, the state's comment that it would have taken effort to get to A's home was not supported by the evidence introduced at trial. The state, on the other hand, argues that this remark was permissible because it properly referred to facts in evidence and then invited the jury to draw a reasonable inference based on those facts. We agree.

"A prosecutor may invite the jury to draw reasonable inferences from the evidence; however, he or she may not invite sheer speculation unconnected to evidence. . . . The rationale for the rule prohibiting the state from making such a reference is to avoid giving the jury the impression that the state has private information, not introduced into evidence, bearing on the case." (Internal quotation marks omitted.) *State* v. *Stevenson*, 269 Conn. 563, 587, 849 A.2d 626 (2004).

At trial, A testified that she lived in a rural part of Putnam. She also testified that the defendant's primary

mode of transportation was a bicycle. Accordingly, the challenged statement was supported by facts properly in evidence. Moreover, the state's assertion that it would have taken some effort for the defendant to reach A's home was a reasonable inference for it to invite the jury to draw, given that A lived in a rural area and the defendant traveled only by bicycle. Thus, because the state's remark amounted to a reasonable inference that was based on facts in evidence, it did not constitute prosecutorial impropriety. See id. Because we determine that no impropriety existed, our inquiry ends there.

The judgment is reversed with respect to the defendant's conviction of harassment in the second degree and stalking in the second degree and the case is remanded with direction to render a judgment of acquittal on those charges only and for resentencing according to law; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JAMAL SUMLER
(AC 43024)

Prescott, Suarez and Bishop, Js.

Syllabus

Convicted, after a jury trial, of the crimes of murder, conspiracy to commit robbery in the first degree and carrying a pistol without a permit, and, after a trial to the court, of the crime of criminal possession of a pistol or revolver, the defendant appealed. The defendant's conviction stemmed from an incident in which he shot and killed a convenience store clerk while he and another individual were robbing the store. Prior to trial, the trial court denied the defendant's motion in limine to preclude the state from introducing testimony from his former probation officer, D, regarding her identification of him in a surveillance video taken from the store and in a still photograph from that video. This court affirmed the defendant's conviction, and the defendant filed a petition for certification to appeal to our Supreme Court, which granted the petition in

part and vacated this court's judgment in part and remanded the case to this court to consider whether, under our Supreme Court's recent decision in *State* v. *Gore* (342 Conn. 129), the trial court abused its discretion by admitting D's testimony. The court in *Gore* articulated a new standard requiring courts to consider, under the totality of the circumstances, whether a witness was more likely than the jury to correctly identify the defendant from surveillance video or photographs, thereby meeting the requirements of the provision (§ 7-1) of the Connecticut Code of Evidence, and set forth four factors to be used in that consideration. *Held* that the trial court did not abuse its discretion by admitting D's testimony, as the four factors outlined in *Gore* weighed in favor of admitting D's testimony: under the first factor, which considers the witness' general familiarity with the defendant's appearance, D clearly had more than a minimal degree of familiarity with the defendant that enabled her to identify him more reliably than the jury based on the frequency, number and duration of their past contacts, the duration of their relationship and time since their last meeting, the relevant viewing conditions and the nature of their relationship; moreover, the second factor, which assesses the witness' familiarity with the defendant's appearance, weighed in favor of admitting D's testimony in light of her familiarity with his appearance at the time the video was taken and with a lanyard worn by the defendant in the video that resembled a similar lanyard that D had seen the defendant wear, the third factor, which assesses whether there had been a change in the defendant's appearance between the time the surveillance video or photographs were taken and trial, weighed in favor of admitting D's testimony because the defendant wore eyeglasses at trial but was not known to wear eyeglasses when the video was recorded and this change in the defendant's appearance put D in a better position to identify the defendant than the jury, which had only seen the defendant wearing eyeglasses, and, finally, the fourth factor, which addresses the quality of the video or photographs, as well as the extent to which the subject is depicted in the surveillance video or photograph, weighed in favor of admitting D's testimony because the video contained multiple views from inside and outside of the store, the defendant was not clearly, fully or solely depicted in either the video or photograph, the video and the photograph were neither unmistakably clear nor hopelessly obscure, and they fell in the range of quality that favors admissibility.

Argued October 25—officially released December 20, 2022

Procedural History

Substitute information charging the defendant with the crimes of felony murder, murder, conspiracy to commit robbery in the first degree, criminal possession of a pistol or revolver and carrying a pistol without a

permit, brought to the Superior Court in the judicial district of New Haven, where the court, *Vitale*, *J.*, granted the defendant's motion to sever the charge of criminal possession of a pistol or revolver; thereafter, the charges of felony murder, murder, conspiracy to commit robbery in the first degree and carrying a pistol without a permit were tried to the jury before *Vitale*, *J.*, and the charge of criminal possession of a pistol or revolver was tried to the court; verdict and judgment of guilty; subsequently, the court vacated the conviction of felony murder, and the defendant appealed to this court, *Prescott*, *Devlin* and *Bishop*, *Js.*, which affirmed the trial court's judgment; thereafter, the defendant, on the granting of certification, appealed to our Supreme Court, which vacated in part this court's judgment and remanded the case to this court for further proceedings. *Affirmed.*

Naomi T. Fetterman, assigned counsel, with whom, on the brief, was *Peter G. Billings*, assigned counsel, for the appellant (defendant).

Laurie N. Feldman, assistant state's attorney, with whom, on the brief, were *Patrick Griffin* and *John P. Doyle*, *Jr.*, state's attorneys, and *Lisa M. D'Angelo*, senior assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. This case returns to us on remand from our Supreme Court with direction to consider whether, in light of our Supreme Court's decisions in *State* v. *Bruny*, 342 Conn. 169, 269 A.3d 38 (2022), and *State* v. *Gore*, 342 Conn. 129, 269 A.3d 1 (2022), the trial court abused its discretion by admitting "testimony of the defendant's former probation officer identifying the defendant [Jamal Sumler] in a still photograph and video surveillance footage . . . ."[1] *State* v. *Sumler*, 345

[1] Our Supreme Court vacated in part this court's judgment in *State* v. *Sumler*, 199 Conn. App. 187, 235 A.3d 576 (2020), vacated in part, 345 Conn. 961, A.3d (2022). In *Sumler*, this court addressed the defendant's three claims made on appeal, namely, that the trial court "(1) improperly

Conn. 961, 961, A.3d (2022). Having considered the new rule governing the admissibility of opinion testimony identifying an individual in surveillance videos or photographs set forth in *Bruny* and *Gore*, we conclude that the trial court did not abuse its discretion by admitting testimony from the defendant's former probation officer with respect to the identity of the defendant in a still photograph and video surveillance footage.[2] Accordingly, we affirm the judgment of the trial court.

The following relevant facts, which were previously set forth in *State* v. *Sumler*, 199 Conn. App. 187, 235 A.3d 576 (2020), vacated in part, 345 Conn. 961,

failed to recuse itself from the defendant's trial, (2) abused its discretion by allowing opinion testimony of the defendant's identity on video surveillance footage [and in a still photograph], and (3) improperly denied the defendant's motion to suppress statements that he made to a police officer . . . ." *State* v. *Sumler*, supra, 199 Conn. App. 189–90. We disagreed with his claims and affirmed the trial court's judgment. Id., 190. Subsequently, the defendant filed a petition for certification that our Supreme Court granted in part. See *State* v. *Sumler*, 343 Conn. 916, 274 A.3d 867 (2022). The defendant's petition for certification was granted as to his second claim, that is, that the court abused its discretion by allowing opinion testimony with respect to the defendant's identity in the video surveillance footage and still photograph. Id. Our Supreme Court subsequently issued a corrected order on the defendant's petition for certification in which it vacated this court's judgment as it pertained to the defendant's claim that the court abused its discretion by allowing opinion testimony with respect to the defendant's identity. *State* v. *Sumler*, 345 Conn. 961, A.3d (2022). The petition for certification was denied as to the defendant's other claims. Id. Thus, our judgment in *State* v. *Sumler*, supra, 199 Conn. App. 187, was unaffected as it pertains to those claims, namely, that the trial court improperly declined to recuse itself and improperly denied the defendant's motion to suppress. Thus, our prior decision as to those claims remains in effect. Further procedural history will be set forth in more detail in the facts and procedural history section of this opinion.

[2] The new rule and factors set forth in *Gore* were rearticulated in our Supreme Court's decision in *Bruny*. The standard set forth in the two opinions for admitting lay opinion testimony about the identity of an individual in surveillance video or photographs is the same. Going forward, the new standard set forth in *Gore* and *Bruny* will be referred to simply by reference to *Gore*.

A.3d (2022), or reasonably found by the trial court, and procedural history are relevant to this claim. "On April 6, 2015, the defendant and two other individuals, Dwayne 'Hoodie' Sayles and Leighton Vanderberg, were travelling together in a green Ford Focus driven by Vanderberg. The defendant sat in the front passenger seat and was wearing sweatpants, a gray hoodie, and dark sneakers. . . .

"The three men drove to Eddy's Food Centre (Eddy's) located at 276 Howard Avenue in New Haven. Once they arrived, the defendant exited the car, while Vanderberg and Sayles remained inside. . . . [The defendant] went into Eddy's for a few minutes, returned to the car, and then went back into the store a second time. [An individual, later identified as the defendant, was captured on Eddy's surveillance video footage.] Upon his return to the car the second time, the defendant handed Sayles a pair of black gloves. He also retrieved his revolver and put it in the waistband of his sweatpants.

"Thereafter, the three men drove to the Fair Haven section of New Haven. Vanderberg pulled onto Kendall Street toward Fulton Terrace and parked the car, intending to smoke 'dutches'.[3] Not having enough cigars, someone suggested that they buy more cigars from a nearby store. The defendant and Sayles then exited the vehicle and walked up Fulton Terrace, with the defendant a few steps in front of Sayles, while Vanderberg remained in the car. The defendant entered the Pay Rite convenience store (Pay Rite) connected to a CITGO gas station located at 262 Forbes Avenue.

"Pay Rite surveillance videos captured the defendant, wearing a black mask, black gloves, a gray hoodie, gray sweatpants, and dark sneakers, walk to the counter and point a gun at the clerk, Sanjay Patel, the victim in this case. While pointing the gun at the victim, the defendant

[3] "A 'dutch' is a marijuana filled cigar." *State* v. *Sumler*, supra, 199 Conn. App. 190 n.2.

walked behind the counter. The surveillance footage captured a second individual . . . later determined to be Sayles . . . entering the store and walking up to the counter. The victim struggled with the defendant and picked up a wooden stool. Sayles then pulled out a gun, aimed it at the victim, fired, and put the gun away in his hoodie pocket. The defendant, pointing his gun at the victim, used his other hand to pass items over the counter to Sayles, who put the items in his pocket before turning and leaving the store. As the defendant bent down to take . . . items, the victim hit him on his upper body with the stool. The defendant then shot the victim and ran out of the store. The victim subsequently died from his injuries." (Footnote omitted; footnote in original.) Id., 190–91.

"On April 17, 2015, detectives met with [Jayme] DeNardis, the defendant's previous probation officer. DeNardis viewed a still photograph from video surveillance footage captured from Eddy's on April 6, 2015. She signed the photograph and identified the defendant as the individual in the footage and as being one of her probationers. The defendant filed a motion in limine to preclude DeNardis from testifying at trial about the identity of the individual captured on surveillance video footage from Eddy's.[4] He claimed that her identification

[4] We read the motion in limine to have requested that DeNardis be precluded from testifying about the identity of the defendant in both the photograph taken from the surveillance video and the surveillance video itself. The motion in limine asked the court to exclude DeNardis' testimony concerning the identification of the defendant in the surveillance video. During the hearing on the motion in limine, the court established that the photograph in which DeNardis identified the defendant was undisputedly taken from the surveillance video. The state intended to elicit testimony from DeNardis regarding her identification of the defendant in the photograph. The state also intended to have DeNardis attempt to identify the defendant in the surveillance video when she viewed the video for the first time at trial before the jury. Thus, the motion in limine sought to preclude DeNardis from testifying about the identity of the defendant in the surveillance video itself as well as the identity of the defendant in the photograph taken from the surveillance video.

of him in the video [and the photograph] would, pursuant to [*State* v. *Finan*, 275 Conn. 60, 881 A.2d 187 (2005), overruled by *State* v. *Gore*, 342 Conn. 129, 269 A.3d 1 (2022)], constitute improper testimony as to 'the ultimate issue in question: identity.'

"A hearing was held on October 26, 2017, during which the state presented DeNardis [as a witness] . . . . The defendant reiterated his objection to the admission of DeNardis' proffered testimony on the basis that it constitutes her opinion about the ultimate issue of fact—whether he was the individual on the surveillance video committing the crimes with which he was charged—which is prohibited under *Finan*.

"The court denied the defendant's motion in limine, concluding that the proffered evidence is not 'tantamount to a legal opinion about the defendant's criminal culpability.' "[5] (Footnote added; footnotes omitted.) *State* v. *Sumler*, supra, 199 Conn. App. 200. In denying the defendant's motion in limine, the court made several factual determinations regarding DeNardis' familiarity with the defendant. The court found that DeNardis met with the defendant face-to-face fifty-nine times over a period of one year and ten months. These meetings took place at the defendant's home, DeNardis' office, and police stations. DeNardis met with the defendant as often as five to six times per month and the meetings averaged between five and twenty minutes. DeNardis last saw the defendant on April 1, 2015, and identified

[5] "The court summarized its findings as follows: 'The record reflects that . . . DeNardis is not claimed to be an eyewitness to the crime that occurred in Pay Rite . . . and, further, that the crime now before the court did not occur at Eddy's . . . .' The court then explained that the proffered evidence 'does not encompass an ultimate issue before the jury, namely, whether the defendant was one of the individuals present inside of the Pay Rite . . . at the time the crimes before the jury were committed.' It explained that the jury could 'view the tape, the still photograph from the tape, and the defendant himself to determine if he is the person depicted in the video or not.' " *State* v. *Sumler*, supra, 199 Conn. App. 200–201.

the defendant only sixteen days later on April 17, 2015.[6] On the basis of these circumstances, the court concluded that "her identification is reliable under the totality of circumstances based on her essentially unchallenged level of contact with the defendant over an almost two year time period."

"At trial, DeNardis testified, among other things . . . that on April 17, 2015, she identified the defendant in a still photograph shown to her by New Haven police. She was shown at trial two segments from the surveillance video at Eddy's and identified the defendant as the person in the footage. At the conclusion of the trial, the court instructed the jury that 'identification is a question of fact for you to decide, taking into consideration all of the evidence that you have seen and heard in the course of the trial.' " *State* v. *Sumler*, supra, 199 Conn. App. 201.

