GABRIELLE DITULLIO *v.* LM GENERAL INSURANCE COMPANY
(AC 44114)

Alvord, Suarez and Clark, Js.

Syllabus

The plaintiff sought to confirm an arbitration award against the defendant arising out of a separate action in which she sought to recover damages from the insurer L for underinsured motorist benefits. The plaintiff previously had received a $20,000 settlement from a tortfeasor in connection with injuries she sustained in a motor vehicle collision. In bringing the underinsured motorist action against L, the plaintiff alleged that the $20,000 settlement was insufficient to fully compensate her and that

L was legally responsible for damages in excess of the underinsured motorist's coverage. The plaintiff, the defendant and L ultimately agreed to settle the case by means of binding arbitration and entered into a written arbitration agreement. Thereafter, an arbitrator issued an award in the amount of $33,807.50. The arbitrator made no findings regarding collateral sources, which were to be deducted from the total damages pursuant to the parties' arbitration agreement. The parties subsequently agreed with each other as to the amounts of collateral sources, but disagreed as to whether the $20,000 settlement should be deducted from the award. The defendant filed an objection to the plaintiff's application to confirm the award, in which it argued, inter alia, that it was legally responsible only for damages exceeding the $20,000 settlement that the plaintiff already had received from the tortfeasor. The defendant did not otherwise file a motion to modify or to correct the award. Thereafter, upon the parties' request, the arbitrator issued an articulation stating that the award of $33,807.50 was a full value award, which did not take into account any collateral sources or offsets, or the $20,000 settlement. Subsequently, the trial court rendered judgment confirming the award with deductions of $1020.02 in collateral sources and $20,000 to offset the prior settlement, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly deducted $20,000 from the arbitration award to offset the settlement that the plaintiff had received from the tortfeasor: although the plaintiff claimed that the court lacked statutory and common-law authority to modify the award, this court concluded that the trial court did not modify the award but, instead, merely conformed the award to the parties' arbitration agreement; moreover, in light of the agreement's reference to the plaintiff's underinsured motorist lawsuit and the nature of her underlying claim, the only reasonable interpretation of the agreement was that the parties initially contemplated and agreed that the arbitrator's gross award would be the sum of the plaintiff's total economic and noneconomic damages, less the $20,000 she had received from the tortfeasor; furthermore, although the arbitration agreement provided that the arbitrator would calculate the gross award and then deduct damages determined to be collateral sources, the arbitrator made clear in his decision and in his articulation that his award was for the full value of the plaintiff's damages, without considering the issues of collateral sources or offsets, demonstrating that the parties subsequently modified their written agreement and submitted to the arbitrator only the question of the plaintiff's total economic and noneconomic damages and preserving the written agreement's provisions limiting the defendant's liability only to those damages in excess of the $20,000 settlement and any collateral sources.
2. This court concluded that, although the trial court properly deducted the $20,000 settlement from the arbitration award, it miscalculated the amount of the judgment: subtracting the collateral sources and the

settlement from the arbitrator's full value award yielded the sum of $12,787.48, not the amount of $12,500 that the trial court had calculated.

Argued May 11, 2021—officially released February 1, 2022

Procedural History

Application to confirm an arbitration award, brought to the Superior Court in the judicial district of Danbury, and tried to the court, *Brazzel-Massaro, J.*; judgment confirming and clarifying the award, from which the plaintiff appealed to this court. *Affirmed in part; reversed in part; judgment directed.*

James M. Harrington, with whom, on the brief, was *Joseph T. Coppola II*, for the appellant (plaintiff).

Matthias J. DeAngelo, with whom, on the brief, was *Evan Tegtmeier*, for the appellee (defendant).

Opinion

CLARK, J. This appeal concerns an arbitration award (award) that arose out of an underinsured motorist cause of action. The plaintiff, Gabrielle DiTullio, appeals from the judgment of the trial court "confirming the arbitration award with a deduction for the $20,000 offset to clarify the amount to be awarded is $12,500 *in accordance with the law*." (Emphasis added.) On appeal, the plaintiff claims that the court improperly deducted $20,000 from the award because the court (1) lacked statutory authority to do so, as the defendant, LM General Insurance Company, failed to file a motion to modify, correct, or vacate the award pursuant to General Statutes § 52-407tt, § 52-407xx, or § 52-407ww, and also (2) lacked common-law authority to do so.[1]

[1] The plaintiff also claims that the court's improper deduction of $20,000 from the award (1) violates the public policy favoring arbitration as an alternative to litigation and (2) permits parties to arbitration agreements to seek judicial intervention when they are dissatisfied with the arbitrator's award, which will have a chilling effect on arbitration. Because we conclude that the court properly confirmed the arbitration award, we need not reach these claims.

We conclude that the deduction was proper, but on different grounds than those relied upon by the court.[2] The court had authority to deduct the $20,000 settlement from the tortfeasor from the full value arbitration award to conform the award to the parties' written agreement. The court, however, miscalculated the amount of the judgment, and thus, we affirm in part and reverse in part the judgment of the trial court.

The record reveals the following undisputed facts. The plaintiff was injured on March 30, 2015, when her motor vehicle was struck in Bethel by a vehicle operated by Tracie Fabri-Lino (tortfeasor). At the time of the collision, the plaintiff's vehicle was insured by Liberty Mutual Insurance Company (Liberty Mutual).[3] The plaintiff settled her claims against the tortfeasor for $20,000. Thereafter, in January, 2018, the plaintiff commenced an underinsured motorist action (UIM case) against Liberty Mutual,[4] alleging that she had sustained

[2] The parties entered into the arbitration agreement on May 31, 2019. In the trial court, the parties litigated, and the trial court adjudicated, the issues pursuant to General Statutes § 53-408 et seq. The parties also cited § 53-408 et seq. in their appellate briefs. Pursuant to No. 18-94 of the 2018 Public Acts, the legislature adopted the Revised Uniform Arbitration Act (revised act), General Statutes § 52-407aa et seq. General Statutes § 52-407cc provides in relevant part that "[s]ections 52-407aa to 52-407eee, inclusive, govern an agreement to arbitrate made on or after October 1, 2018 . . . ."

Following oral argument before us, we ordered the parties to file simultaneous supplemental briefs "addressing whether the [revised act] governs the arbitration at issue in this case, and if so, whether that has any effect on the present appeal." In their supplemental briefs, the parties agree that the revised act applies to the present appeal, and they each assert that the revised act does not alter their respective positions regarding the issues on appeal. In this opinion, we refer to statutes in the revised act when relevant.

[3] In the confirmation proceeding and on appeal, the defendant was identified as the insurer of the vehicle.

[4] See *DiTullio* v. *Liberty Mutual Ins. Co.*, Superior Court, judicial district of Danbury, Docket No. CV-18-6024859-S (withdrawn). The plaintiff withdrew the UIM case on May 31, 2019, the date that the parties signed the written agreement. She, however, moved to restore the UIM case on July 19, 2019, following receipt of the arbitrator's decision. On September 26, 2019, the plaintiff filed a motion to stay the restored UIM case pending a resolution of the arbitration. In response to the motion for stay, the trial

injuries, damages, and other losses as a direct result of the tortfeasor's negligence. She also alleged that she had settled her claim against the tortfeasor for $20,000, the limit of the tortfeasor's liability policy. Significantly with respect to the present appeal, the plaintiff alleged that the settlement was "insufficient to fully compensate [her] for her damages and losses. . . . Wherefore [Liberty Mutual] . . . is legally responsible for all damages *in excess* of the underinsured driver's coverage." (Emphasis added.)

A pretrial settlement conference in the UIM case was held in May, 2019, at which time the parties were unable to agree on a sum to resolve the litigation. They agreed, however, to settle the UIM case by means of binding arbitration and that the UIM case would be withdrawn. On May 31, 2019, the plaintiff, Liberty Mutual, and the defendant signed an arbitration agreement (written agreement) that provides in relevant part: "[The parties] have agreed to *arbitrate the UM/UIM Plaintiff's claim* against the [defendant and Liberty Mutual] regarding a motor vehicle accident which occurred on March 30, 2015 . . . . [T]he [p]arties hereby agree to the following:

"1. The *issues in the Lawsuit shall be resolved by means of binding arbitration*, and the Lawsuit shall be resolved by way of release and withdrawal of action. . . .

"2. The Arbitrator shall be mutually agreed upon . . . . All issues of *liability*, *causation*, *and damages* shall be decided by the Arbitrator.

court issued an order stating in part: "Counsel appeared at short calendar and addressed the issue of whether the arbitrator will rule on the impact if any for the $20,000 payment to the plaintiff as damages for the accident and whether such insurance proceeds were considered by the arbitrator in entering an award for $32,500." The plaintiff again withdrew the UIM case on October 30, 2019, when the case was called for jury selection.

* * *

"6. Following the arbitration hearing in connection with this matter, the Arbitrator will render a decision containing a 'Gross Award.'

"7. After determining the Gross Award, the Arbitrator is to deduct from total damages, all economic damages determined to be collateral sources.

"8. After the agreed deductions from the Gross Award per Paragraph 7, the resulting sum shall be the 'Net Award.'

"9. The parameters of the arbitration shall be subject to a confidential high/low agreement wherein the Net Award to the Plaintiff, per Paragraph 8, will be no higher than thirty-two thousand five hundred dollars ($32,500) and no lower than two thousand five hundred dollars ($2,500).

"10. In the event that the Net Award is $32,500 or greater, then the sum due . . . shall be $32,500. In the event the Net Award is $2,500 or less, then the Sum Due shall be $2,500.

"11. None of the parties will disclose the high and low figures of this Agreement to the Arbitrator. . . ."[5] (Emphasis added.)

On July 9, 2019, Attorney Christopher P. Kriesen (arbitrator) held an arbitration hearing, and on July 12, 2019, he issued a written decision. In his decision, the arbitrator found that the tortfeasor's negligence proximately caused the plaintiff's injuries. He also found that the plaintiff had received treatment from several medical providers, but was able to complete training at the police academy and become a patrol officer. The

[5] The agreement referred to the underlying UIM case, but did not otherwise make any express reference to the $20,000 settlement that the plaintiff had received from the tortfeasor.

arbitrator found that the plaintiff's economic damages were $13,807.50, her noneconomic damages were $20,000, and the award was $33,807.50. The arbitrator further stated that he made "no finding on collateral sources. If the parties are unable to agree on the issue, they may submit the issue to me."[6] Neither the plaintiff nor the defendant and Liberty Mutual filed with the arbitrator a motion to modify or correct the award pursuant to § 52-407tt.[7]

Thereafter, counsel for the plaintiff informed counsel for the defendant and Liberty Mutual that the collateral source payments totaled $1020.02. Counsel subtracted the collateral source amount from the arbitrator's economic award, added the remainder to the arbitrator's $20,000 noneconomic award, and stated that the net award was $32,787.48, which should be reduced to $32,500 in accordance with the "high/low" provision set forth in paragraphs 9 and 10 of the written agreement. Counsel for the defendant and Liberty Mutual agreed with respect to the amount of collateral source payments, but countered that the $20,000 settlement that the plaintiff had received from the tortfeasor also had to be subtracted from the award, resulting in a net award of $12,787.48. Counsel for the plaintiff disagreed, contending that the agreement was for "new money" and that the written agreement did not include a provision regarding the $20,000 tortfeasor settlement. Counsel were unable to resolve their disagreement, and on

[6] See paragraphs 7 and 8 of the written agreement previously set forth in this opinion.

[7] General Statutes § 52-407tt provides in relevant part: "(a) On motion to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

"(1) Upon a ground stated in subdivision (1) or (3) of subsection (a) of section 52-407xx . . . ."

General Statutes § 52-407xx (a) provides in relevant part: "(1) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing or property referred to in the award . . . (3) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted."

July 19, 2019, the plaintiff moved to restore the UIM case. See footnote 4 of this opinion.

On September 27, 2019, the plaintiff commenced the present proceeding to confirm the award; she also filed a motion to stay the UIM case. In her application to confirm the award, the plaintiff asked the court to "order that the defendant comply with the terms of the arbitration agreement and that the plaintiff be paid $32,500 pursuant to that agreement and the arbitrator's award." In her application, the plaintiff argued that the court must confirm the award unless it finds grounds to vacate, modify, or correct the award as permitted by statute. She also argued that the agreement was clear and unambiguous, made no mention of the $20,000 settlement and provided that only collateral sources, which pursuant to General Statutes § 52-225b[8] do not include amounts received as a settlement, were to be deducted from the gross award.

On October 11, 2019, the defendant filed an objection to the plaintiff's application to confirm the award on the ground that it was frivolous given that there was a prior lawsuit pending before the court. It also argued that the plaintiff was asking the court to confirm "an arbitration award without taking into account the nature of the claim. This claim is, and always was, a

[8] General Statutes § 52-225b defines collateral sources for purposes of General Statutes §§ 52-225a through 52-225c, inclusive. It provides in relevant part: " 'Collateral sources' means any payments made to the claimant, or on his behalf, by or pursuant to: (1) Any health or sickness insurance, automobile accident insurance that provides health benefits, and any other similar insurance benefits, except life insurance benefits available to the claimant, whether purchased by him or provided by others; or (2) any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the costs of hospital, medical, dental or other health care services. 'Collateral sources' do not include amounts received by a claimant as a settlement." General Statutes § 52-225b. As the court noted, however, the written agreement did not define "collateral sources" or make reference to § 52-225b.

contractual claim for underinsured motorist benefits." The defendant argued, as well, that the complaint in the plaintiff's underlying UIM case alleged that the defendant and Liberty Mutual are "legally responsible for *all damages in excess* of the [underinsured] driver's coverage." (Emphasis altered.) The defendant also argued that "it is well established that a plaintiff is not [to] be compensated twice for the same damages." The defendant suggested that the parties return to the arbitrator for clarification of the award, noting that the arbitrator had not made a finding with regard to collateral sources and that the arbitrator had invited the parties to return if they were unable to agree with respect to collateral sources.