"[The] jury found [the defendant] guilty of felony murder in violation of General Statutes § 53a-54c, murder in violation of General Statutes § 53a-54a (a), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (2), and carrying a pistol without a permit in violation of General Statutes § 29-35 (a), and the trial court, *Vitale*, *J.*, found him guilty of criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c (a) (1)." Id., 189. The defendant appealed from the judgment of conviction, claiming that the court "(1) improperly failed to recuse itself from the defendant's trial because [the trial judge] previously had signed warrants for the defendant's arrest and for the search of his home, (2) abused its discretion by allowing opinion

[6] The trial court stated that DeNardis last saw the defendant on April 1, 2015, and identified the defendant on April 17, 2015. The court, however, mistakenly stated that DeNardis last saw the defendant "approximately five days before the alleged crime . . . ."

testimony of the defendant's identity on video surveillance footage [and in a still photograph], and (3) improperly denied the defendant's motion to suppress statements that he made to a police officer while being transported to the police department." Id., 189–90.

This court affirmed the judgment of conviction, concluding that (1) the defendant's claim that the court improperly failed to recuse itself was unpreserved; (2) the court did not abuse its discretion by allowing the defendant's probation officer to identify the defendant in the still photograph and video surveillance footage at trial because, according to the test set forth in *Finan* and as applied by this court to a similar factual scenario in *State* v. *Holley*, 160 Conn. App. 578, 127 A.3d 221 (2015), rev'd on other grounds, 327 Conn. 576, 175 A.3d 514 (2018), the probation officer's identification of the defendant did not constitute an opinion on the ultimate issue in the case; and (3), the court did not improperly deny the defendant's motion to suppress certain evidence. *State* v. *Sumler*, supra, 199 Conn. App. 195, 202–204. Following the release of this court's decision, the defendant filed a petition for certification to appeal with our Supreme Court on September 3, 2020.

After the defendant filed his petition for certification to appeal our decision in *State* v. *Sumler*, supra, 199 Conn. App. 187, our Supreme Court decided *Gore* and *Bruny*. *Gore* effectively "amend[ed] § 7-3 (a) of the Connecticut Code of Evidence to incorporate an exception to the ultimate issue rule for lay opinion testimony that relates to the identification of persons depicted in surveillance video or photographs . . . ."[7] *State* v.

[7] Section 7-3 of the Connecticut Code of Evidence provides in relevant part: "(a) General Rule. Testimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact, except that, other than as provided in subsection (b), an expert witness may give an opinion that embraces an ultimate issue where the trier of fact needs expert assistance in deciding the issue. . . . "

Gore, supra, 342 Conn. 133. *Gore* overruled *Finan* and set forth new factors for courts to consider when determining whether opinion testimony regarding the identity of an individual in a surveillance video or photograph is admissible.[8] Id., 148–49. Specifically, the court in *Gore* articulated a new standard requiring courts to consider whether, under the totality of the circumstances, a witness is more likely to correctly identify the defendant than is the jury. Id., 150–51. This standard replaced the rule in *Finan* that required courts to determine whether testimony from a witness about an individual's identity in surveillance video or photographs was barred by § 7-3 (a) as an opinion on the ultimate issue in the case. *State* v. *Finan*, supra, 275 Conn. 66.

On May 17, 2022, after the release of our Supreme Court's decision in *Gore*, our Supreme Court granted the defendant's petition for certification only "as to the defendant's claim that the testimony of the defendant's former probation officer identifying the defendant in a still photograph and video surveillance footage constituted impermissible opinion testimony on the ultimate issue . . . ." *State* v. *Sumler*, supra, 343 Conn. 916. It denied the petition for certification "as to all other claims presented for review."[9] Id. Subsequently, our

[8] The court in *Gore* stated: "To the extent that this court's decision in *Finan* is inconsistent with the rule we adopt today, that decision and its progeny; see *State* v. *Holley*, supra, 160 Conn. App. 578; *State* v. *Felder*, [99 Conn. App. 18, 912 A.2d 1054 (2007)]; are overruled." *State* v. *Gore*, supra, 342 Conn. 148–49. The court in *Finan* interpreted § 7-3 (a) of the Connecticut Code of Evidence to bar the admission of a witness' opinion testimony about the identification of the defendant as a perpetrator of the crime at issue because the testimony encompassed an ultimate issue in the case. *State* v. *Finan*, supra, 275 Conn. 66.

[9] The May 17, 2022 order states: "The petition is granted as to the defendant's claim that the testimony of the defendant's former probation officer identifying the defendant in a still photograph and video surveillance footage constituted impermissible opinion testimony on the ultimate issue and denied as to all other claims presented for review. It is further ordered that the case is remanded to the Appellate Court with direction to consider the defendant's claim regarding the allegedly improper opinion testimony in light of this court's decisions in *State* v. *Bruny*, [supra] 342 Conn. 169, and

Supreme Court vacated in part this court's judgment in *State* v. *Sumler*, supra, 199 Conn. App. 187, and remanded the case to this court to reconsider the defendant's claim regarding the allegedly improper opinion testimony, in light of the new rule set forth in *Gore*. *State* v. *Sumler*, supra, 345 Conn. 961.

On June 3, 2022, this court ordered the parties to file supplemental briefs addressing "the defendant's claim that the testimony of the defendant's former probation officer identifying the defendant in a still photograph and video surveillance footage constituted impermissible opinion testimony on the ultimate issue in light of our Supreme Court's decisions in [*Bruny*] and [*Gore*]." Both parties submitted supplemental briefs and this court subsequently heard oral argument.[10] Additional facts will be set forth as necessary.

State v. *Gore*, [supra] 342 Conn. 129 . . . ." *State* v. *Sumler*, supra, 343 Conn. 916. On October 20, 2022, our Supreme Court issued a corrected order on the petition for certification that included the same language but also vacated in part the Appellate Court's judgment in *State* v. *Sumler*, supra, 199 Conn. App. 187. *State* v. *Sumler*, supra, 345 Conn. 961.

[10] After the parties submitted their supplemental briefs, our Supreme Court issued its decision in *State* v. *Davis*, 344 Conn. 122, 145, 277 A.3d 1234 (2022), in which it applied the *Gore* factors retroactively. In *Davis*, the defendant argued that it would be improper to apply *Gore* retroactively. Id., 144–45. Our Supreme Court was not persuaded and stated that, "as a general rule, judicial decisions apply retroactively to pending cases . . . . A common-law decision will be applied nonretroactively only if: (1) it establishes a new principle of law, either by overruling past precedent on which litigants have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . (2) given its prior history, purpose and effect, retrospective application of the rule would [impede] its operation; and (3) retroactive application would produce substantial inequitable results, injustice, or hardship. . . .

"Moreover, it is axiomatic that [t]he issue of retroactivity of decisional law is a question of policy to be decided by [this court], and may be decided by the policy consideration of whether litigants could be deemed to have relied on past precedent or whether the new resolution of an old issue was foreshadowed, or whether equity, given the particular facts, requires a prospective application only. . . . In the present case, it is unpersuasive to suggest that this court's present application of the standard set forth in *Gore* gives rise to any of the concerns set forth in the preceding paragraph.

The sole question presented to us on remand is whether the trial court abused its discretion by admitting opinion testimony from the defendant's probation officer identifying the defendant in the photograph and surveillance video. The defendant argues that the court abused its discretion because, in his view, the *Gore* factors weigh against admitting DeNardis' testimony identifying the defendant. The state argues that the court did not abuse its discretion because the *Gore* factors weigh in favor of admitting DeNardis' testimony. We agree with the state.

The following standard of review and legal principles are relevant to our resolution of this appeal. Whether to admit opinion testimony identifying an individual in a surveillance video or photograph is an evidentiary ruling that will not be disturbed unless it amounts to an abuse of discretion. See *State* v. *Gore*, supra, 342 Conn 159–63; see also *State* v. *Rivera*, 169 Conn. App. 343, 371, 150 A.3d 244 (2016) ("[t]he trial court has wide discretion in its rulings on evidence and its rulings will be reversed only if the court has abused its discretion or an injustice appears to have been done" (internal quotation marks omitted)), cert. denied, 324 Conn. 905, 152 A.3d 544 (2017).

As discussed previously in this opinion, *Gore* effectively "amend[ed] § 7-3 (a) of the Connecticut Code of Evidence to incorporate an exception to the ultimate

That is, although *Gore* does establish a new principle of law by overruling past precedent, the defendant has not argued, let alone demonstrated, that he relied to his detriment on one legal standard over another during the events underlying this case, the underlying trial, or in bringing the present appeal . . . despite being afforded an opportunity to do so in the supplemental briefing ordered by this court to address the applicability of *Gore* to this case." (Citations omitted; internal quotation marks omitted.) Id., 145–46. Our Supreme Court went on to note that, even if *Gore* had not been applied retroactively, application of the rule in *Finan* would reach the same result. Id., 149. In the present case, neither the defendant nor the state argue against applying *Gore* retroactively.

issue rule for lay opinion testimony that relates to the identification of persons depicted in surveillance video or photographs . . . .'' *State* v. *Gore*, supra, 342 Conn. 133. ''[Our Supreme Court] now hold[s] that opinion testimony that relates to the identification of persons depicted in surveillance video or photographs is not inadmissible solely because it embraces an ultimate issue. Lay opinion testimony identifying a person in surveillance video or photographs is admissible if that testimony meets the requirements of § 7-1 of the Connecticut Code of Evidence. That is, such testimony is admissible if the opinion is rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.'' (Footnote omitted; internal quotation marks omitted.) Id., 148; see also Conn. Code Evid. § 7-1.[11]

''Testimony identifying a defendant as depicted in surveillance video or photographs meets the requirements of § 7-1 of the Connecticut Code of Evidence and is therefore admissible if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph [or video] than is the jury. . . . In making this determination, *we evaluate the following four factors*, *considering the totality of the circumstances*: (1) the witness' general level of familiarity with the defendant's appearance . . . (2) the witness' familiarity with the defendant's appearance, including items of clothing worn, at the time that the surveillance video or photographs were taken . . . (3) a change in the defendant's appearance between the time the surveillance video or photographs

[11] Section 7-1 of the Connecticut Code of Evidence provides: ''If a witness is not testifying as an expert, the witness may not testify in the form of an opinion, unless the opinion is rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.''

were taken and trial, or the subject's use of a disguise in the surveillance footage . . . and (4) the quality of the video or photographs, as well as the extent to which the subject is depicted in the surveillance footage." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Bruny*, supra, 342 Conn. 181–82, citing *State* v. *Gore*, supra, 342 Conn. 151. Because we consider the totality of the circumstances to determine whether opinion testimony identifying an individual is admissible, no single factor is dispositive. *State* v. *Bruny*, supra, 184.

Accordingly, turning our attention to the present case, we must apply the factors set forth in *Gore* to determine whether DeNardis was more likely than the jury to identify correctly the defendant from the photograph and video testimony, thereby meeting the requirements of § 7-1 of the Connecticut Code of Evidence. The first factor—the witness' general level of familiarity with the defendant's appearance—strongly weighs in favor of admitting DeNardis' testimony with respect to the defendant's identity in the photograph and surveillance video. "In order for the witness' general familiarity with the defendant's appearance to weigh in favor of admitting such testimony, the proponent of the testimony must demonstrate that the witness possesses more than a minimal degree of familiarity with the defendant. . . . [If] a witness who is familiar with the defendant's appearance views surveillance video or photographs that may or may not depict him, that witness brings to the task of identification an ability the jury cannot acquire in the context of a criminal trial. The witness' process of recognition is informed by having observed the defendant in different contexts, over an extended period of time. That wealth of experience renders the testimony helpful to the jury." *State* v. *Gore*, supra, 342 Conn. 164.

To determine whether a witness has sufficient general familiarity with the defendant, courts may consider a number of relevant circumstances indicative of the witness' relationship with the defendant and, in turn, the reliability of the witness' identification. Id., 159. "[C]ourts should consider the particular, relevant circumstances, including, but not limited to, the frequency, number and duration of any individual prior contacts; the duration of the entire course of contacts and the length of time since the contacts; the relevant viewing conditions; and the nature of the relationship between the witness and the defendant, if any." Id.

In the present case, the court, although it was evaluating the admissibility of the testimony using a different standard, considered the circumstances described in the preceding paragraph and concluded that "DeNardis possessed sufficient relevant familiarity with the defendant . . . ." Specifically, the court found that DeNardis had known the defendant for one year and ten months in her role as the defendant's probation officer. DeNardis first met the defendant during an intake interview on May 28, 2013, and last met with the defendant on April 1, 2015.[12] In that time, DeNardis met with the defendant face-to-face fifty-nine times in a variety of settings. DeNardis met with the defendant as often as five to six times per month, and the meetings averaged between five and twenty minutes. These regular meetings took place at the defendant's home, DeNardis' office, and police stations. On the basis of the frequency, number, and duration of their past contacts, the duration of their relationship and time since their last meeting, the relevant viewing conditions and, finally, the nature of their relationship, DeNardis clearly had more than a minimal degree of familiarity with the defendant that enabled her to identify him more reliably than the jury.

[12] DeNardis remained the defendant's probation officer until April 15, 2015.

The second factor—the witness' familiarity with the defendant's appearance, including items of clothing worn at the time that the surveillance video or photographs were taken—also weighs in favor of admitting DeNardis' testimony about the identity of the defendant in the surveillance video and photograph. The defendant wore eyeglasses throughout the trial.[13] At the time of the surveillance video, however, the defendant was not wearing eyeglasses. DeNardis was familiar with the defendant's appearance at the time, having seen the defendant only five days before the surveillance video was recorded. During that time, the defendant was not known to wear eyeglasses.[14] DeNardis was also familiar with the lanyard that the defendant was wearing around his neck in the surveillance video. In their past interactions, DeNardis had seen the defendant wear a similar lanyard. The lanyard depicted in the surveillance video resembled a lanyard that the defendant wore attached to his employee identification card. See *United States* v. *Saniti*, 604 F.2d 603, 605 (9th Cir.) (per curiam) (court properly admitted identification testimony of witnesses who were able to identify clothing worn by individual in surveillance photographs as clothing that belonged to defendant), cert. denied, 444 U.S. 969, 100 S. Ct. 461, 62 L. Ed. 2d 384 (1979); see also *United States* v. *Pierce*, 136 F.3d 770, 775 (11th Cir.) (court properly admitted identification of defendant by witness familiar with defendant's appearance when wearing baseball hat and sunglasses, items defendant was wearing in surveillance photograph), cert. denied, 525 U.S. 974, 119 S. Ct. 430, 142 L. Ed. 2d 350 (1998).[15] DeNardis' familiarity

[13] Both DeNardis and another witness described the defendant as wearing eyeglasses in court.