The parties returned to the arbitrator on October 30, 2019, and requested that he articulate his July 12, 2019 award. On the same date, the arbitrator issued an articulation, stating that "the award of *$33,807.50 is a 'full value' award*, taking into account only the facts and basis set forth in the decision. . . . The award *does not take into account any collateral sources or offsets. . . . The award does not take into account in any way the $20,000 payment apparently made by the alleged tortfeasor*. This amount was disclosed to the arbitrator in a position statement (which was not evidence) by the plaintiff and in a deposition transcript submitted by the defendant (*but which was not considered since it was irrelevant to the arbitrator's determination of the award and was therefore not deemed a fact by the arbitrator*). . . . *The arbitrator will consider any issues of collateral sources and/or offsets if the parties have agreed, or do agree, to have these issues considered by the arbitrator*." (Emphasis added.)

On March 9, 2020, the parties appeared before the court for a hearing on the plaintiff's application to confirm the award. The court issued a memorandum of decision on May 19, 2020, in which it noted that the

plaintiff had moved to confirm the award, and that, under Connecticut law, a court must confirm an award unless a motion to vacate, modify or correct the award is filed and granted in accordance with the statutes governing such motions.[9] The plaintiff argued that because no motion to vacate, modify or correct had been filed, the court's review was limited to determining whether the arbitrator decided only matters the parties submitted to arbitration, as defined by the written agreement. She also argued that the written agreement is clear and unambiguous and only permits deductions for collateral sources, which, according to her, do not include prior settlements.

The court also noted the defendant's objection, in which the defendant argued that the application to confirm was frivolous when filed because the UIM case had been restored to the docket and remained pending at that time. The defendant noted that the plaintiff was asking the court to confirm the award without taking into account the nature of the underlying contractual claim for underinsured motorist benefits or the plaintiff's UIM lawsuit, which were incorporated into the written agreement by reference, and the defendant alleged that it was legally responsible only for damages exceeding the $20,000 settlement that the plaintiff already had received from the tortfeasor.

In addition, during the March 9, 2020 hearing on the plaintiff's application to confirm, "the defendant also alleged that the parties agreed to an offset and stated in front of the arbitrator that he did not need to take that into consideration because the parties had agreed to the offset." The plaintiff denied that there had been

[9] General Statutes § 52-407vv provides: "After a party to an arbitration proceeding receives notice of an award, the party may make a motion to the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to section 52-407tt or 52-407xx or is vacated pursuant to section 52-407ww."

any conversation with the arbitrator about an offset and the court ultimately concluded that it was "not necessary . . . to address any disagreement between the parties about the subject of discussing the offset with the arbitrator, as the arbitrator explained that the award was a full value award, and though he was aware of the offset, he did not consider it because it was irrelevant in determining the award."

Turning to the merits of the plaintiff's application to confirm, the court found that the plaintiff's underlying claim was a contractual one for underinsured motorist benefits. It also found that the written agreement was clear and unambiguous, but that it did not mention offsets for prior settlements. In addition, neither party took issue with the decision rendered by the arbitrator. Instead, they disagreed about whether an offset should be subtracted from the arbitrator's full value award.

Even though the defendant had not filed with the court a motion to vacate, modify, or correct the award pursuant to the statutory provisions authorizing such filings, the court nevertheless considered the defendant's objection and reviewed the law governing underinsured motorist coverage. In considering the plaintiff's application to confirm, the court stated that it was "necessary to also apply to the present case the fundamental principle of the purpose of underinsured motorist insurance recognized by [Connecticut courts], which is to place the insured in the same, but not better, position as the insured would have been if the underinsured tortfeasor had been fully insured, and the requirement regarding automobile liability policies in [General Statutes] § 38a-335 (c) that no one is entitled to receive duplicate payments for the same element of loss," citing *Haynes* v. *Yale-New Haven Hospital*, 243 Conn. 17, 27, 699 A.2d 964 (1997) (public policy established by underinsured motorist statute is that every insured entitled to recover for damages he or she would have been

able to recover if underinsured motorist had maintained adequate policy of liability insurance), and *Fahey* v. *Safeco Ins. Co. of America*, 49 Conn. App. 306, 309–10, 714 A.2d 686 (1998) (purpose of underinsured motorist coverage is to protect named insured and additional insured from suffering inadequately compensated injury caused by accident with inadequately insured automobile; in no event shall any person be entitled to duplicate payments for same element of loss).

In ruling on the plaintiff's motion to confirm, the court noted the articulation that the award is a "*full value award* has significance in deciphering the award as no more than $32,500, which would not [have been] so if the court awarded the entire sum in addition to the settlement amount of $20,000." (Emphasis in original.) Therefore, pursuant to General Statutes § 52-407vv, the court confirmed the award, but also ordered that "in confirming the award, the $20,000 offset must be deducted to clarify the amount to be awarded" to the plaintiff is "$12,500 *in accordance with the law*." (Emphasis added.) The plaintiff appealed.

On appeal, the plaintiff's principal claim is that the court lacked statutory and common-law authority to modify the award. We agree that it would have been improper for the court to modify the arbitrator's award.

It is well settled that courts generally lack the authority to review unrestricted arbitration awards for errors of law, particularly in the absence of a motion to vacate. *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 80, 881 A.2d 139 (2005); id., 81 (motion to vacate should be granted when arbitrator exceeded powers or so imperfectly executed them that mutual, final, definite award not made). "Judicial review of arbitral decisions is narrowly confined." (Internal quotation marks omitted.) *State* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, 265 Conn. 771, 777,

830 A.2d 729 (2003). "[T]he law in this state takes a strongly affirmative view of consensual arbitration. . . . Arbitration is a favored method to prevent litigation, promote tranquility and expedite the equitable settlement of disputes." (Citation omitted; internal quotation marks omitted.) *Rocky Hill Teachers' Assn.* v. *Board of Education*, 72 Conn. App. 274, 278, 804 A.2d 999, cert. denied, 262 Conn. 907, 810 A.2d 272 (2002). "Where the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds that . . . the interpretation of the agreement by the arbitrators was erroneous. Courts will not review the evidence nor, where the submission is unrestricted, will they review the arbitrators' decision of the legal questions involved. . . . In other words, [u]nder an unrestricted submission, the arbitrators' decision is considered final and binding; thus courts will not review the evidence considered by the arbitrators nor will they review the award *for errors of law* or fact. . . ." (Emphasis added; internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, supra, 80.[10]

We, however, conclude that the court did not modify the arbitrator's award, but, in confirming the award as it did, merely effectuated the parties' written agreement. As it did at trial, the defendant claims that the trial court's decision to deduct $20,000 from the award was proper because making that deduction conformed the arbitrator's award to the parties' agreement. For the reasons that follow, we agree.

"Arbitration agreements are contracts and their meaning is to be determined . . . under accepted rules of [state] contract law . . . ." (Internal quotation marks omitted.) *Levine* v. *Advest, Inc.*, 244 Conn. 732,

[10] We agree with the parties that the submission in the present case was unrestricted.

745, 714 A.2d 649 (1998). "When a party asserts a claim that challenges the . . . construction of a contract, we must first ascertain whether the relevant language in the agreement is ambiguous. . . . A contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact . . . . If a contract is unambiguous within its four corners, intent of the parties is a question of law requiring plenary review. . . . Where the language of a contract is clear and unambiguous, the contract is to be given effect according to its terms." (Citation omitted; internal quotation marks omitted.) *O'Connor* v. *Waterbury*, 286 Conn. 732, 743–44, 945 A.2d 936 (2008).

The parties' written agreement in this case provides, in relevant part, that "[the plaintiff] and [the defendant and Liberty Mutual] . . . have agreed to arbitrate *the UM/UIM Plaintiff's claim* against the [defendant and Liberty Mutual] regarding a motor vehicle accident . . . . The issues in *the [l]awsuit* shall be resolved by means of binding arbitration . . . ." (Emphasis added.) The circumstances surrounding the making of the written agreement were the parties' inability to settle the UIM case. The parties, therefore, entered into the agreement to resolve the plaintiff's UIM lawsuit. The plaintiff's complaint in that lawsuit specifically alleged that the tortfeasor's $20,000 settlement with the plaintiff was insufficient to fully compensate her for her damages and losses and that Liberty Mutual was legally responsible for all damages *in excess of the tortfeasor's coverage*.

The written agreement further provides that the arbitrator would render a "Gross Award." After determining the "Gross Award," the written agreement stated that the arbitrator would "deduct from total damages, all economic damages determined to be collateral sources." The resulting sum would constitute the "Net

Award." The "Sum Due" would be the "Net Award," subject to the agreement's "high/low" provision.[11] In light of the written agreement's reference to the plaintiff's lawsuit and the nature of her underlying claim, the only reasonable interpretation of the agreement is that the parties initially contemplated and agreed that the arbitrator's "Gross Award" would be the sum of the plaintiff's total economic and noneconomic damages, less the $20,000 she had received from the tortfeasor. The "Net Award," in turn, would be that sum less "all economic damages determined to be collateral sources." The arbitrator's decision and articulation make clear, however, that the parties ultimately submitted a different question to him.

In his decision, the arbitrator found that the tortfeasor caused the plaintiff's injuries and that the plaintiff sustained $20,000 in noneconomic damages and $13,807.50 in economic damages. He issued an "Award" in the amount of $33,807.50. He made no mention of a "Gross Award" or "Net Award" and made no findings regarding "collateral sources." Instead, he informed the parties that if they were "unable to agree on the issue, *they may submit the issue to me*." (Emphasis added.)

The parties subsequently agreed to return to the arbitrator for a clarification of his award. The arbitrator articulated that the award was a " 'full value' award, taking into account only the facts and basis set forth in the decision." The arbitrator also stated in his articulation that "[t]he award does not take into account any collateral sources or offsets. . . . *The award does not take into account in any way the $20,000 payment apparently made by the alleged tortfeasor. This amount was disclosed to the arbitrator in a position statement (which was not evidence) by the plaintiff*

[11] The written agreement prohibited the parties from disclosing to the arbitrator the "high/low" provision of the agreement.

and in a deposition transcript submitted by the defendant (but which was not considered since it was irrelevant to the arbitrator's determination of the award and was therefore not deemed a fact by the arbitrator)." (Emphasis added.) Last, the arbitrator stated that he would "consider any issues of collateral sources and/or offsets *if the parties have agreed, or do agree, to have these issues considered by the arbitrator.*" (Emphasis added.)

The arbitrator's decision and articulation, therefore, make clear that, although the written agreement between the parties was to have the arbitrator decide "[a]ll issues of liability, causation, and damages" and issue a "Gross Award" that accounted for the plaintiff's $20,000 settlement with the tortfeasor, the parties subsequently agreed to submit to him only the question of the plaintiff's total economic and noneconomic damages as result of the motor vehicle accident. That is precisely the question that the arbitrator answered in his articulation, and, in doing so, he made clear that his award was for the full value of the plaintiff's damages.

There is nothing in the record to support a claim that, when they modified their written agreement about what to submit to the arbitrator, the parties also agreed to alter that agreement to limit the extent of the defendant's liability to the amount it allegedly owed the plaintiff under the underinsured motorist policy. Concluding otherwise would require us to infer that the defendant agreed to change the written agreement in a way that would make it liable to the plaintiff for amounts that the plaintiff had never sought in the underlying lawsuit and was not entitled to under the laws governing underinsured motorist coverage in our state. See General Statutes § 38a-335 (c); see also *Haynes* v. *Yale-New Haven Hospital*, supra, 243 Conn. 27; *Fahey* v. *Safeco Ins. Co. of America*, supra, 49 Conn. App. 309–10. Nothing in the record supports such an inference.

On the basis of our review of the entire record, including the written agreement, the plaintiff's UIM complaint, the arbitrator's decision, the parties' agreement to return to the arbitrator, and the articulation, we conclude that the parties agreed to submit to the arbitrator only the question of the plaintiff's total economic and noneconomic damages as a result of the underlying automobile collision, but also preserved the written agreement's provisions limiting the defendant's liability to only those damages in excess of the $20,000 settlement and any "collateral sources," up to a maximum of $32,500. For this reason, the court properly confirmed the award, and effectuated the parties' written agreement, by deducting from the arbitrator's "full value" award the plaintiff's $20,000 settlement with the tortfeasor, plus the amounts the parties agreed represent "collateral sources."

There is, however, another issue for us to consider. In its brief, the defendant has identified an error in the court's calculation of the amount of the judgment, i.e., $12,500. We agree with the defendant. The amount due to the plaintiff is the arbitrator's full value award less collateral sources and the $20,000 settlement with the tortfeasor. Subtracting from the arbitrator's gross award of $33,807.50 the undisputed amount of $1020.02 in collateral sources and the $20,000 settlement amount yields the sum of $12,787.48. Therefore, the net award due to the plaintiff is $12,787.48.

The judgment is reversed only as to the amount of the award, and the case is remanded with direction to render judgment in accordance with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

CHARLES ILL *v.* ELLEN MANZO-ILL
(AC 42735)

Prescott, Alexander and Suarez, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgments of the trial court finding him in contempt and awarding the defendant attorney's fees. On appeal, the plaintiff claimed, inter alia, that the court improperly found him to be in contempt, awarded the defendant attorney's fees, and improperly limited his defense at the contempt hearing and at the attorney's fees hearing. *Held* that the trial court abused its discretion in limiting the plaintiff's defense at the contempt hearing: the defendant was afforded the opportunity to establish her prima facie case over a period of four days, whereas the plaintiff was allowed, as a consequence of the court's scheduling order, only one day to call witnesses on his behalf, his defense was largely limited to the introduction of exhibits, and, given the lengthy postjudgment procedural history of the case related to the court's property distribution orders and the complexity of the issues before the court, affording the plaintiff one day to present his defense resulted in an unfair hearing in deprivation of the plaintiff's due process rights; moreover, the court's scheduling order appeared to be arbitrary and not based on the complexity of the issues before it or on the reasonable needs of the parties to present their case, the court, over repeated objections by the plaintiff's counsel, having limited the plaintiff's case before he had an opportunity to present any evidence, indicating that the cout's scheduling order could not have been based on a determination that some or all of the plaintiff's evidence was not relevant or inadmissible on some other grounds; accordingly, the judgments on both the motion for contempt and the award of attorney's fees were reversed and a new contempt hearing was ordered.

Argued May 13, 2021—officially released February 1, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the the court, *Shay, J.*, rendered judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Hon. Michael E. Shay*, judge trial referee, granted in part the defendant's motion for contempt, and the plaintiff appealed to this court and the defendant filed a cross appeal;

thereafter, the court, *Hon. Michael E. Shay*, judge trial referee, awarded the defendant attorney's fees and costs, and the plaintiff amended his appeal; subsequently, the defendant withdrew her cross appeal. *Reversed*; *further proceedings*.