[14] Another witness, who had known the defendant during the time the surveillance video was recorded, testified that he had never seen the defendant wear eyeglasses prior to trial.

[15] "Because § 7-1 of the Connecticut Code of Evidence essentially mirrors rule 701 of the Federal Rules of Evidence, we look to federal decisions for guidance in determining whether the trial court . . . acted within its discre-

with the defendant's appearance at the time of the video and with the lanyard worn by the defendant in the video enabled her to identify him more reliably than the jury.

The third factor, which calls on us to consider whether there has been a change in the defendant's appearance between the time the surveillance video or photographs were taken and trial, or whether the subject used a disguise, also weighs in favor of admitting DeNardis' identification testimony. As previously discussed in this opinion, the defendant wore eyeglasses at trial but was not known to wear eyeglasses when the surveillance video was recorded. Although we agree with the defendant that his wearing of eyeglasses in the presence of the jury at the time of the trial does not amount to a disguise, this change in the defendant's appearance put DeNardis in a better position to identify the defendant than the jury, which had only seen the defendant wearing eyeglasses. See, e.g., *United States* v. *Walker*, 974 F.3d 193, 205 (2d Cir. 2020) (court properly admitted testimony identifying defendant when defendant wore eyeglasses at trial but was not wearing eyeglasses in surveillance video), cert. denied, U.S. , 141 S. Ct. 2823, 210 L. Ed. 2d 943 (2021).

The defendant argues that his wearing of eyeglasses throughout trial did not significantly change his appearance. Specifically, the defendant argues that, because the eyeglasses did not obstruct his face from view, we should not conclude that the third *Gore* factor weighs in favor of admitting DeNardis' testimony. The third factor, however, does not require a significant change in the defendant's appearance or that the change in appearance obstructs the view of the defendant in the surveillance video or photograph. Rather, we must determine if there has been *a change* in the defendant's

tion in allowing the testimony." (Footnote omitted.) *State* v. *Gore*, supra, 342 Conn. 149.

appearance. We are not persuaded that a witness who is familiar with an individual's appearance without eyeglasses is unable to better identify that individual, when the individual is not wearing eyeglasses, than a jury who has only seen the individual wearing eyeglasses.

Finally, the fourth factor, which addresses the quality of the video or photographs, as well as the extent to which the subject is depicted in the surveillance video or photograph, also weighs in favor of admitting DeNardis' testimony. The video contained views from directly behind Eddy's counter where the cash register is located, a side view adjacent to the counter, a view of the outside of the store, and a view from inside the store showing the entry door.[16] Depending on the view of the camera, the defendant's face in the video is more or less obscured, and the defendant is not the only person in the surveillance video or photograph. The photograph, which was taken from the surveillance video, shows the body of the individual identified as the defendant largely obscured by the store counter. The defendant is wearing a hoodie and facing the camera. In the photograph, Eddy's store clerk is pictured in the foreground and the defendant is in the middle ground of the photograph. Simply put, the defendant was not clearly, fully, or solely depicted in either the surveillance video or the photograph.

Turning to the quality of the surveillance video and the photograph, the court described the video as being "clear enough . . . ." "With respect to the quality of

[16] The court found that "[t]he tape has four different perspectives and the tape is divided into four segments. Those segments are a view directly behind the counter where the cash register is located, a side view adjacent to the counter, a view of the outside of the store depicting the sidewalk, and the streets and a view of the exterior of the front door as well as a view from inside the store showing the entry door. The tape lasts in total approximately fifteen minutes. There are several individuals depicted walking or standing during the video. So the defendant is not the only person depicted in the video . . . ."

the video or photographs . . . this factor favors admissibility when the [video or] photographs are not either so unmistakably clear or so hopelessly obscure that the witness is no [better suited] than the jury to make the identification." (Internal quotation marks omitted.) *State* v. *Gore*, supra, 342 Conn. 164–65. Thus, the surveillance video and the still photograph taken from it were neither unmistakably clear nor hopelessly obscure and fall within the range of quality that favors admissibility.

The quality of the surveillance video and the photograph, as well as the extent to which the defendant was depicted in them, both lead us to conclude that the fourth factor also weighs in favor of admitting DeNardis' testimony identifying the defendant. See, e.g., *State* v. *Davis*, supra, 344 Conn. 143–44 (quality of video favored admission of witness' testimony identifying defendant when video showed defendant with his face obscured at certain angles and wearing hat and winter jacket); see also, e.g., *United States* v. *Jackman*, 48 F.3d 1, 5 (1st Cir. 1995) (court properly admitted witnesses' identifications of individual pictured in somewhat blurred photographs that showed only part of individual's face).

The defendant argues on remand that the state already conceded that the video was of clear quality.[17] We do not agree. At oral argument before this court, the state denied making any concession to the clear quality of the video. The defendant appears to mistakenly rely on the state's reference to the court's description of the video as being "clear enough" for an individual to make an identification, to support his claim that

[17] The defendant refers us to the state's principal brief in *State* v. *Sumler*, supra, 199 Conn. App. 187, in which it argued: "The trial court found that, unlike, the 'brief and difficult to discern' videotape in [*Finan*] . . . the clear quality of Eddy's videotape gave a basis for making an identification as a matter of fact and not mere suspicion . . . ." The state's statement, however, relies on the court's description of the surveillance video as being "clear enough . . . ." The court never described the surveillance video as having a "clear quality."

the state conceded to the court's recognition of the clarity of the video. The terms "clear enough" and "clear" are distinguishable from each other for purposes of the fourth *Gore* factor, which favors the admission of surveillance video and photographs that are neither "so unmistakably clear or so hopelessly obscure . . . ." *State* v. *Gore*, supra, 342 Conn. 165. Although the jury may have been able to compare the defendant as he appeared before it at trial to the surveillance video and photograph, DeNardis was in a better position to reliably identify him.

Finally, the defendant argues that it was neither DeNardis' general familiarity with the defendant, nor her specific familiarity with the defendant's appearance at the time the surveillance video was recorded, that enabled her to identify the defendant. Rather, the defendant argues that DeNardis was able to identify the defendant only because of the clarity of the surveillance video and photograph and the " 'unobstructed view' " of the defendant depicted in them. Simply put, the defendant asserts that DeNardis was equally as well situated as the jury to identify the defendant. First, as we articulated in our preceding analysis of the fourth factor, we are not persuaded by the defendant's argument that the surveillance video or photograph shows the defendant clearly and without obstruction. Furthermore, even if we assume, arguendo, that the surveillance video and photograph provide a clear and unobstructed view of the defendant, the clarity of the surveillance video or photograph is only one of the four factors set forth in *Gore*. We consider the *Gore* factors in their totality and, thus, a single factor is not dispositive. Accordingly, the defendant's argument that DeNardis was able to identify him only because he clearly was depicted in the surveillance video and photograph is unpersuasive and ignores the weight that we must give to the first, second, and third factors.

For the foregoing reasons, the factors articulated in *Gore* all weigh in favor of admitting DeNardis' testimony about the identity of the defendant in the photograph and surveillance video. Given the totality of the circumstances, the court did not abuse its discretion by admitting DeNardis' testimony.

The judgment is affirmed.

In this opinion the other judges concurred.

RAY C. JOHNSON ET AL. *v.* VITA BUILT, LLC, ET AL.
(AC 45123)

Prescott, Seeley and Eveleigh, Js.

Syllabus

The plaintiff property owners brought an action against the defendants, a contractor and an architect, alleging, inter alia, breach of contract. The plaintiffs owned real property in Westport and hired the defendants to design and build a new home on the property with the goal of selling the redeveloped property for a profit. During the course of their working relationship, the parties executed a contract for the construction of the new residence. Pursuant to the construction contract, the defendants agreed to design and construct the new home and provide related services for a fee. Later that month, the defendants agreed, by letter, as a part of the parties' ongoing discussions, to reduce their fees (fee reduction letter). More than one year later, the parties entered into a separate agreement titled "Additional Fee and Profit Sharing Agreement" (2019 agreement), which incorporated by reference the construction contract and the fee reduction letter. The 2019 agreement included a section titled "Additional Fee and Profits/Losses," which provided that the parties would share in "all profits . . . and all losses" associated with the sale of the property, defined "profits" as net profits and set forth in detail how net profits would be calculated, and provided that the previously reduced fees would be reinstated and that, after certain enumerated expenses were paid, any remaining funds would be allocated among the parties on a percentage basis. The 2019 agreement did not contain language defining the term "losses" or explaining how losses, if any, would be determined and calculated or apportioned among the parties. The property was ultimately sold at a loss, and the parties disagreed about what effect this shortfall meant relative to the parties' financial stakes as expressed in their contracts. The defendants claimed that they

had no obligation under the terms of the 2019 agreement to share in any shortfall. The plaintiffs took the position that the "net profit" calculation, if made in accordance with the intent of the 2019 agreement, resulted in a negative number or "losses," which the parties had intended to share at the same percentages that they would have shared with respect to net profits. After the plaintiffs filed their application for a prejudgment remedy and commenced this action, the defendants asserted a counterclaim against the plaintiffs for breach of contract; in addition, they filed their own application for a prejudgment remedy. The trial court denied the plaintiffs' application for a prejudgment remedy, finding that there was no ambiguity in the contract language and that, read as a whole, it did not require the defendants to share in the loss attributed to the sale of the property. The court concluded that the defendants had shown probable cause that they would prevail on their counterclaim and granted the defendants' application for a prejudgment remedy. In the alternative, the court found that, even if there was ambiguity in the 2019 agreement, the parol evidence offered by the parties also supported a conclusion that the contract could not be interpreted reasonably to require the sharing of losses. In reaching its alternative conclusion, the court relied heavily on its factual finding that, as part of the 2019 agreement, the defendants agreed to risk, and ultimately lost, the fees owed to the defendants under the construction contract as modified by the fee reduction letter. On the plaintiffs' appeal to this court, *held:*

1. The trial court improperly concluded that the 2019 agreement unambiguously provided that the parties would share only in net profits and did not reflect an intent to share in all losses resulting from the sale of the property: although the 2019 agreement contained no definition for the term "losses" and was silent as to how the parties would treat a situation in which the proceeds from the sale of the property were insufficient to satisfy each of the enumerated categories of expenses, the parties' use of express language that the parties would share in all profits and all losses associated with the property and their failure to define precisely what they intended by that language created a clear ambiguity in the contract that necessitated looking beyond the four corners of the contract to determine the parties' intent and, accordingly, the trial court's conclusion could not stand as a basis for finding that the defendants would prevail on their counterclaim.
2. The trial court relied on clearly erroneous factual findings in support of its alternative conclusion that, even if the contract was ambiguous regarding the parties' intent, the parol evidence offered by the parties established probable cause that the defendants would prevail on their counterclaim: there was no dispute that, contrary to the trial court's findings, the fees owed to the defendants under the construction contract as modified by the fee reduction letter never were at risk and, in fact, were paid in full to the defendants; moreover, although the defendants

pointed to other extrinsic evidence in the record that may have supported the trial court's alternative holding, there was no indication in that court's decision to what extent, if any, that court considered or credited any other extrinsic evidence and, accordingly, because the court relied primarily on its erroneous factual finding in reaching its alternative conclusion, not the evidence advanced by the defendants, this court was left with no confidence in the trial court's assessment of probable cause that the defendants would prevail on their counterclaim; accordingly, the prejudgment remedy awarded could not stand and a new hearing on the defendants' application was warranted.

Argued October 5—officially released December 20, 2022

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendants filed a counterclaim; thereafter, the court, *Kavanewsky, J.*, granted the defendants' application for a prejudgment remedy and denied the plaintiffs' application for a prejudgment remedy and rendered judgment thereon, from which the plaintiffs appealed to this court. *Reversed in part*; *further proceedings.*

William N. Wright, for the appellants (plaintiffs).

John J. Ribas, with whom, on the brief, was *Bruce L. Elstein*, for the appellees (defendants).

Opinion

PRESCOTT, J. In this contract action arising out of the redevelopment and sale of residential property in Westport, the plaintiff property owners, Ray C. Johnson and Indre L. Johnson, appeal from the judgment of the trial court granting an application for a prejudgment remedy filed by the defendants, Vita Built, LLC (Vita Built), and Vita Design Group, LLC (Vita Design), after finding probable cause that the defendants will prevail on their breach of contract counterclaim against the

plaintiffs.[1] The plaintiffs claim on appeal that the court improperly (1) misconstrued the relevant contract as unambiguously providing that the parties intended to share only in potential profits resulting from the sale of the redeveloped property, despite express contradictory language in the contract indicating that the parties would share in all profits and losses, and (2) relied upon clearly erroneous factual findings in reaching its alternative conclusion that, even if the contract language is ambiguous, the extrinsic evidence presented to the court favored the defendants' interpretation that the parties did not intend to share in all potential losses.

We agree that the court improperly concluded that the contract unambiguously provided that the parties would share only in net profits and did not reflect an intent to share in all losses resulting from the sale of the property. We also agree with the plaintiffs that the court made clearly erroneous factual findings in support of its alternative conclusion that, even if the contract is ambiguous regarding the parties' intent, the parol evidence established probable cause that the defendants would prevail on their counterclaim. Accordingly, we reverse the judgment of the court granting the defendants' application for a prejudgment remedy and remand for a new prejudgment remedy hearing.

The following facts, as found by the court or that are otherwise undisputed in the record, and procedural history are relevant to our resolution of this appeal. The plaintiffs owned residential property located at 281 Compo Road South in Westport. They acquired the

[1] Although the plaintiffs indicated on their appeal form that they also sought to appeal from the court's judgment denying their own application for a prejudgment remedy, the plaintiffs have not raised or briefed any claim of error as to that aspect of the court's ruling and, thus, have abandoned any such claim. See *Deutsche Bank National Trust Co.* v. *Bertrand*, 140 Conn. App. 646, 648 n.2, 59 A.3d 864, cert. dismissed, 309 Conn. 905, 68 A.3d 661 (2013).

property in 2007 for $2,428,000. By 2016, the plaintiffs had begun to formulate a plan to demolish the existing residence on the property, which, at that time, was valued at approximately $1,840,000, and to construct a new home with the hopes of selling the redeveloped property for a profit. In late 2016, the plaintiffs met with Lucien Vita to discuss their redevelopment plans. Vita was the controlling principal of the two defendant companies: Vita Built, a licensed new home construction and home improvement contractor, and Vita Design, an architectural firm specializing in residential properties. During their ongoing negotiations, the plaintiffs suggested to Vita that the defendants' involvement in the redevelopment would provide the defendants with positive publicity and marketing opportunities and that the parties should discuss an agreement that reflected those benefits to the defendants.