Norman A. Roberts II, with whom, on the brief, was *Anthony L. Cenatiempo*, for the appellant (plaintiff).

Kenneth J. Bartschi, with whom were *Brendon P. Levesque*, *James H. Lee*, and, on the brief, *Maria McKeon*, for the appellee (defendant).

Opinion

SUAREZ, J. In this postdissolution matter, the plaintiff, Charles Ill, appeals from the judgment of the trial court finding him in contempt and subsequently awarding interest and attorney's fees to the defendant, Ellen Manzo-Ill. On appeal, the plaintiff claims that the court improperly (1) found him to be in contempt, (2) ordered him to pay the defendant the value of certain shares of a private corporation, (3) awarded the defendant postjudgment interest, (4) awarded the defendant attorney's fees, and (5) by virtue of its scheduling order, limited his defense at the contempt hearing and the attorney's fees hearing. We agree with the plaintiff's fifth claim and reverse the judgments of the court and remand the case for a new contempt hearing.

The following undisputed facts and procedural history are relevant to this appeal. On August 19, 2008, following a trial that took place over the course of five days, the court, *Shay*, *J.*, dissolved the marriage of the parties and entered orders related to alimony and the division of the parties' marital property. These orders, which were clarified by the court on October 3, 2008, provided in relevant part that "[t]he following investment accounts, whether in sole or joint names shall be divided as follows: Within two . . . weeks from the

date of this order, the parties shall divide the stocks, bonds, and cash in the Glenmede CLI account (standing in the sole name of the [plaintiff], less that portion attributed to the inherited IRA in the approximate amount of $72,000); Glenmede CLI/EMI account (joint); Wachovia Securities account ([standing in the sole name of the plaintiff]); Avaya/Sierra Holdings ([plaintiff]/sole); Gabelli CLI/EMI account (joint); Assets Plus Investment account; and Deutsche Bank Alex Brown (joint BEA stock) on a pro-rata basis 60 [percent] to the [defendant] and 40 [percent] to the [plaintiff]. Any fractional shares shall be sold and the net proceeds divided in the same proportion." (Emphasis omitted.) The court further ordered that "[t]he parties shall cooperate in the preparation and filing of the 2007 state and federal income tax returns. Any tax due, including interest and penalties for late filing, shall be paid from joint funds, and any refunds shall be divided equally." (Emphasis omitted.)

Neither party was satisfied with the terms of the dissolution judgment. This led to extensive postjudgment litigation. Much of this litigation was detailed in an earlier appeal, *Ill* v. *Manzo-Ill*, 166 Conn. App. 809, 142 A.3d 1176 (2016). For example, on October 23, 2008, the plaintiff filed a direct appeal from the judgment of dissolution, which later was withdrawn on June 8, 2010. Id., 813. On September 19, 2008, the defendant filed a motion to open the judgment of dissolution, which the court denied on April 20, 2010. Id. The defendant filed a motion to reargue the court's denial of her motion to open the judgment, which the court denied on May 24, 2010. Id. On June 14, 2010, the defendant filed a motion for extension of time to file an appeal from the court's denial of her motion to the open the judgment of dissolution, but she subsequently withdrew the motion on June 24, 2010, and did not bring an appeal from the court's denial of that motion. Id.

On April 6, 2010, while her motion to open the judgment was pending, the defendant filed a motion for modification of alimony on the basis of a substantial change in the parties' circumstances. Id., 813–14. Specifically, the defendant alleged that, "[s]ince the date of the [judgment of dissolution], the circumstances concerning this case have changed substantially in that the plaintiff is currently employed and earning an income, while the defendant is not currently employed, and that a substantial amount of time has elapsed since the judgment was entered and that as a result of the plaintiff's appeal of the judgment, the defendant has been denied access to the funds necessary to support herself." (Internal quotation marks omitted.) Id., 814.

Following a protracted course of litigation with respect to the motion for modification, on May 14, 2014, the trial court, *Heller*, *J.*, granted the plaintiff's second motion to dismiss the motion for modification, noting that "[t]he defendant has failed to show good cause for her delay in prosecuting [the motion] . . . . Under Practice Book § 25-34 [(f)], the defendant's motion for modification is stale, it has not been diligently prosecuted, and it will not be considered by the court." (Internal quotation marks omitted.) Id., 819. Following an appeal by the defendant, this court rejected her claim that the trial court lacked the authority to dismiss the motion for modification. Id., 825. This court also rejected the defendant's claim that the trial court incorrectly determined that she failed to show good cause to avoid dismissal and that she had failed to prosecute her motion with reasonable diligence. Id., 828–30.

Against this backdrop of postdissolution litigation between the parties, we turn to the litigation underlying this appeal. On December 2, 2017, the defendant filed an amended motion for contempt requesting "that the court enter an order finding the plaintiff in contempt for his refusal to transfer assets to the defendant in

violation of a court order . . . .'' The defendant claimed that ''[t]he plaintiff did not pay to the defendant her 60 [percent] share of the Glenmede CLI account (standing in the sole name of the plaintiff, less that portion attributed to the inherited IRA in the approximate amount of $72,000) until July 30, 2015 . . . [t]he plaintiff did not cooperate in the payment to the defendant [of] her 60 [percent] share of the Glenmede joint account and thus prevented distribution to her until July 30, 2015 . . . [t]he plaintiff did not cooperate in the payment to the defendant [of] her 60 [percent] share of the Deutsche Bank Alex Brown joint account and thus prevented distribution to her until October 20, 2015 . . . [t]he plaintiff did not cooperate in the payment to the defendant [of] her 50 [percent] share of the 2007 federal and state income tax refunds until July 30, 2015 . . . [and] [t]he plaintiff did not cooperate in the sale of the marital home causing the defendant a significant loss of value.''

The defendant further claimed that, ''[a]s of the date of this motion, the plaintiff has failed and/or refused to transfer to the defendant the following funds/assets . . . [the] defendant's full 60 [percent] of the plaintiff's sole Wachovia accounts . . . [i]ncome generated by the defendant's 60 [percent] of the plaintiff's sole Wachovia accounts from the date of the dissolution through the entry of judgment through the date of partial distribution and the present . . . [i]ncome generated by the defendant's 60 [percent] of the plaintiff's sole Glenmede account . . . from the entry of judgment to July 30, 2015 (the date of distribution to [the] defendant) . . . [i]ncome generated by the defendant's 60 [percent] of the parties joint Glenmede account . . . from the entry of judgment to July 30, 2015 (the date of distribution to [the] defendant) . . . [i]ncome generated by the defendant's 60 [percent] of the parties' joint Gabelli account from the entry of judgment to July 30,

2015 (the date of distribution to [the] defendant) . . . [t]he defendant's 60 [percent] of the Avaya/Sierra Holdings shares . . . [and] [i]ncome generated by the defendant's 60 [percent] of the Avaya/Sierra Holdings shares from the entry of judgment to the present."

The plaintiff argued in his written objection that "the defendant is not credible," and addressed her claims with respect to each account or asset at issue. With regard to the Avaya/Sierra Holdings shares, the plaintiff argued that "the defendant's claim . . . must fail because (1) the defendant is mostly at fault for the failure of the transfer to occur . . . (2) there is no evidence of even a theoretical transaction that could have taken place, and the assertion that there was a transaction available is pure, unsupportable speculation that is contrary to all admitted evidence . . . and (3) there is no evidence of the fair market value of the shares." (Footnotes omitted.) With regard to the Glenmede, Gabelli, and Deutsche Bank accounts, the plaintiff argued that because these accounts "were jointly held by the parties . . . [i]t was always . . . within the defendant's power to effectuate the judgment related to these accounts . . . ." The plaintiff went on to state that "[o]ver [eight] years ago, the plaintiff attempted to get the defendant to sign authorizations to transfer the amounts due from these accounts. He did so on multiple occasions . . . ." With regard to the Wachovia account, the plaintiff argued that he "was precluded by a court order . . . from distributing the Wachovia funds earlier than he did," that "the amount [he] paid [to the defendant] was in excess of the amount due," and that no interest should be awarded to the defendant because she "was to a great extent responsible for the delay in implementing the orders . . . ." With regard to the sale of the marital home, the plaintiff argued that the defendant "offered no real evidence in support of this claim," and that she failed to make a

prima facie case. Finally, the plaintiff argued that "[t]he defendant was unresponsive to seemingly anything involving the implementation of the property orders in the judgment."

The plaintiff then concluded by stating that, "[b]ecause of the defendant's refusal to participate in a meaningful way, the implementation of some of the property orders contained in the judgment was delayed." According to the plaintiff, he "did everything he was supposed to do," and "[t]he defendant's motions seek to retroactively place [him] in an impossible situation—on the one hand, he would have had to circumvent or otherwise compensate for the defendant's lack of participation . . . and implement the judgment on his own; or on the other hand, face claims of contempt and interest." It was the plaintiff's position that the defendant's motion should be denied because he "is not at fault for any delays in implementation of the judgment, but the defendant is."

The court held an evidentiary hearing on the defendant's motion for contempt over five nonconsecutive days beginning on December 14, 2017, and continuing on December 15, 2017, and August 1, 2, and 3, 2018. On March 8, 2019, the court issued a memorandum of decision in which it granted in part the defendant's motion for contempt. In its memorandum of decision, the court found by clear and convincing evidence that the judgment of dissolution clearly "provided for, among other things, the division of marital property including bank accounts, investment accounts, and stock . . . as well as tax refunds and the proceeds from the sale of the marital residence." The court found that the plaintiff failed to comply in a timely manner with the division of the Wachovia, Deutsche Bank, Glenmede, and Gabelli accounts, and that the plaintiff's failure to comply was "[wilful] and without good cause . . . ." The court further found that there was a "clear

and unequivocal order of the court that the [tax] refunds be divided 50 [percent] to the [defendant] and 50 [percent] to the [plaintiff]; that the [plaintiff] has failed to comply therewith in a timely manner; that under all the facts and circumstances, the [plaintiff's] failure to comply was [wilful] and without good cause . . . ." The court ordered the plaintiff to pay the defendant $1,620,271, which included $1,088,380 in interest.[1] Additionally, the court ordered that the plaintiff "shall be responsible for his own attorney's fees and costs incurred in connection with this action; and further, on or before March 28, 2019, the [defendant] shall file with the court, with a copy to counsel, an affidavit of fees in the proper format. Counsel for the [plaintiff] shall have a reasonable opportunity to review same, and to notify opposing counsel and the court of his intention to challenge the reasonableness of the fees and costs claimed, after which the court will schedule a hearing." The plaintiff filed this appeal on March 26, 2019.

On October 24, 2019, the court held a hearing on the reasonableness of the defendant's claimed attorney's fees. The hearing continued on October 29, 2019, and December 18, 2019. On February 19, 2020, the court issued a memorandum of decision in which it concluded that, "having found the [plaintiff] in contempt as to the Wachovia accounts, Deutsche Bank-Alex Brown account,Glenmede accounts, Gabelli account, and the 2007 state and federal income tax refunds, it is equitable and appropriate to award [the defendant] attorney's

[1] The court ordered the plaintiff to pay the award as follows: "On or before June 7, 2019, the sum of $850,000, without interest if paid in full in a timely fashion, otherwise said sum shall bear simple interest at the rate of 5 [percent] per annum from the date of this memorandum of decision to and including the date of payment. The balance due in the amount of $770,271 shall be paid by the [plaintiff] in full on or before January 7, 2020, together with simple interest at the rate of 5 [percent] per annum thereon from the date of this memorandum of decision to and including the date of payment in full." (Emphasis omitted.)

fees . . . .” The court further concluded that, although it “did not make a finding of contempt as to the [plaintiff's] actions concerning the transfer of the Avaya Stock, it did find him in breach of the court order . . . that it was equitable and appropriate to take into account the [plaintiff's] behavior and the resulting economic loss to the [defendant] . . . [and that] under all the circumstances, including the [plaintiff's] demonstrably dilatory behavior in complying with the court's orders, it would be manifestly unjust to require the [defendant] to pay all of the attorney's fees and costs incurred by her during the protracted litigation, and that it is equitable and appropriate to award her fees . . . .” Thereafter, the court ordered that the plaintiff “shall pay . . . the sum of $1,206,825.10, as and for the legal fees and costs of suit incurred by [the defendant] in connection with this case.”

The plaintiff filed an amended appeal from the court's judgment on the motion for contempt and its judgment awarding attorney's fees.[2] Additional facts and procedural history will be set forth as necessary.

We begin our analysis by considering the plaintiff's claim that, by means of its scheduling order, the court improperly limited his defense at the contempt hearing.[3]

[2] The defendant filed a cross appeal from the court's judgment on her contempt motion. The defendant later withdrew the cross appeal.

[3] As we stated previously in this opinion, the plaintiff also claims that the court improperly limited his defense at the attorney's fees hearing. Because we conclude that the court improperly limited the plaintiff's defense at the contempt hearing and that the plaintiff is entitled to a new hearing, the court's award of attorney's fees, which flowed from its finding of contempt, also must be vacated. We need not consider the claim related to the attorney's fees hearing, or the remaining claims in this appeal, as the issues raised therein are not likely to arise during the proceedings on remand. See *Zheng* v. *Xia*, 204 Conn. App. 302, 308 n.10, 253 A.3d 69 (2021) (reviewing court need not reach remaining claims if it is not persuaded that issues raised therein are likely to arise during proceedings on remand).

Although we do not reach the merits of the plaintiff's claim that the court improperly awarded attorney's fees to the defendant, we note that it appears on the face of the court's award that the award of fees does not arise solely

Our resolution of this claim is dispositive of the appeal. The plaintiff couches the present claim in terms of the trial court having abused its discretion by terminating the hearing before he had a fair opportunity to present his defense. The plaintiff argues that the consequence of the court's abuse of its discretion was that he was deprived of his right to present his defense. We are persuaded that the plaintiff adequately preserved the present claim by means of repeated objections to the court's order by the plaintiff's counsel. We also conclude that the court's discretionary rulings were harmful and that a new contempt hearing is warranted.