In September, 2017, although the parties continued to negotiate some of the details of their financial arrangements, they executed a contract for the construction of the new residence. Pursuant to the construction contract, Vita Built agreed to construct the new home and provide related management services for a fee of $197,000, and Vita Design agreed to provide architectural plans and related services for an additional $197,000, for a total of $394,000. Later that month, the defendants, by letter, agreed as a part of the parties' ongoing discussions to reduce their fees as set forth in the construction contract (fee reduction letter). Specifically, each defendant agreed to reduce its fee by $63,000. As a result, the plaintiffs agreed to pay the defendants a combined total of $268,000. The fee reduction letter further provided that the estimated budget for the project was $2,300,700, which sum included the defendants' reduced fees.

On February 2, 2019, the parties entered into a separate agreement that was titled "Additional Fee and

Profit Sharing Agreement" (2019 agreement). The plaintiff Indre L. Johnson drafted the 2019 agreement using as a template an earlier version of a profit sharing agreement drafted by the defendants' attorney. The 2019 agreement incorporates by reference both the construction contract and the fee reduction letter. It also includes an integration or merger clause that provides that "[the 2019 agreement] represents the entire agreement and understanding of the [p]arties with respect to the subject matter hereof, absent further agreement."

Section 7 of the 2019 agreement is the critical provision at issue in the present appeal. In relevant part, it provides: "Additional Fee and *Profits/Losses*. In consideration of the additional work and responsibilities associated with finalizing design and construction plans and details for marketing new construction to potential buyers under the Listing Agreement, Owner[2] has agreed to reinstate the fee reduction agreed to in the Fee Reduction Letter,[3] paying Architect and Builder the additional $63,000 in fees each, for a total of $126,000, according to the distribution which will be outlined below, at the time of closing of sale. Owner has also agreed to offer profit sharing should profits exist after distribution according to the allocation outlined below.

"Owner, Architect and Builder will share in all Profits (as hereinafter defined) *and all losses* associated with

[2] As reflected in the opening paragraph of the 2019 agreement, the term "Owner" refers to the plaintiffs, "Architect" refers to the defendant Vita Design, and "Builder" refers to the defendant Vita Built.

[3] The phrase "to reinstate the fee reduction" is a non sequitur under the circumstances of this case. Reinstating a fee reduction logically means giving effect again to a reduction in fees, which would mean *lowering* the fees due to the defendants. As is readily apparent from the concluding clause of this sentence, however, the plaintiffs actually were agreeing to *increase* the amount of the fees owed to the defendants by reinstating the fees that the defendants previously had agreed to forgo in the fee reduction letter. In other words, read in context, the plaintiffs were offering to *rescind*, not reinstate, the fee reduction.

the Property as set forth herein. As used in this Agreement, 'Profits' shall be deemed the net profits with respect to the Property, calculated as the final sales price of the Property . . . less [certain enumerated expenses][4] . . . the payoff of the reinstated fees of $63,000 each to Architect and Builder (for a total of $126,000); and . . . the Owner's basis in the Property of $1,450,000.00. Any remaining funds shall be divided as follows: twenty percent (20%) of the remaining funds shall be disbursed to the Owner, forty percent (40%) of the remaining funds shall be disbursed to the Builder and forty percent (40%) of the remaining funds shall be disbursed to the Architect."[5] (Emphasis added; footnotes added.) Although the 2019 agreement explicitly provides that the parties would share in "all losses," it contains no language defining the term losses or explaining how losses, if any, would be determined and calculated. It also does not specify how the losses, if any, would be apportioned among the parties.

[4] The enumerated expenses listed in Section 7 of the 2019 agreement are as follows: "a) a mutually agreed percent real estate commission and staging expenses; b) state and local conveyance taxes; c) reasonable attorney's fees for the sale of the Property; d) the payoff of the note and mortgage to the Owner's construction lender; e) any reimbursements to Owner for build costs (including, but not limited to: surveying, appraisal fees, architecture, plans, engineering, tree removal and other landscaping expenses, site planning, construction costs and materials, utility expenses, maintenance and upkeep expenses for the Property); [and] f) construction loan interest, builder's risk and general liability insurance premiums for the Property, and real estate taxes and sewer use charges for the Property incurred by the Owner from the date the Owner vacated the Property to the time of the closing, adjusted on a per diem basis . . . ."

[5] The parties refer to this as the "waterfall" provision, with the proceeds generated from the sale of the property intended to flow from the top of the enumerated list of deductions to the bottom, paying each category in full and in order. As drafted, at the very bottom of the waterfall is the plaintiffs' $1,450,000 basis in the property, meaning that this is the item most likely left unsatisfied, at least in part, if the property sells for less than anticipated. Any proceeds remaining after the "waterfall" distribution would, according to the 2019 agreement, be the "net profits" subject to the 20/40/40 disbursement provision.

The new home was completed in the early part of 2019. The plaintiffs, in consultation with the defendants, listed the property for sale at a price of $5,879,000. It sold on August 3, 2019, for $4,900,000, which was nearly one million dollars less than the original listing price. Calculating the "net profit" of the sale in accordance with the terms of the 2019 agreement, which included taking deductions for the $126,000 in additional fees that the plaintiffs had agreed to pay the defendants (reinstated fees) and the plaintiffs' $1,450,000 basis in the property, the result was a deficit of $563,530. The parties disagreed about what effect this shortfall in anticipated proceeds meant relative to the parties' financial stakes as expressed in their contracts. The defendants' position was that the sale had generated sufficient proceeds to satisfy the $126,000 in reinstated fees as agreed to by the plaintiffs and that they had no obligation under the terms of the 2019 agreement to share in any shortfall that prevented a full reimbursement of the plaintiffs' basis in the property. The plaintiffs took the position that the "net profit" calculation, if made in accordance with the intent of the 2019 agreement, resulted in a negative number or "losses," which the parties had intended to share at the same percentages that they would have shared with respect to net profits.

On December 24, 2019, in anticipation of litigation to resolve the parties' dispute, the plaintiffs filed with the court an application for a prejudgment remedy, which subsequently was served on the defendants. The application sought to attach $324,824 in assets of the defendants, which is the amount that the plaintiffs calculated that they were owed by the defendants as their share of the net loss from the sale of the property.[6]

[6] This figure is equal to 80 percent of the $563,530 purported loss less $126,000, which was the amount of the reinstated fees owed to the defendants.

The plaintiffs later commenced the present action by service of process on March 13, 2020. In their one count initial complaint, the plaintiffs characterized the 2019 agreement as a "joint venture agreement" in which the parties had agreed to share fully in both profits or losses associated with the redevelopment and sale of the property. The plaintiffs alleged that the defendants had breached the 2019 agreement by refusing to accept responsibility for their share of the net loss of the redevelopment project. According to the plaintiffs, each defendant owed the plaintiffs $162,412.

The defendants filed a joint answer in which they denied the substantive allegations of the complaint and asserted a counterclaim against the plaintiffs for breach of contract. According to the defendants, the parties did not intend by entering into the 2019 agreement that the defendants would be responsible for sharing in any and all losses resulting from the sale of the property. The defendants alleged that the plaintiffs breached the parties' agreements by "fail[ing] to pay the defendants in accordance with the schedule for the payment as set forth in the [2019 agreement] as intended by the parties," which entitled each defendant to a payment of $63,000 from the sale proceeds, the amount of the reinstated fees.

The defendants also filed their own application for a prejudgment remedy. They argued that there was probable cause that they would prevail on their counterclaim against the plaintiffs and sought permission to attach real and personal property of the plaintiffs in the amount of $126,000.

The plaintiffs, thereafter, filed the operative amended complaint in which they added a second count that sought reformation of the 2019 agreement. Specifically, the plaintiffs asked the court to reform the term "funds," as used in the previously quoted Section 7, to read

"profits," which is defined in the agreement to mean "net profits." The plaintiffs maintain that reformation is necessary so that the contract's language conforms to the actual intention of the parties to share in both potential profits or losses.

The court conducted a remote hearing on the parties' competing applications for prejudgment remedies over two days, beginning on March 23, 2021, and ending on April 5, 2021. The court heard testimony from Indre L. Johnson and Vita. The parties also each submitted various documentary evidence. At the close of evidence, the court instructed the parties to file simultaneous postargument briefs followed by simultaneous reply briefs. Briefs and reply briefs were filed by both parties, following which the court issued a memorandum of decision in which it granted the defendants' application for a prejudgment remedy and denied the plaintiffs' application for a prejudgment remedy.

In its analysis, the court first agreed with the defendants that there is no ambiguity in the contract language and that, read as a whole, it does not require the defendants to share in the loss attributed to the sale of the property. The court rejected the plaintiffs' contrary assertion that the contract unambiguously provides for loss sharing, characterizing it as "not viable." The court made note of the language in Section 7 that provides that the "Owner, Architect and Builder will share in all Profits (as hereinafter defined) *and all losses* associated with the Property as set forth herein." (Emphasis added.) The court, however, rejected the plaintiffs' view that this language is an unambiguous statement about the parties' intent to share in both profits and losses or that it imparts any ambiguity into the contract. Rather, the court deemed it significant that "the term 'profits' is meticulously defined" but that "the agreement is notably silent in defining the term 'losses.' Following the extensive list of expenses that would be

used to arrive at a 'net profit,' the parties chose to refer to a distribution of remaining 'funds.' The court cannot rewrite the agreement, and it cannot import any definitional term."[7]

Although the court first concluded that there was no ambiguity in the contract regarding the sharing of losses, it went on to conclude in the alternative that, even if there is ambiguity in the 2019 agreement, "the more credible evidence decidedly leads to an interpretation favoring the defendants." In other words, the parol evidence also supported a conclusion that the contract could not be interpreted reasonably to require the sharing of losses.

The court explained: "In September, 2017, the parties entered into the original construction contract. Very soon thereafter, the defendants agreed to a substantial fee reduction, from $197,000 to $134,000 each. Construction was not completed and the home was not listed until February, 2019. By that time, the residential market had darkened. The 2019 agreement specified

[7] Although count two of the operative amended complaint sought to reform the 2019 agreement and, specifically, its use of the word "funds," the court, in denying the plaintiff's application for a prejudgment remedy, concluded that the plaintiffs had failed to show probable cause for a reformation under the circumstances presented. The court stated: "Reformation is appropriate in cases of mutual mistake—that is where, in reducing to writing an agreement made or transaction entered into as intended by the parties thereto, through mistake, common to both parties, the written instrument fails to express the real agreement or transaction. . . . The evidence does not support a basis for the reformation of this agreement. The plaintiffs have not demonstrated that there was a mistake common to both of the parties. In fact, the plaintiffs' very own allegations suggest otherwise by stating that the reference to 'funds' rather than 'profits' may have been the result of a euphoric oversight and/or the simple scrivener's error. There was no evidence to support that the defendants signed the 2019 agreement because of any gross misconception. Likewise, the evidence demonstrated that it was the plaintiff Indre Johnson who drafted the agreement; further, the evidence showed that she was thorough in her drafting of it." (Citations omitted; footnote omitted; internal quotation marks omitted.)

that the architect, Vita, would have increased responsibility in marketing the property. The court finds that he substantially fulfilled those new duties. But what the court believes is even more telling concerns the continued evolvement of the fee structure of the defendants. While the 2019 agreement provided for a fee reinstatement of $63,000 for each defendant, as an 'above the line' expense, the defendants now agreed to put their remaining $134,000 each as a 'below the line' fund distribution payable only after a calculation of the 'net profit.' In short, the defendants agreed to take on a substantial risk (here, a risk and a loss that materialized) that they would never recover those monies. The plaintiffs' position, then, that they would have never agreed to a fee reinstatement unless the defendants had concomitantly agreed to share in losses is without merit. In fact, the defendants had already agreed to 'share the pain' as the market worsened." The court concluded: "[T]he plaintiffs have not shown probable cause that they will prevail in their action. The court denies their request for a prejudgment remedy . . . . The defendants have shown probable cause that they will prevail on their counterclaim and will recover damages of $126,000. The court grants their request for a prejudgment remedy in that amount . . . . The court also grants the defendants' motion for disclosure of assets . . . and it orders that the plaintiffs comply with said motion within thirty days." This appeal followed.[8]

The plaintiffs claim on appeal that the court improperly granted the defendants' application for a prejudgment remedy. The plaintiffs' claim is twofold. They first claim that the court improperly determined that the

[8] After the granting of their application for a prejudgment remedy and the filing of this appeal, the defendants amended their counterclaim to include additional counts alleging a breach of the implied covenant of good faith and fair dealing and a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq.

2019 agreement unambiguously provided that the parties would share only in any profits realized from the sale of the redeveloped property, not losses. Second, they claim that the court relied on clearly erroneous factual findings in reaching its alternative conclusion that, even if the relevant contractual language is ambiguous, the extrinsic evidence offered by the parties favored the defendants' interpretation. We agree with both claims and address them in turn.

We begin our discussion by setting forth relevant legal principles, including our standard of review. As provided for in our prejudgment remedy statutes, General Statutes § 52-278a et seq., "[a] prejudgment remedy means any remedy or combination of remedies that enables a person by way of attachment, foreign attachment, garnishment or replevin to deprive the defendant [or counterclaim defendant] in a civil action of, or affect the use, possession or enjoyment by [that party] of, his property prior to final judgment . . . . A prejudgment remedy is available upon a finding by the court that there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any defenses, counterclaims or setoffs, will be rendered in the matter in favor of the plaintiff [or counterclaimant] . . . . Proof of probable cause as a condition of obtaining a prejudgment remedy is not as demanding as proof by a fair preponderance of the evidence. . . . The legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it. . . . Probable cause is a flexible common sense standard. It does not demand that a belief be correct or more likely true than false. . . .

"As for our standard of review, [our Supreme Court has] stated: [An appellate court's] role on review of the granting of a prejudgment remedy is very circumscribed. . . . In its determination of probable cause, the trial court is vested with broad discretion which is not to be overruled in the absence of clear error. . . . Under the clear error standard, we review the record with a heightened standard of deference that exceeds the level of deference afforded under the abuse of discretion standard and will overrule the granting of a prejudgment remedy only if we are left with the definite and firm conviction that a mistake has been committed." (Citations omitted; internal quotation marks omitted.) *Valencis* v. *Nyberg*, 160 Conn. App. 777, 782–83, 125 A.3d 1026 (2015). Even under this deferential standard, however, our review of a trial court's conclusions regarding questions of law will be plenary. See *Levco Tech*, *Inc.* v. *Kelly*, 214 Conn. App. 257, 283, 279 A.3d 248, cert. denied, 345 Conn. 918, A.3d (2022).

Because the court's probable cause determination in the present case turned on its interpretation of the parties' contract, we turn next to a discussion of the law governing the construction of contracts. "[If] a party asserts a claim that challenges the trial court's construction of a contract, we must first ascertain whether the relevant language in the agreement is ambiguous. . . . If a contract is unambiguous within its four corners, intent of the parties is a question of law requiring plenary review. . . . [If] the language of a contract is ambiguous, the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous. . . . A contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . Accordingly, any ambiguity in a contract must emanate from the language used in

the contract rather than from one party's subjective perception of the terms. . . .

"[W]e accord the language employed in the contract a rational construction based on its common, natural and ordinary meaning and usage as applied to the subject matter of the contract. . . . [If] the language is unambiguous, we must give the contract effect according to its terms. . . . [If] the language is ambiguous, however, we must construe those ambiguities against the drafter. . . . Moreover, in construing contracts, we give effect to all the language included therein, as the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous. . . .

"In ascertaining the intent of contracting parties, we are also mindful that a court's interpretation of a contract must also be informed by whether the terms of the contract are contained in a fully integrated writing. This is important because [t]he parol evidence rule prohibits the use of extrinsic evidence to vary or contradict the terms of an integrated written contract. . . . The parol evidence rule does not apply, however, if the written contract is not completely integrated. . . ."[9]

[9] "[I]t is well established that the parol evidence rule is not a rule of evidence, but a substantive rule of contract law that bars the use of extrinsic evidence to vary [or contradict] the terms of an otherwise plain and unambiguous contract. . . . The rule does not prohibit the use of extrinsic evidence for other purposes, however, such as to prove mistake, fraud or misrepresentation in the inducement of the contract." (Citation omitted; internal quotation marks omitted.) *Zhou* v. *Zhang*, 334 Conn. 601, 620–21, 223 A.3d 775 (2020); see also *TIE Communications, Inc.* v. *Kopp*, 218 Conn. 281, 288–89, 589 A.2d 329 (1991) (explaining that, although use of parol evidence is disallowed if offered solely to vary or contradict written terms of integrated contract, parol evidence is permitted "(1) to explain an ambiguity appearing in the instrument; (2) to prove a collateral oral agreement which does not vary the terms of the writing; (3) to add a missing term in a writing which indicates on its face that it does not set forth the complete agreement; or (4) to show mistake or fraud" (internal quotation marks omitted)). A party's failure to object to evidence on the ground that it is inadmissible pursuant to the parol evidence rule does not preclude us from considering on appeal whether a court's reliance on such evidence was proper. See *Capp Indus-*

"An integrated contract is one that the parties have reduced to written form and which represents the full and final statement of the agreement between the parties. . . . Accordingly, an integrated contract must be interpreted solely according to the terms contained therein. Whether a contract is deemed integrated oftentimes will turn on whether a merger clause exists in the contract. . . . The presence of a merger clause in a written agreement establishes conclusive proof of the parties' intent to create a completely integrated contract and, unless there was unequal bargaining power between the parties, the use of extrinsic evidence in construing the contract is prohibited. . . .

"We long have held that when the parties have deliberately put their engagements into writing, in such terms as import a legal obligation, *without any uncertainty as to the object or extent of such engagement*, it is conclusively presumed, that the whole engagement of the parties, and the extent and manner of their understanding, was reduced to writing. After this, to permit oral testimony, or prior or contemporaneous conversations, or circumstances, or usages [etc.], in order to learn what was intended, or to contradict what is written, would be dangerous and unjust in the extreme. . . . Although there are exceptions to this rule, we continue to adhere to the general principle that the unambiguous terms of a written contract containing a merger clause may not be varied or contradicted by extrinsic evidence. . . . Courts must always be mindful that parties are entitled to the benefit of their bargain, and the mere fact it turns out to have been a bad bargain for one of the parties does not justify, through artful interpretation, changing the clear meaning of the parties' words." (Citations omitted; emphasis added; footnote

tries, *Inc.* v. *Schoenberg*, 104 Conn. App. 101, 110 n.6, 932 A.2d 453, cert. denied, 284 Conn. 941, 937 A.2d 696 (2007).

added; internal quotation marks omitted.) *EH Investment Co., LLC* v. *Chappo, LLC*, 174 Conn. App. 344, 358–60, 166 A.3d 800 (2017); see also 2 Restatement (Second), Contracts § 204, comment (e), p. 98 (1981) ("[if] there is complete integration and interpretation of the writing discloses a failure to agree on an essential term, evidence of prior negotiations or agreements is not admissible to supply the omitted term"). With the foregoing principles in mind, we turn to the plaintiffs' claims on appeal.

I

The plaintiffs first claim that the court improperly determined that the 2019 agreement unambiguously provided that the parties would share only in any potential profits generated by the sale of the redeveloped property, not losses. According to the plaintiffs, the court's decision effectively ignores or reads out of the contract the parties' express inclusion of the term "losses" in expressing that the parties would "share in all [p]rofits . . . and all losses associated with the [p]roperty . . . ." The defendants counter that, read as a whole, the agreement is only susceptible to one reasonable interpretation; namely, that the parties intended only to engage in profit sharing. We agree with the plaintiffs that the 2019 agreement is ambiguous regarding whether the parties intended to share in all losses.

Whether contractual language is ambiguous presents a question of law subject to this court's plenary review. See *Cruz* v. *Visual Perceptions, LLC*, 311 Conn. 93, 101–102, 84 A.3d 828 (2014). To reiterate, "a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in

light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Citation omitted; internal quotation marks omitted.) Id., 103.

The language at issue in the present case is found in Section 7 of the 2019 agreement, the complete text of which we set forth previously in this opinion. Section 7 is entitled "Additional Fee and Profits/*Losses*." (Emphasis added.) Section 7 first provides that the plaintiffs, for due consideration, agree to pay the defendants the $63,000 that each defendant had agreed to give up in the fee reduction letter and that the plaintiffs "also agreed to offer profit sharing should profits exist after distribution according to the allocation outlined below." Section 7 then continues, in relevant part: "Owner, Architect and Builder will share in all Profits (as hereinafter defined) *and all losses* associated with the Property as set forth herein." (Emphasis added.) The section defines profits as net profits and sets forth how net profits will be calculated. Specifically, it provides that expenses associated with the acquisition and development of the property, including construction and sale related costs and fees, will be deducted from the sale proceeds, with "[a]ny remaining funds" after this allocation of expenses distributed following closing. Unlike the term "profits," the contract contains no definition for the term "losses." In fact, Section 7 is silent as to how the parties would treat a situation in which the proceeds from the sale of the property were insufficient to satisfy each of the enumerated categories of expenses. Nevertheless, the contract contains express language that the parties would "share in all [p]rofits . . . *and all losses* associated with the [p]roperty . . . ." (Emphasis added.) It is the parties' use of this language that creates an ambiguity as to how the

parties intended to distribute funds in the event of a net loss rather than a net profit, the precise situation that they now face.

On the one hand, Section 7 could be read to suggest that any "losses" resulting from a lower than anticipated sale price simply would be allocated through the inability of the diminished sale proceeds to satisfy, in the order enumerated in the "waterfall," each category of expenses. Because reimbursement of the plaintiffs' $1,450,000 equity in the land was the last of these enumerated expenses, Section 7 could be read effectively to allocate the risk of a potential loss, with the greatest risk assigned to the plaintiffs. The waterfall could also be read, however, to require a purely mathematical calculation of "net profit" that contemplates not fully satisfying each of the enumerated expense categories and thus potentially resulting in a negative number or "losses." Such losses could then be shared by the parties in accordance with the same percentages that would have applied if funds remained.

For purposes of our review, it is not relevant which of these scenarios is the more plausible or if there may be other logical readings of Section 7. Instead, what is important is that the parties, through express language, indicated that they would share in all profits *and all losses*, and their failure to define precisely what they intended by that language creates a clear ambiguity in the contract that necessitates looking beyond the four corners of the contract to determine the parties' intent.

The only way that the trial court properly could have construed the language of the contract as unambiguously providing only for the sharing of profits was either by ignoring the parties' inclusion of the phrase "and all losses" in the contract, which it is not permitted to do under our canons of contract construction, or by

interpreting the contract as having effectively incorporated the concept of loss sharing, as it was understood by the parties, into the "waterfall" provision and the calculation of net profits, an explanation that the court failed to give. On the basis of our plenary review, we conclude that Section 7 of the 2019 agreement, read in context, reasonably could be interpreted as evincing the parties' intent to share only in profits, if any were realized from the sale of the redeveloped property, or their intent to share in both potential profits or losses. Because the contract language in Section 7, read as a whole, is susceptible to more than one reasonable meaning, it is ambiguous. The trial court's conclusion to the contrary, therefore, cannot stand as a basis for finding probable cause that the defendants will prevail on their counterclaim.

Our conclusion regarding the plaintiffs' first claim, however, does not end our discussion because the court also decided, in the alternative, that, even if the contract language is ambiguous, the court would reach the same result on the basis of the extrinsic evidence presented. We therefore turn to the plaintiffs' second claim challenging this independent basis for the court's decision.

II

The plaintiffs next claim that the court's alternative conclusion—that, even if the relevant contractual language is ambiguous, the extrinsic evidence offered by the parties favored the defendants' interpretation—was improper because, in reaching that conclusion, the court relied on a clearly erroneous factual finding. Specifically, the plaintiffs contend that the court incorrectly found that the defendants, in signing the 2019 agreement, had placed at risk the $268,000 in fees owed to them under the construction contract as modified by the fee reduction letter whereas, in fact, the defendants had been paid those fees and they were never at risk.

The defendants concede that the court misstated the facts but point to a "substantial body of evidence" in the record that demonstrates that the plaintiffs only offered profit sharing and "never contemplated the defendants paying for any losses." Because the court relied primarily on its erroneous factual finding in reaching its conclusion, not the evidence advanced by the defendants, we agree with the plaintiffs that the court's interpretation of the 2019 agreement was incorrect. Accordingly, a new hearing on the defendants' application for a prejudgment remedy is warranted.

In applying the clearly erroneous standard of review, "we focus on the conclusion of the trial court, *as well as the method by which it arrived at that conclusion*, to determine whether it is legally correct and factually supported." (Emphasis added.) *Pandolphe's Auto Parts, Inc.* v. *Manchester*, 181 Conn. 217, 222, 435 A.2d 24 (1980). Here, the court arrived at its conclusion that the parties had not intended to share in potential losses based on its finding that the defendants, by agreeing to the "waterfall" provision of the 2019 agreement, had, in fact, placed in jeopardy the entirety of their fee. Because the defendants had already accepted that level of risk, the court reasoned, it was unlikely that the defendants would have agreed to share in the possibility of additional losses in the manner suggested by the plaintiff. It was on this basis that the court agreed with the defendants' reading of the contract.

The court's finding regarding the defendants' risk, however, is not supported by the record. The court found that the defendants had "agreed to take on a substantial risk" by agreeing to place their $268,000 in "remaining" fees "below the line" and thus payable "only after a calculation of the 'net profit.' " The court also characterized the risk taken as a "risk and a loss that materialized." There is no dispute, however, that

the $268,000 in fees owed under the construction contract as modified by the fee reduction letter never were at risk and, in fact, were paid in full to the defendants. It was only the $126,000 in reinstated fees that the defendants were not paid up front, and those fees were to be paid out in accordance with the waterfall provision; they were not a "below the line" item and were to be paid as part of the calculation of net profits, not after.[10]

The defendants conceded the court's factual error at oral argument before this court. Although the defendants hope to explain away the court's error as inconsequential given other extrinsic evidence presented at the hearing, the problem is that there is no indication in the court's decision to what extent, if any, the court considered or credited any other extrinsic evidence. Furthermore, even if we were to assume that the court relied on other evidence in reaching its decision, this would be of no avail to the plaintiffs because the trial court's assessment of this evidence would have been viewed through the lens of its erroneous assessment of the level of risk the defendants had undertaken.

Given the court's erroneous determination that the contract was unambiguous regarding the parties' intent to share in potential losses and its reliance on clearly erroneous factual findings in reaching its alternative conclusion that the extrinsic evidence presented favored the defendants' interpretation of the contract, we are left with no confidence in the court's assessment of probable cause that the defendants will prevail on their counterclaim. Accordingly, the prejudgment remedy awarded cannot stand, and we remand the case to

[10] The court's description of some items being "above the line" and others "below the line" is simply incongruous with the express language of the waterfall provision, which contemplated the payment of all enumerated expenses, including the $126,000 in reinstated fees, as part of the calculation of net profits.

the court for a new hearing on the defendants' application for a prejudgment remedy.

The judgment is reversed with respect to the granting of the defendant's application for a prejudgment remedy and the case is remanded with direction to hold a new hearing on that application; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION *v.* ROGER ESSAGHOF ET AL.
(AC 45109)

Elgo, Suarez and Bear, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain of the defendants' residential property after they had defaulted on a loan secured by a mortgage deed. The defendants had executed a promissory note in favor of W Co., secured by the mortgage deed, and, subsequently, the plaintiff acquired W Co. and its assets, including the defendants' loan. Following a bench trial in 2015, the trial court rendered a judgment of strict foreclosure in favor of the plaintiff, and the defendants appealed to this court, which affirmed the judgment of the trial court. The defendants then appealed to our Supreme Court, which reversed in part the judgment of this court and ordered the case remanded to this court with direction to reverse the trial court's order directing the defendants to reimburse the plaintiff for certain property taxes and homeowners insurance premiums and to remand the case to that court for the purpose of setting a new law day. On remand, the trial court denied the defendants' motion to dismiss, which was predicated on two alleged deficiencies with the statutory (§ 8-265ee) Emergency Mortgage Assistance Program (EMAP) notice provided by the plaintiff in 2009, a copy of which was introduced into evidence at the trial in 2015. The court then set new law days in accordance with the remand order from the Supreme Court, and the defendants appealed to this court. *Held*:

1. The defendants could not prevail on their claim that the trial court improperly construed the remand order from our Supreme Court in a narrow manner; the directive from the Supreme Court was specific in nature, limited in scope and was clear that this court was ordered to remand

the case to the trial court for the purpose of setting a new law day, and this was not a case in which the Supreme Court remanded the matter for further proceedings in accordance with law.