Specifically, the plaintiff argues that, "[a]s a result of the trial court's [scheduling] order [that limited the contempt hearing to five days], [he] was forced to condense his case into less than one day after the [defendant] tried her case over four days. The [defendant] had unfettered discretion to craft her presentation in a manner she saw fit to best support her claims. [He] was not afforded the same opportunity." According to the plaintiff, "[g]iven the heightened evidentiary standards and rigorous due process requirements for indirect civil contempt proceedings . . . the trial court's limitation of the [plaintiff's] case constitutes reversible error." (Citation omitted; internal quotation marks omitted.) The plaintiff also argues that the court (1) "erred

from the motion for contempt that is the subject of this appeal; rather, the court stated that its award encompassed "all of the attorney's fees and costs incurred by [the defendant] during this protracted litigation . . . ." Because the trial court may be asked to award attorney's fees during the proceedings on remand, we emphasize that the court has the discretion to award attorney's fees to the prevailing party in a contempt proceeding and that "[a]n abuse of discretion in granting . . . counsel fees will be found only if this court determines that the trial court could not reasonably have concluded as it did." (Internal quotation marks omitted.) *Malpeso* v. *Malpeso*, 165 Conn. App. 151, 184, 138 A.3d 1069 (2016). When contempt is established, "the concomitant award of attorney's fees properly is awarded pursuant to [General Statutes] § 46b-87 and is *restricted to efforts related to the contempt action*." (Emphasis added; internal quotation marks omitted.) Id.

in limiting [his] presentation of his defense at the contempt hearing," (2) "erred when it prohibited [him] from cross-examining witnesses and otherwise limited [him] from presenting his case and perfecting the record," and (3) that, "in the aggregate, the . . . court's procedural irregularities and rulings constitute an impermissible departure from the . . . court's proper role as a neutral arbiter of disputes raised by the parties."

We next set forth the applicable standard of review and the relevant legal principles that govern our resolution of this claim. It is well settled that "[m]atters involving judicial economy, docket management [and control of] courtroom proceedings . . . are particularly within the province of a trial court. . . . Connecticut trial judges have inherent discretionary powers to control proceedings, exclude evidence, and prevent occurrences that might unnecessarily prejudice the right of any party to a fair trial." (Citation omitted; internal quotation marks omitted.) *Sowell* v. *DiCara*, 161 Conn. App. 102, 132, 127 A.3d 356, cert. denied, 320 Conn. 909, 128 A.3d 953 (2015). "The [trial] court has wide latitude in docket control and is responsible for the efficient and orderly movement of cases." *Daily* v. *New Britain Machine Co.*, 200 Conn. 562, 574, 512 A.2d 893 (1986). The trial court has "inherent authority to control the proceedings before it to ensure that there [is] no prejudice or inordinate delay." *Gianquitti* v. *Sheppard*, 53 Conn. App. 72, 76, 728 A.2d 1133 (1999). "The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion." (Internal quotation marks omitted.) *Sowell* v. *DiCara*, supra, 132.

In reviewing the court's exercise of its discretion, we are mindful that "[d]iscretion imports something more than leeway in decision-making. . . . It means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to

impede or defeat the ends of substantial justice. . . . In addition, the court's discretion should be exercised mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court." (Citations omitted; internal quotation marks omitted.) *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 16, 776 A.2d 1115 (2001).

In order to put the court's ruling in the present case in necessary context, we note the nature of the contempt matter that was before the court and the burden that shifted to the plaintiff once the defendant proved her prima facie case. Mindful that the plaintiff argues that the court's exercise of discretion resulted in a violation of his due process right to present a defense, we also set forth some basic principles related to the due process rights of the plaintiff to his day in court. "Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense. . . .

"[C]ivil contempt is committed when a person violates an order of court which requires that person in specific and definite language to do or refrain from doing an act or series of acts. . . . In part because the contempt remedy is *particularly harsh* . . . such punishment should not rest upon implication or conjecture, [and] the language [of the court order] declaring . . . rights should be clear, or imposing burdens [should be] specific and unequivocal, so that the parties may not be misled thereby. . . .

"To constitute contempt, it is not enough that a party has merely violated a court order; the violation must be wilful. . . . The inability of a party to obey an order of the court, without fault on his part, is a good defense to the charge of contempt. . . .

"It is the burden of the party seeking an order of contempt to prove, by clear and convincing evidence,

both a clear and unambiguous directive to the alleged contemnor and the alleged contemnor's wilful noncompliance with that directive. . . . If the moving party establishes this twofold prima facie case, the burden of production shifts to the alleged contemnor to provide evidence in support of the defense of an inability to comply with the court order. . . .

"In the absence of an admission of contempt, indirect contempt must be proven by clear and convincing evidence. . . . A judgment of contempt cannot be based on representations of counsel in a motion, but must be supported by evidence produced in court at a proper proceeding. . . .

"[D]ue process of law . . . requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a *chance to testify and call other witnesses* [*o*]*n his behalf*, *either by way of defense or explanation*." (Citations omitted; emphasis added; internal quotation marks omitted.) *Puff* v. *Puff*, 334 Conn. 341, 364–67, 222 A.3d 493 (2020).

"A fundamental premise of due process is that a court cannot adjudicate any matter unless the parties have been given a reasonable opportunity to be heard on the issues involved . . . . Generally, when the exercise of the court's discretion depends on issues of fact which are disputed, due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses. . . . It is a fundamental tenet of due process of law as guaranteed by the fourteenth amendment to the United States constitution and article first, § 10, of the Connecticut constitution that persons whose . . . rights will be affected by a court's decision are entitled to be heard at a meaningful time and in a meaningful

manner. . . . Whe[n] a party is not afforded an opportunity to subject the factual determinations underlying the trial court's decision to the crucible of meaningful adversarial testing, an order cannot be sustained." (Citations omitted; internal quotation marks omitted.) *Szot* v. *Szot*, 41 Conn. App. 238, 241–42, 674 A.2d 1384 (1996). Accordingly, a court does "not have the right to terminate [a] hearing before [the parties have] had a fair opportunity to present evidence on the contested issues." Id., 242.

In the present case, as we will explain in greater detail, the defendant was provided an opportunity to establish her prima facie case over a period of four days. When the burden of production thereafter shifted to the plaintiff to provide evidence of an inability to comply with the court orders that were the subject of the defendant's motion, however, he was allowed, as a consequence of the court's scheduling order, only one day to call witnesses on his behalf, and his defense was largely limited to the introduction of exhibits. Given the lengthy postjudgment procedural history of this case related to the court's property distribution orders, and the complexity of the issues before the court, we conclude that affording the plaintiff only one day to present his defense was an abuse of the court's discretion that resulted in a hearing that was unfair to the plaintiff, depriving him of his due process rights.