2. The trial court properly denied the defendants' motion to dismiss that claimed that court lacked subject matter jurisdiction over the foreclosure proceeding due to the plaintiff's noncompliance with the EMAP notice requirements set forth in § 8-265ee, as the motion constituted an impermissible collateral attack on the judgment of strict foreclosure: the defendants' first alleged deficiency, that their counsel was unable to obtain tracking information for the EMAP notice on the website of the United States Postal Service for a mailing that was sent twelve years earlier, did not demonstrate an absence of subject matter jurisdiction that made the judgment of strict foreclosure entirely invalid, the court having taken judicial notice of the undisputed fact that the United States Postal Service stores tracking information for certified mail only for a period of two years; moreover, in rendering its judgment of strict foreclosure in favor of the plaintiff in 2015, the court necessarily rejected the second claimed deficiency, namely, that the EMAP notice furnished by the plaintiff bore the name of W Co., the plaintiff's predecessor in interest, rather than that of the plaintiff itself, the defendants thereafter did not request an articulation of the court's judgment in that regard, and, because that claimed deficiency was at issue before the trial court in 2015, it was incumbent on the defendants to raise any claim of error in their prior appeal with respect thereto, which they failed to do, and, as a result, they abandoned that claim; furthermore, this court concurred with the trial court's observation that a motion to dismiss was a procedurally impermissible substitute for failing to appeal the issue.

Argued October 6—officially released December 20, 2022

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant JPMorgan Chase Bank, N.A., was defaulted for failure to appear; thereafter, the case was tried to the court, *Hon. Kevin Tierney*, judge trial referee; judgment of strict foreclosure, from which the named defendant et al. appealed to this court, *Lavine*, *Mullins* and *Mihalakos*, *Js.*; subsequently, the court, *Hon. Kevin Tierney*, judge trial referee, granted the plaintiff's motion for reimbursement of property taxes and insurance premiums, and the named defendant et al. filed an amended appeal;

thereafter, this court affirmed the judgment of the trial court, and the named defendant et al., on the granting of certification, appealed to the Supreme Court, which reversed in part the judgment of this court; subsequently, the court, *Spader*, *J.*, granted the plaintiff's motion to reset law days and denied the motion to dismiss filed by the named defendant et al., and the named defendant et al. appealed to this court. *Affirmed.*

Ridgely Whitmore Brown, for the appellants (named defendant et al.).

Brian D. Rich, for the appellee (plaintiff).

Opinion

ELGO, J. In this foreclosure action, the defendants Roger Essaghof and Katherine Marr-Essaghof[1] appeal from the judgment of the trial court granting the motion of the plaintiff, JPMorgan Chase Bank, National Association, to reset the law days in accordance with a remand order of our Supreme Court. See *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 336 Conn. 633, 653, 249 A.3d 327 (2020). On appeal, the defendants claim that the court improperly (1) construed that remand order in a narrow manner and (2) denied their motion to dismiss predicated on the plaintiff's alleged noncompliance with the Emergency Mortgage Assistance Program (EMAP) notice requirements set forth in General Statutes § 8-265ee (a).[2] We affirm the judgment of the trial court.

[1] The plaintiff, JPMorgan Chase Bank, National Association, acquired Washington Mutual Bank, F.A., the originator of the note and mortgage from which this foreclosure action arises. Washington Mutual Bank, F.A., also held a junior lien with respect to the mortgage that was foreclosed in this action. As a result, JPMorgan Chase Bank, N.A., also was named as a defendant in this action. Because JPMorgan Chase Bank, N.A., was defaulted for failure to appear as a defendant and is not a party to this appeal in that capacity, we refer to Roger Essaghof and Katherine Marr-Essaghof collectively as the defendants and individually by name.

[2] Although the statement of issues in the defendants' principal appellate brief includes multiple claims, the brief does not include an "argument, divided under appropriate headings into as many parts as there are points

The relevant facts are not in dispute. In May, 2006, the defendants executed an adjustable rate promissory note in favor of Washington Mutual Bank, F.A. (Washington Mutual) in the amount of $1.92 million.[3] The

to be presented, with appropriate references to the statement of facts or to the page or pages of the transcript or to the relevant document"; Practice Book § 67-4 (e); nor does it include "on *each point* . . . a separate, brief statement of the standard of review the appellant believes should be applied." (Emphasis added.) Id. Indeed, the defendants expressly state in the "Argument of Law" portion of that brief that "[a]ll five [claims listed in the statement of issues] are addressed in this subsection . . . ." Nowhere in their brief do the defendants identify an applicable standard of review. As a result, it is difficult to discern any coherent analysis from much of the defendants' brief in the present case. See *Paoletta* v. *Anchor Reef Club at Branford, LLC*, 123 Conn. App. 402, 407, 1 A.3d 1238, cert. denied, 298 Conn. 931, 5 A.3d 491 (2010).

In their statement of issues, the defendants also argue that the court improperly denied their request for an evidentiary hearing and improperly applied a uniform foreclosure standing order, which we note are governed by the abuse of discretion standard of review. See *Customers Bank* v. *CB Associates, Inc.*, 156 Conn. App. 678, 695–96, 115 A.3d 461 (2015); *Norwich* v. *Norwich Harborview Corp.*, 156 Conn. App. 45, 52, 111 A.3d 956 (2015). The defendants have not provided any analysis or legal authority to substantiate those bald assertions. Accordingly, we decline to review those inadequately briefed claims. See *Northeast Ct. Economic Alliance, Inc.* v. *ATC Partnership*, 272 Conn. 14, 51 n.23, 861 A.2d 473 (2004) ("[i]nasmuch as the plaintiffs' briefing of the . . . issue constitutes an abstract assertion completely devoid of citation to legal authority or the appropriate standard of review, we exercise our discretion to decline to review this claim as inadequately briefed"); *Gorski* v. *McIsaac*, 156 Conn. App. 195, 209, 112 A.3d 201 (2015) ("We are not obligated to consider issues that are not adequately briefed. . . . Whe[n] an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived. . . . In addition, mere conclusory assertions regarding a claim, with no mention of relevant authority and minimal or no citations from the record, will not suffice." (Internal quotation marks omitted.)).

Although § 8-265ee has been amended since the events underlying this appeal; see, e.g., Public Acts 2009, No. 09-219, § 29; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[3] As this court noted in the defendants' prior appeal, "Roger Essaghof [is] a highly experienced real estate investor who had negotiated numerous residential and commercial mortgages . . . ." *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 177 Conn. App. 144, 148, 171 A.3d 494 (2017), rev'd in part, 336 Conn. 633, 249 A.3d 327 (2020).

loan was secured by a mortgage deed executed by the defendants on residential property in Weston. On June 24, 2008, the defendants executed a loan modification; they defaulted on the loan shortly thereafter. In September, 2008, the plaintiff acquired Washington Mutual and its assets, including the defendants' loan.

The plaintiff commenced this foreclosure action in March, 2009. Following a bench trial in 2015, the court rendered a judgment of strict foreclosure in favor of the plaintiff. The court found that the total debt was more than $3.2 million, while the fair market value of the property was $1.65 million, and set the law days. From that judgment, the defendants appealed to this court.

While that appeal was pending, the plaintiff filed a motion for equitable relief in the trial court, seeking reimbursement from the defendants for property taxes and homeowners insurance premiums paid during the pendency of the appeal. After hearing argument and receiving supplemental briefing from the parties, the court granted the plaintiff's motion. The defendants then amended their appeal to include a challenge to that determination. As a result, two distinct claims were presented to this court in the defendants' prior appeal: (1) whether the trial court improperly rejected their special defenses of fraudulent inducement and unclean hands; and (2) whether the trial court abused its discretion in ordering them to reimburse the plaintiff for property taxes and homeowners insurance premiums paid by the plaintiff during the pendency of the appeal. See *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 177 Conn. App. 144, 146, 171 A.3d 494 (2017), rev'd in part, 336 Conn. 633, 249 A.3d 327 (2020). This court rejected those claims and affirmed the judgment of the trial court in all respects. See id., 163.

Our Supreme Court subsequently granted the defendants' petition for certification to appeal from that judg-

ment, limited to the issue of whether this court properly had affirmed "the judgment of the trial court ordering the defendants to reimburse the plaintiff for property taxes and homeowners insurance premiums in violation of the provisions of General Statutes § 49-14 . . . ." *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 328 Conn. 915, 915, 180 A.3d 962 (2018). Although that court certified a single question for further review; see *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, supra, 336 Conn. 638 ("we granted the defendants' petition limited to the one issue"); the defendants nonetheless raised *two* claims before the Supreme Court: (1) whether this court improperly had affirmed the trial court's order to reimburse the plaintiff for taxes and insurance premiums; and (2) whether the Supreme Court "should vacate the judgment in its entirety and order a new trial before a different judge because certain statements the trial court made at a hearing . . . call into question the trial court's impartiality . . . ." Id., 638–39.

With respect to the certified issue, the Supreme Court concluded that "the trial court abused its discretion because the relief it ordered is inconsistent with the remedial scheme available to a mortgagee in a strict foreclosure."[4] Id., 635. With respect to the defendants' claim of judicial bias, the court refused to consider

[4] As the court explained, "when the defendants defaulted on their payment obligations, and the plaintiff elected strict foreclosure as its remedy, the plaintiff chose a remedial scheme that prescribes a specific and exclusive process by which it could be made whole. At the conclusion of this process, assuming the defendants do not redeem, their equity of redemption will be extinguished by the passing of the law days, and absolute title to the property will vest in the plaintiff. If the debt exceeds the value of the property, the plaintiff may then pursue the difference from the defendants in a deficiency proceeding pursuant to § 49-14. The deficiency judgment is the only procedure available to the plaintiff to recover its mortgage debt, including payments advanced to pay real estate taxes and property insurance, in excess of the value of the property." *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, supra, 336 Conn. 650.

the merits of that contention, stating: "We decline to consider the merits of the defendants' second claim because the defendants did not raise the disqualification issue before the trial court or the Appellate Court, and because it is outside the scope of the certified question." Id., 639. The Supreme Court thus reversed in part the judgment of this court and ordered as follows: "[T]he case is remanded to that court with direction to reverse the trial court's order directing the defendants to reimburse the plaintiff for property taxes and homeowners insurance premiums and to remand the case to that court for the purpose of setting a new law day; the judgment of the Appellate Court is affirmed in all other respects." Id., 653.

On August 13, 2021, the plaintiff filed a motion in the trial court to reset the law days in accordance with that remand order. In response, the defendants filed an objection to that motion as well as a motion to dismiss, in which they argued that the trial court lacked subject matter jurisdiction over the foreclosure action due to the plaintiff's alleged failure to comply with the EMAP notice requirements.[5] The court held a hearing on those motions on October 8, 2021. It thereafter issued a memorandum of decision in which it denied the defendants' motion to dismiss and set new law days in accordance with the remand order from the Supreme Court. From that judgment, the defendants now appeal.

I

We first address the defendants' contention that the trial court improperly construed the remand order from the Supreme Court in a narrow manner. A determination as to the scope of a remand order presents a question of law, over which our review is plenary. See *State*

[5] More specifically, the defendants alleged that the EMAP notice furnished by the plaintiff in the present case (1) was not sent by certified mail and (2) bore the name of Washington Mutual, rather than the plaintiff.

v. *Brundage*, 320 Conn. 740, 747, 135 A.3d 697 (2016). As the Supreme Court has explained, "[i]t is the duty of the trial court on remand to comply strictly with the mandate of [an] appellate court according to its true intent and meaning. No judgment other than that directed or permitted by the reviewing court may be rendered . . . ." (Internal quotation marks omitted.) *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 65, 689 A.2d 1097 (1997). The remand order from the Supreme Court in this case could not be more clear—this court was ordered to "remand the case to [the trial] court for the purpose of setting a new law day . . . ." *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, supra, 336 Conn. 653. This is not a case in which our Supreme Court remanded the matter for further proceedings in accordance with law. See, e.g., *Allstate Life Ins. Co.* v. *BFA Ltd. Partnership*, 287 Conn. 307, 323, 948 A.2d 318 (2008). Here, the directive was specific in nature and limited in scope. We, therefore, reject the defendants' claim that the trial court narrowly construed the remand order from the Supreme Court when it granted the plaintiff's motion to set new law days.

II

The defendants also argue that, because the EMAP notice requirements, when applicable, operate as a "condition precedent" to a court's exercise of jurisdiction over a foreclosure action, the court improperly denied their motion to dismiss. This court has held that noncompliance with the EMAP notice requirements deprives a trial court of subject matter jurisdiction over a foreclosure proceeding. See *Pennymac Corp.* v. *Tarzia*, 215 Conn. App. 190, 202, 281 A.3d 469 (2022); *MTGLQ Investors, L.P.* v. *Hammons*, 196 Conn. App. 636, 646, 230 A.3d 882, cert. denied, 335 Conn. 950, 238 A.3d 21 (2020). Relying on the precept that an issue of subject matter jurisdiction may be raised at any time; see, e.g., *Oxford House at Yale* v. *Gilligan*, 125 Conn.

App. 464, 473, 10 A.3d 52 (2010); the defendants claim that the court improperly concluded that their motion to dismiss constituted an impermissible collateral attack on the judgment of strict foreclosure rendered in 2015. We do not agree.

As this court has observed, "[o]ur jurisprudence . . . has recognized limits to raising a collateral attack setting forth a claim of lack of subject matter jurisdiction. . . . Although challenges to subject matter jurisdiction may be raised at any time, it is well settled that [f]inal judgments are . . . presumptively valid . . . and collateral attacks on their validity are disfavored. . . . [U]nless a litigant can show an absence of subject matter jurisdiction that makes the prior judgment of a tribunal entirely invalid, he or she must resort to direct proceedings to correct perceived wrongs . . . . A collateral attack on a judgment is a procedurally impermissible substitute for an appeal. . . . [A]t least where the lack of jurisdiction is not entirely obvious, the critical considerations are whether the complaining party had the opportunity to litigate the question of jurisdiction in the original action, and, if he did have such an opportunity, whether there are strong policy reasons for giving him a second opportunity to do so. . . . Our Supreme Court [has] explained that such a collateral attack is permissible only in rare instances when the lack of jurisdiction is entirely obvious so as to amount to a fundamental mistake that is so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority . . . [or] the exceptional case in which the court that rendered judgment lacked even an arguable basis for jurisdiction." (Citations omitted; internal quotation marks omitted.) *Rider* v. *Rider*, 200 Conn. App. 466, 479–80, 239 A.3d 357 (2020); see also *Hirtle* v. *Hirtle*, 217 Conn. 394, 401–402, 586 A.2d 578 (1991) (party advocating collateral attack on judgment bears "burden to prove the existence of a jurisdictional deficiency").

The defendants' motion to dismiss is predicated on two alleged deficiencies with the EMAP notice provided by the plaintiff in 2009, a copy of which was introduced into evidence at trial in 2015. The first requires little discussion, as the defendants claim that "when one searches the certified number . . . on the United States Postal Service's tracking website, [as the defendants' counsel] did on August 17, 2021, the website responds with a message indicating 'Label created, not yet in system.' " In its memorandum of decision, the trial court rejected that claim, taking judicial notice of the undisputed fact that the United States Postal Service only stores tracking information for certified mail for two years.[6] See, e.g., *Trustees of The Park Place Condominium Trust* v. *Basic Devices, LLC*, Docket No. 15-P-1427, 2016 WL 7161971, *2 n.5 (Mass. App. December 8, 2016) (decision without published opinion, 90 Mass. App. 1119, 65 N.E.3d 32) (taking judicial notice of fact that "[t]he United States Postal Service only keeps records of certified mail tracking information for 'up to two (2) years' "); *My Way B & G, Inc.* v. *Director, Division of Taxation*, Docket No. A-0583-17T2, 2019 WL 2427514, *3 n.3 (N.J. Super. App. Div. June 11, 2019) ("the United States Postal Service only maintains tracking records for two years after the delivery"). The mere fact that the defendants' counsel was unable to obtain tracking information in 2021 for a mailing that was sent twelve years earlier[7] does not demonstrate an

[6] In an objection filed more than one month prior to the October 8, 2021 hearing on the defendants' motion to dismiss, the plaintiff asked the court to take judicial notice "of the practices and policies of the United States Postal Service as they pertain to tracking information." Appended to that objection as an exhibit was a copy of a "Tracking Guide" promulgated by the United States Postal Service, which states that records of tracking and delivery confirmation for certified mail are kept for "[u]p to [two] years."

[7] The plaintiff's sworn affidavit of compliance with EMAP requirements, which was admitted as an exhibit at trial in 2015, states in relevant part that the plaintiff mailed a notice "containing all of the information required by [§ 8-265ee (a)]" on January 6, 2009.

absence of subject matter jurisdiction that makes the judgment of strict foreclosure entirely invalid. See *Rider* v. *Rider*, supra, 200 Conn. App. 479.

In their motion to dismiss, the defendants also claim that the trial court lacked jurisdiction over this foreclosure action because the notice furnished by the plaintiff bore the name of Washington Mutual, the plaintiff's predecessor in interest, rather than that of the plaintiff itself. The record before us indicates that the issue of whether the plaintiff complied with the EMAP requirements in this regard was disputed by the parties at trial. Indeed, the March 4, 2015 trial transcript contains the testimony of a witness offered by the plaintiff regarding the notice provided to the defendants and the names used therein.[8] In their July 1, 2015 posttrial brief, the defendants specifically argued that the EMAP notice in evidence "was not from the plaintiff, it was from a nonexistent entity . . . which many months before the January, 2009 notice, had ceased to exist . . . . Its assets were sold to the plaintiff but the entity was gone." Significantly, the defendants at that time alleged that "[t]he notice was deficient for that reason." The defendants further argued that, as a result of that deficiency, "the plaintiff has failed to satisfy a condition precedent

[8] The March 4, 2015 transcript contains the following colloquy between the plaintiff's attorney and the witness Wilkin Rodriguez:

"Q. Can you tell me, after [the plaintiff] purchased the assets of Washington Mutual, whether [the plaintiff] continued to use the name of Washington Mutual for some time after?

"A. Yes. The Washington Mutual name was kept for servicing purposes for a while after the merger. It took a while to integrate the servicing platforms for the two companies so a lot of the customers were still receiving mail under the Washington Mutual name. We had several duplicate loan numbers and things of that nature that had to be straightened out before everybody began being serviced under [the plaintiff's name].

"Q. So is it your understanding, based on that, that [the January 6, 2009 notice to the defendants] was issued by [the plaintiff] in the name of Washington Mutual?

"A. That's correct."

to mortgage foreclosure and the case should fail for that reason."

In rendering a judgment of strict foreclosure in favor of the plaintiff, the trial court necessarily rejected that claimed deficiency in the notice furnished by the plaintiff. See *Young* v. *Commissioner of Correction*, 104 Conn. App. 188, 190 n.1, 932 A.2d 467 (2007) (when decision lacks specificity, Appellate Court presumes trial court made necessary findings and determinations supported by record on which judgment is predicated), cert. denied, 285 Conn. 907, 942 A.2d 416 (2008). The defendants thereafter did not request an articulation of the court's judgment in that regard. See *Orcutt* v. *Commissioner of Correction*, 284 Conn. 724, 739 n.25, 937 A.2d 656 (2007) ("in the absence of an articulation . . . [an appellate court will] presume that the trial court acted properly").

Because that claimed deficiency was at issue before the trial court in 2015, it was incumbent on the defendants to raise any claim of error in their appeal with respect thereto. That they failed to do. As a result, the defendants abandoned that claim. See *Marlborough* v. *AFSCME, Council 4, Local 818-052*, 309 Conn. 790, 795 n.5, 75 A.3d 15 (2013) (claim raised by party at trial deemed abandoned when trial court did not specifically address claim and party "has not raised that issue on appeal" before either Appellate Court or Supreme Court); *Czarnecki* v. *Plastics Liquidating Co.*, 179 Conn. 261, 262 n.1, 425 A.2d 1289 (1979) ("claims of error not briefed are considered abandoned").

In denying the defendants' motion to dismiss, the court remarked that "it is entirely inappropriate to collaterally attack a judgment when the issue raised today was raised at the trial [in 2015] and not preserved for appeal. This motion to dismiss is a procedurally impermissible substitute for failing to appeal on this issue."

We concur with that observation. As our Supreme Court has explained, "even litigation about subject matter jurisdiction should take into account the importance of the principle of the finality of judgments, particularly when the parties have had a full opportunity originally to contest the jurisdiction of the adjudicatory tribunal." (Internal quotation marks omitted.) *Investment Associates* v. *Summit Associates, Inc.*, 309 Conn. 840, 855, 74 A.3d 1192 (2013). This is not a case in which a party is seeking to raise a jurisdictional challenge for the first time on remand from the Supreme Court. See *Noble* v. *White*, 85 Conn. App. 233, 237, 857 A.2d 362 (2004). Here, the defendants contested the jurisdictional issue of the plaintiff's compliance with the EMAP notice requirements before the trial court in 2015, claiming that "the plaintiff has failed to satisfy a condition precedent to mortgage foreclosure and the case should fail" due to the fact that the EMAP notice to the defendants did not specify the plaintiff's name.[9] The trial court did not agree and rendered a judgment of strict foreclosure in favor of the plaintiff. Although the defendants appealed from that judgment to this court and later amended that appeal to include an additional claim, they did not raise any claim with respect to the jurisdictional issue of the plaintiff's compliance with the EMAP notice requirements. That appeal ultimately was resolved by our Supreme Court, which rendered a final judgment and remanded the case to the trial court "for the purpose of setting a new law day . . . ." *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, supra, 336 Conn. 653. In such circumstances, a second bite at the proverbial apple is unwarranted. We, therefore, conclude that the court properly denied the defendants'

[9] At oral argument before this court, the defendants were asked if it was their position that that the EMAP notice never was sent. The defendants' counsel at that time conceded that the notice had been sent but maintained that said notice was "invalid" because it did not bear the name of the plaintiff.

motion to dismiss and set new law days in accordance with the remand order of our Supreme Court.

The judgment is affirmed and, in accordance with our Supreme Court's remand order, the case is remanded for the sole purpose of setting new law days.

In this opinion the other judges concurred.

STEPHEN M. TUNICK *v.* BARBARA TUNICK ET AL. (AC 45085)

Moll, Seeley and Lavine, Js.

Syllabus

The plaintiff, who was a remainder beneficiary of a revocable trust, which included a corpus of, inter alia, antique automobiles, sought damages from the defendants, his sisters, B and R, and from D, the administrator of the estate of S, the plaintiff's mother, in connection with the administration of the trust. The plaintiff claimed, inter alia, that B and S, who had been cotrustees of the trust, had breached their fiduciary duties to him. D and B filed motions to strike the counts that alleged that a contract had been breached, which the trial court granted, and, thereafter, the defendants filed separate motions for summary judgment on the ground that the plaintiff's claims were time barred pursuant to the three year tort statute of limitations (§ 52-577). While the motions for summary judgment were pending, the plaintiff filed a revised complaint that added a count against B sounding in unjust enrichment, alleging that B, by a continuing course of conduct, breached the trust agreement by, inter alia, misappropriating and diverting assets, principal and income from the plaintiff. The trial court granted the motions for summary judgment filed by R and D, having determined that they met their burden of showing that the plaintiff's claims were time barred by § 52-577. The trial court also granted in part the motion for summary judgment filed by B; the count of unjust enrichment was not adjudicated in that ruling. The court determined that there was no evidentiary basis for the plaintiff's claims that the statute of limitations in § 52-577 was tolled by the continuous course of conduct doctrine, and it concluded that no genuine issues of material fact existed as to when the plaintiff's cause accrued and when his action was commenced. On the plaintiff's prior appeal to this court, this court affirmed the trial court's granting of summary judgment in favor of R and D but did not address on the merits the plaintiff's challenges to the trial court's rendering of summary judgment in part in favor of B, reasoning that a final judgment as to B was lacking

because the unjust enrichment count of the complaint remained pending. Thereafter, the trial court granted B's motion to strike the unjust enrichment count on the ground that it was time barred by § 52-577, and the plaintiff appealed to this court. *Held*:

1. The trial court improperly granted B's motion to strike the unjust enrichment count of the revised complaint on the ground that it was time barred by § 52-577: a claim of unjust enrichment sounds neither in tort nor in contract but is an equitable claim for relief, not subject to any statute of limitations, and, instead, is subject to the equitable doctrine of laches; moreover, B's argument that § 52-577 applied because the unjust enrichment claim contained tort like allegations was unsupported by our jurisprudence.
2. The plaintiff could not prevail on his claim that the trial court improperly granted B's motion for summary judgment, that court having determined that no genuine issues of material fact existed as to whether § 52-577 was tolled by the operation of the continuing course of conduct doctrine; in the present case, B's alleged failure to account for antique automobiles and unspecified automobile parts did not constitute a continuous series of events that gave rise to a cumulative injury, and the plaintiff failed to establish the existence of a genuine issue of material fact as to whether B committed a continuous breach of the fiduciary duty she owed to remainder beneficiaries that resulted in an enhanced injury to the plaintiff.

Argued October 11—officially released December 20, 2022

Procedural History

Action for, inter alia, breach of fiduciary duty, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Truglia*, *J.*, granted the motions to strike filed by the defendant Richard S. DiPreta et al.; thereafter, the plaintiff filed an amended complaint; subsequently, the court granted in part the motion for summary judgment filed by the named defendant, granted the motions for summary judgment filed by the defendant Roberta G. Tunick et al. and rendered judgment thereon, from which the plaintiff appealed to this court, *Keller*, *Elgo* and *Lavery*, *Js.*; subsequently, the court, *Truglia*, *J.*, denied the plaintiff's motion to open the judgment, and the plaintiff filed an amended appeal to this court, which dismissed the appeal in part and affirmed the judgment in all other respects; thereafter, the court, *Hon. Dale W. Radcliffe*,

judge trial referee, granted the named defendant's motions to strike and for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed in part*; *further proceedings.*

William W. Taylor, for the appellant (plaintiff).

Christina M. Volpe, with whom, on the brief, was *Thomas P. O'Dea, Jr.*, for the appellee (named defendant).

Opinion

LAVINE, J. The plaintiff, Stephen M. Tunick, appeals from the judgment of the trial court rendered in favor of the defendant Barbara Tunick.[1] On appeal, the plaintiff contends that the court improperly granted the defendant's (1) motion to strike and (2) motion for summary judgment. We agree with the first claim and disagree with the second claim. Accordingly, we reverse in part and affirm in part the judgment of the trial court.

In *Tunick* v. *Tunick*, 201 Conn. App. 512, 517–22, 242 A.3d 1011 (2020), cert. denied, 336 Conn. 910, 244 A.3d 561 (2021), this court detailed the facts, as gleaned from the pleadings, affidavits, and other proof submitted, viewed in the light most favorable to the plaintiff, which we now summarize. In 1981, David H. Tunick (settlor) established the David H. Tunick revocable trust (trust). Id., 517. The trust corpus included, among other things,

[1] The plaintiff initially commenced this action against his sisters, Barbara Tunick and Roberta G. Tunick (Roberta). Also named as defendants were Richard S. DiPreta, coadministrator of the estate of the plaintiff's mother, Sylvia G. Tunick, who died in 2015, and Edward Axelrod, coadministrator of the estate of Sylvia G. Tunick. Subsequently, the plaintiff withdrew the action as against Axelrod, and the court's rendering of summary judgment in favor of Roberta and DiPreta previously was affirmed by this court. See *Tunick* v. *Tunick*, 201 Conn. App. 512, 517–22, 242 A.3d 1011 (2020), cert. denied, 336 Conn. 910, 244 A.3d 561 (2021). Consequently, Barbara Tunick is the only defendant participating in this appeal. For clarity, in this opinion we refer to Barbara Tunick as the defendant.

antique automobiles. Id. The primary beneficiaries of the trust were the settlor and his wife, Sylvia G. Tunick (Sylvia), and their three children—the plaintiff, the defendant, and Roberta G. Tunick (Roberta)—who were named as remainder beneficiaries. Id. The plaintiff and the defendant initially were appointed as cotrustees of the trust, and, in 1993, the trust was amended to include Sylvia as a third cotrustee. Id. The trust provided in relevant part that Sylvia would become the sole primary beneficiary of the trust upon the settlor's death and that all income and principal of the trust would be used for her benefit. Id. The trust further provided that, upon Sylvia's death, the plaintiff, the defendant, and Roberta would receive equal shares of the remaining trust property. Id. The settlor died in 1997, leaving Sylvia as the sole primary beneficiary of the trust. Id. In 2004, Sylvia and the defendant filed an application with the Probate Court to remove the plaintiff as a trustee. Id. The court removed him as a trustee, ordering that he deliver any property belonging to the trust to the remaining trustees and that the antique automobiles be sold. Id., 517–18. Sylvia and the defendant acted as cotrustees of the trust from July 7, 2004, until June 11, 2013, when the Probate Court issued an order removing them as cotrustees.[2] Id., 518. Sylvia died in 2015, and Richard S. DiPreta was appointed as the administrator of her estate. Id.

The plaintiff thereafter commenced the present action in 2016 and alleged the following in his twelve count second revised complaint: breach of fiduciary duty against the defendant and Sylvia;[3] conversion, civil theft in violation of General Statutes § 52-564, and fraudulent misrepresentation against the defendant, Sylvia,

[2] The Probate Court appointed Richard J. Margenot as the successor trustee.

[3] The claims concerning Sylvia were brought against DiPreta, in his capacity as administrator of Sylvia's estate, and relate to actions taken by Sylvia as cotrustee of the trust.

and Roberta; and breach of contract against the defendant. The defendant filed a motion to strike the breach of contract count, arguing that it was legally insufficient as a matter of law because a trust is not a contract. The defendant also filed a motion for summary judgment, in which she argued that the counts against her alleging breach of fiduciary duty, conversion, civil theft, and fraudulent misrepresentation were time barred pursuant to the three year tort statute of limitations, General Statutes § 52-577.[4] The defendant also argued that she was entitled to summary judgment on the breach of contract count. Roberta and DiPreta filed separate motions for summary judgment and argued that the counts against them were time barred by § 52-577. In his memorandum of law in opposition to the three motions for summary judgment, the plaintiff argued, among other things, that the time limitation in § 52-577 was tolled by a continuing course of conduct.

The court, *Truglia*, *J.*, granted the defendant's motion to strike the breach of contract count. While the motions for summary judgment were pending, the plaintiff filed a third revised complaint, which, notably, omitted the breach of contract claim against the defendant and added a claim of unjust enrichment in its place. The court, *Truglia*, *J.*, thereafter, granted the defendant's motion for summary judgment on the counts in the second revised complaint against the defendant alleging breach of fiduciary duty, conversion, civil theft, and fraudulent misrepresentation. In response to a motion for articulation filed by the plaintiff, the court clarified that it had not rendered summary judgment as to the new twelfth count of the third revised complaint, which alleged unjust enrichment. The court granted in full the

[4] General Statutes § 52-577 provides that "[n]o action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

motions for summary judgment filed by Roberta and DiPreta.

Thereafter, the plaintiff appealed to this court, claiming, among other things, that genuine issues of material fact existed as to whether the claims in his complaint were time barred under § 52-577. *Tunick* v. *Tunick*, supra, 201 Conn. App. 516–17. This court affirmed the trial court's judgment granting the motions for summary judgment filed by Roberta and DiPreta and dismissed the portion of the plaintiff's appeal challenging the trial court's granting in part the defendant's motion for summary judgment. Id., 522–24. In 2021, the plaintiff filed a fifth revised complaint, which alleged, in count twelve, unjust enrichment.[5] The defendant moved to strike the unjust enrichment count of the fifth revised complaint, arguing that it was time barred by § 52-577. The court, *Radcliffe*, *J.*, granted the motion. Thereafter, pursuant to Practice Book § 10-44, the defendant filed a motion for judgment on the stricken unjust enrichment count, which was the remaining count of the complaint directed to the defendant that was not disposed of by the court's granting of the defendant's motion for summary judgment.[6] The court granted the motion and rendered judgment in favor of the defendant. This appeal

[5] In this complaint, the plaintiff also alleged against the defendant, for purposes of preservation of rights for appellate review, breach of fiduciary duty, conversion, civil theft and misrepresentation/fraud.

[6] Practice Book § 10-44 provides in relevant part: "Within fifteen days after the granting of any motion to strike, the party whose pleading has been stricken may file a new pleading; provided that in those instances where an entire complaint, counterclaim or cross complaint, or any count in a complaint, counterclaim or cross complaint has been stricken, and the party whose pleading or a count thereof has been so stricken fails to file a new pleading within that fifteen day period, the judicial authority may, upon motion, enter judgment against said party on said stricken complaint, counterclaim or cross complaint, or count thereof. . . ." See also *Lavette* v. *Stanley Black Decker, Inc.*, 213 Conn. App. 463, 469 n.6, 278 A.3d 1072 (2022) ("As a general rule, [a]fter a court has granted a motion to strike, the plaintiff may either amend his pleading [pursuant to Practice Book § 10-44] or, on the rendering of judgment, file an appeal. . . . The choices are mutually exclusive [as] [t]he filing of an amended pleading operates as a waiver of

followed. Additional facts and procedural history will be set forth as necessary.

I

The plaintiff claims that the court improperly granted the defendant's motion to strike the unjust enrichment count of the fifth revised complaint on the ground that it was time barred by § 52-577. We agree.

In the twelfth count of the fifth revised complaint, the plaintiff alleged that the defendant breached her fiduciary duties under the trust agreement by, among other things, failing to turn over trust assets, and thereby unjustly enriched herself to the detriment of the plaintiff.[7] In granting the motion to strike, the court determined that the three year tort statute of limitations in § 52-577 applied so as to bar the unjust enrichment claim, as it did not allege a contractual dispute but, rather, involved allegations of tortious conduct. "Whether a particular action is barred by the statute of limitations is a question of law to which we apply a plenary standard of review." *Federal Deposit Ins. Corp.* v. *Owen*, 88 Conn. App. 806, 814, 873 A.2d 1003, cert. denied, 275 Conn. 902, 882 A.2d 670 (2005).

Generally, a motion to strike is not the proper procedural vehicle for raising a claim that an action is time barred by the lapse of a statute of limitations. *Forbes* v. *Ballaro*, 31 Conn. App. 235, 239–40, 624 A.2d 389 (1993). In the present case, however, we turn our focus away from procedural concerns to an even more fundamental issue. In *Reclaimant Corp.* v. *Deutsch*, 332 Conn.

the right to claim that there was error in the sustaining of the [motion to strike] the original pleading." (Internal quotation marks omitted.)).

[7] "Plaintiffs seeking recovery for unjust enrichment must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment." (Internal quotation marks omitted.) *Schirmer* v. *Souza*, 126 Conn. App. 759, 763, 12 A.3d 1048 (2011).

590, 211 A.3d 976 (2019), our Supreme Court held that "unjust enrichment is not a legal claim sounding in either tort or contract—it is an equitable claim for relief. As an equitable claim, its timeliness is not subject to a statute of limitations but, rather, to the equitable doctrine of laches." Id., 613; see id. (for purposes of laches, courts in equitable proceedings may look by analogy to statute of limitations but are not obligated to adhere to those limitations). The court concluded that unjust enrichment claims are not barred by the three year limitation period in § 52-577. Id., 614.

We agree with the plaintiff that his claim for unjust enrichment against the defendant is not subject to a statute of limitations. The defendant's argument—that § 52-577 applies because the unjust enrichment count contains tort like allegations of breaches of fiduciary duties—is creative, but unavailing. *Reclaimant Corp.* makes no exception to its holding that unjust enrichment claims are not bound by a statute of limitations. A claim of unjust enrichment, which sounds neither in tort nor in contract, is an equitable claim for relief that is not subject to *any* statute of limitations, including § 52-577. Id., 613–14. Because the unjust enrichment count was not a tort claim and was not time barred by § 52-577, we conclude that the court improperly granted the motion to strike on that basis.

II

The plaintiff next claims that the court improperly granted the defendant's motion for summary judgment as to the counts of the second revised complaint[8] alleging breach of fiduciary duty, conversion, civil theft, and

[8] A final disposition was rendered on all counts of the underlying complaint by the court's granting of a partial summary judgment as to the defendant on the second revised complaint and by the striking of the unjust enrichment count against the defendant on the fifth revised complaint. See footnote 10 of this opinion. Accordingly, we address in this appeal the plaintiff's claims regarding the court's decisions as to the defendant on both the second revised complaint and fifth revised complaint.

fraudulent misrepresentation because genuine issues of material fact exist as to whether § 52-577[9] was tolled by the continuing course of conduct doctrine. We disagree.

We begin with the standard of review and relevant legal principles. When reviewing a decision of a trial court to grant a motion for summary judgment, "[t]he facts at issue are those alleged in the pleadings . . . . 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. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Citation omitted; internal quotation marks omitted.) *Tunick* v. *Tunick*, supra, 201 Conn. App. 532

"The continuing course of conduct doctrine operates to delay the commencement of the running of an otherwise applicable statute of limitations. . . . When presented with a motion for summary judgment under the continuous course of conduct doctrine, [the court] must determine whether there is a genuine issue of material fact with respect to whether the defendant: (1) committed an initial wrong upon the plaintiff; (2) owed a continuing duty to the plaintiff that was related to the alleged original wrong; and (3) continually breached that duty. . . . Although the question of whether a party's claim is barred by the statute of limitations is a question of law, the issue of whether a party engaged in a continuing course of conduct that tolled the running of the statute of limitations is a mixed question of law and fact."

[9] See footnote 4 of this opinion.

(Citations omitted; internal quotation marks omitted.) Id., 535–36.

In ruling on the motions for summary judgment, the trial court determined that the three year limitation period in § 52-577 commenced in 2013 and had expired by the time the plaintiff commenced the action in 2017. In rejecting the plaintiff's argument that the relevant limitation period was tolled under the continuing course of conduct doctrine, the court reasoned in its memorandum of decision that "[t]he gravamen of the plaintiff's complaint is that [the defendant] and [Sylvia's estate] are liable to him for breach of fiduciary duties as trustees. Through a continuing course of conduct, beginning in 1997 and ending in 2013, the plaintiff alleges that [the defendant] and Sylvia, acting alone or together, improperly dissipated trust assets by prematurely distributing funds out of the trust to themselves, thereby intentionally misappropriating and diverting principle, income and assets that should have passed to him as a remainderman of that trust. He also alleges that [the defendant] and Sylvia engaged in self-dealing and/or intentionally and carelessly handled the trust assets." As to the defendant and Sylvia, who were both trustees and against whom the plaintiff alleged claims for breach of fiduciary duty, conversion, civil theft, and fraudulent misrepresentation, the court stated: "[T]he court agrees that all of the plaintiff's allegations of wrongdoing in the complaint describe conduct by [the defendant, Sylvia, and Roberta] from 1997 to 2013. . . . The plaintiff does not contest [their] assertions that [the defendant] and [Sylvia] ceased acting as trustees in June, 2013. . . . In short, [the defendant, DiPreta and Roberta] have met their preliminary burden of showing that the plaintiff's claims are time barred by the three year statute of limitations under § 52-577. The burden now shifts to the plaintiff to show that genuine issues of material fact exist upon which the trier of fact could conclude that

the statute of limitations has been tolled to May 5, 2017, the date of service. . . . [T]he court rejects all the tolling arguments advanced by the plaintiff. . . . The court . . . finds no evidentiary basis for the plaintiff's claims that the statute of limitations is tolled by the continuous course of conduct doctrine . . . ." (Footnote omitted.)

In the plaintiff's previous appeal, this court did not address on the merits the plaintiff's challenge to the trial court's rendering of summary judgment in part in favor of the defendant, reasoning that a final judgment was lacking because the unjust enrichment count of the complaint remained pending.[10] *Tunick* v. *Tunick*, supra, 201 Conn. App. 522–24. In affirming the trial court's granting of the motions for summary judgment filed by Roberta and DiPreta, this court rejected the plaintiff's argument that genuine issues of material fact existed as to whether § 52-577 was tolled by the operation of the continuing course of conduct doctrine. Id., 531–53.

In addressing the plaintiff's claim that the court improperly granted the motion for summary judgment filed by DiPreta as to the claims concerning Sylvia, who, for purposes of the unjust enrichment claim, is situated similarly to the defendant, this court in the previous appeal determined that the trial court properly had

[10] In the present appeal, the plaintiff argues that, if we reverse the judgment of the court granting the defendant's motion to strike, then we cannot review his second claim due to the lack of a final judgment. In striking the unjust enrichment count and subsequently rendering judgment thereon, the trial court rendered judgment on the remaining count of the complaint directed to the defendant that was not disposed of by the court's granting of the defendant's motion for summary judgment. See footnote 6 of this opinion. Because there has been a final disposition as to all counts of the underlying complaint, a final judgment exists for purposes of appeal. See *Krausman* v. *Liberty Mutual Ins. Co.*, 195 Conn. App. 682, 687, 227 A.3d 91 (2020) ("an appeal challenging an order issued during the pendency of a civil action ordinarily must wait until there has been a final disposition as to all counts of the underlying complaint").

determined that the application of the continuing course of conduct doctrine was not warranted. Id., 534–49. This court determined that, because Sylvia had served as a trustee from 1993 to June 11, 2013, she owed a continuing fiduciary duty to the plaintiff, as a remainder beneficiary of the trust, to account for trust assets and that her duty did not end immediately upon her removal as a trustee on June 11, 2013. Id., 537–42. We noted, however, regarding the third prong of the continuing course of conduct doctrine, that the relevant question was "whether the plaintiff has presented an evidentiary basis to establish a genuine issue of material fact as to whether Sylvia and the estate continually breached the fiduciary duty to account for trust assets following her removal as a trustee in 2013." Id., 542. This court determined that the pleadings contained no specific allegations of a continuing breach of a fiduciary duty after Sylvia's removal as a trustee in June, 2013, except with respect to the issue of antique automobiles and parts, and that "the failure to account for the two antique automobiles and unspecified automobile parts does not constitute a continuous series of events that give rise to a cumulative injury." Id., 548. This court determined that the plaintiff had not established the existence of a genuine issue of material fact regarding whether Sylvia and DiPreta committed a continuous breach of the fiduciary duty owed to remainder beneficiaries that resulted in an enhanced injury to him and concluded that the court properly determined that the application of the continuing course of conduct doctrine was not warranted. Id., 541–49.

In the present appeal, the plaintiff argues that genuine issues of material fact exist as to whether § 52-577 was tolled by the continuing course of conduct doctrine and focuses on the defendant's alleged failure to account for antique automobiles and parts to support his con-

tention. We disagree with the plaintiff and are not persuaded by his argument that the continuing course of conduct doctrine applies as to the defendant because, unlike Sylvia, the defendant "is still alive and has the ability to retain an auto[s] of her choosing . . . ." The alleged injury is the same as to both Sylvia and the defendant. As with Sylvia, the only specific allegations made by the plaintiff of a continuing breach of a fiduciary duty owed to him by the defendant after she ceased being a trustee in June, 2013, concerned the failure to account for antique automobiles and parts. The reasoning stated in *Tunick* for why the trial court properly determined that the continuing course of conduct doctrine did not operate to toll § 52-577 as to Sylvia, applies also to the defendant. As this court reasoned in *Tunick* with respect to Sylvia, we now conclude in the present appeal as to the defendant that the alleged failure to account for antique automobiles and unspecified automobile parts does not constitute a continuous series of events that give rise to a cumulative injury and the plaintiff has not established the existence of a genuine issue of material fact as to whether the defendant committed a continuous breach of the fiduciary duty she owed to remainder beneficiaries that resulted in an enhanced injury to the plaintiff. See *Tunick* v. *Tunick*, supra, 201 Conn. App. 548–49. Accordingly, we conclude that the court properly determined that the application of the continuing course of conduct doctrine was not warranted as to the defendant.

The judgment is reversed only with respect to the granting of the defendant's motion to strike count twelve of the plaintiff's fifth revised complaint and the case is remanded for further proceedings according to law; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.