The following facts are relevant to our analysis. The hearing on the defendant's motion for contempt originally was scheduled for four days. On the first day of evidence, the plaintiff's counsel, Norman Roberts, expressed his reservations over the time limitations given the lengthy postjudgment history of the case. He repeatedly asserted that he would not have sufficient time to present the plaintiff's defense to the defendant's allegations. As early as the morning of the first day of evidence, Roberts argued to the court that "it does

appear we're going to need more dates . . . . I didn't think that we would be halfway through the first day and be where we are." Later during the first day of evidence, Roberts renewed his concern that "[w]e're going to need more time," and again expressed his apprehensions that a hearing lasting only four days was not going to be sufficient. The court responded to Roberts' concerns by saying, "maybe like a stone rolling down a hill it'll pick up speed . . . . " The court expressed its reluctance to allow additional time because it was concerned that "[t]he work [would expand] to fill the time allotted for its completion." It maintained that, "if we stay focused . . . we'll get this done and I'll get a clear, cogent picture of why the Avaya shares are still not transferred."

At the end of the second day of evidence, Roberts again argued that the plaintiff would not be able to have a meaningful hearing without additional time: "[G]iven that we're two days in and we're still on . . . witness number one, can we get extra dates . . . because we're not going to finish. . . . I mean, there's just no possible way we're going to finish this." The court reassured the parties that they would be afforded "plenty of time . . . ."

Like Roberts, the court also expressed its concerns with the pace of the defendant's case-in-chief. On the second day of evidence, the court admonished the defendant's counsel on her prosecution of the motion. It stated: "[A]nd now we've got a problem. All right. On something that should have taken a very short time, probably thirty minutes on one side, thirty on another, if that, and done. And now we're doing it here, it's 10:30 in the morning, we haven't called our first witness, we're in the middle of a witness." Once again, on the morning of the last scheduled day, the court began by expressing its expectation that the defendant would finish her case-in-chief that day, despite noting that "this is our fourth

day," as well as that "[w]e have just a limited number of days assigned." The court conveyed its frustration by noting: "[O]ne of the things that I've experienced in this job for almost nineteen years now, is that oftentimes one party basically sucks all the oxygen out of the case. And there is no time for the opposing counsel to defend their client . . . . One of the functions that a trial judge has is to take charge of the case, balance the interest of the parties, and get the case done as expeditiously as possible. So we plowed the same row for a while yesterday. And that just can't happen. So, we need to be more economical with our presentations, and focus on what is really important. And then we'll have this case, basically, wrapped up tomorrow." The court further stated: "I just want people to understand that this is a system that is under extreme stress. And I expect counsel to focus on what is important, and what is relevant, and what is going to get us from point A to point B. Particularly the judge—you know—educating me in terms of the facts."

At the conclusion of the fourth day, after the defendant rested her case-in-chief, the court allowed for an additional day in which the plaintiff could present his defense. The court, however, preemptively placed restrictions on the plaintiff's ability to present his case. Specifically, after Roberts stated that he intended to call four witnesses in presenting the plaintiff's defense, the court responded by saying: "So, I think that—you know—a lean, spare examination, so that we're not plowing that same old furrow again there. You know—just let's—you know—you've got tonight to think about it. You know—sit down with [co-counsel], and just figure out what is important to you." Roberts expressed his frustration with the court's decision to limit the plaintiff's case-in-chief to one day, arguing that "I don't see the possibility of closing evidence tomorrow. I

really, really don't." The court admonished the plaintiff's counsel by saying: "This case has gone on way too long. A ten year old case is—you know—it's reached its shelf life, folks. It's expired. All right? So, for everybody's sake—for the system—the least of our worries, but the system, and for these two people whose lives have been on hold all this time, we've got to get some resolution. So, that's the dose of reality . . . . You're a good lawyer. You're—you know—you're a creative lawyer. You need to sit down with all your associates, and figure out how it is that you get your case in, and finish it tomorrow."

Alternatively, in light of the plaintiff's objections to the truncated scheduling order, the court threatened to declare a mistrial. Specifically, the court said: "So, one of the options that I have is—and I—I could—I've probably done it twice in my career, is to [mistry this proceeding], because this is not going to go—I am not carrying this case over to October." Thereafter, in compliance with the court's scheduling order, the plaintiff limited the presentation of his defense by introducing exhibits and limiting the testimony of witnesses to one day.[4]

In his appellate brief, the plaintiff asserts that he was prejudiced by the restrictions that the court placed on him because he "was required to submit numerous documents as exhibits without the benefit of testimony to explain and illuminate the salient portions . . .

[4] The defendant argues that, because the plaintiff did not "accept" what it mistakenly characterizes as the court's "offer" to declare a mistrial, and proceeded to present his case, the plaintiff should not now be permitted to seek reversal on the ground that the court did not afford him a fair hearing. "[A] party cannot take a path at trial and change tactics on appeal." (Internal quotation marks omitted.) *State* v. *Martone*, 160 Conn. App. 315, 327, 125 A.3d 590, cert. denied, 320 Conn. 904, 127 A.3d 187 (2015). In light of the repeated objections by the plaintiff's counsel to the court's scheduling order, we are not persuaded that this claim is a departure from any tactical decision made by the plaintiff's counsel at the hearing or that the plaintiff induced the alleged error at issue in this claim.

[and] to limit the number of his witnesses, and limit their testimony." Furthermore, the plaintiff's counsel asserted at oral argument before this court that the plaintiff was prejudiced by the restrictions placed on his defense because he was forced to reformulate his entire presentation in order to attempt to get all of his exhibits admitted into evidence, he was forced to focus on putting documents into evidence to support his trial brief instead of using witnesses to explain or to give context to the evidence for the benefit of the court, and because his ability to call and to examine witnesses was severely circumscribed.

The court's scheduling order does not appear to have been based on the complexity of the issues before the court in ruling on the defendant's motion or the reasonable needs of the parties to present their case. Indeed, the record reflects that, over the repeated objections of the plaintiff's counsel, the court limited the plaintiff's case-in-chief before he even had an opportunity to present any evidence. Thus, the court's scheduling order could not have been based on a determination that some or all of the plaintiff's evidence was not relevant or that it was inadmissible on some other ground, such as its being cumulative in nature or likely to waste time. See, e.g., Conn. Code Evid. § 4-3. Rather, the court's scheduling order appeared to be arbitrary, and its limitation on the plaintiff's case-in-chief seemingly was the result of the court's frustration that the parties' dispute had been long-standing.

Although the court appears to have been frustrated with the pace of the defendant's presentation of her case, it did not use the tools at its disposal to confine her case-in-chief to relevant matters and to prevent her from presenting what it believed to be cumulative evidence. Instead, in an effort to bring the hearing to a conclusion, it truncated the plaintiff's presentation of

his defense. The court's dissatisfaction with the presentation of the defendant's case-in-chief, however, was not a valid basis on which to infringe the plaintiff's right to be heard and to present a defense. The court may limit the time allowed for an evidentiary hearing but its limitation must be reasonable in light of the needs of the parties to present their case. See, e.g., *Dicker* v. *Dicker*, 189 Conn. App. 247, 265, 207 A.3d 525 (2019) ("we previously have determined that the court reasonably may limit the time allowed for an evidentiary hearing" (internal quotation marks omitted)). Nothing in the record suggests that the plaintiff agreed with the court's scheduling order or that he willingly accepted the limitations imposed on him by the court. In fact, the record clearly shows the opposite; as discussed previously, Roberts consistently and repeatedly expressed concern that he would not have enough time to present the plaintiff's case in full. Furthermore, as we discussed previously, the plaintiff specifically has claimed before this court that the trial court's restrictions severely circumscribed his ability to present his defense because they hampered his ability to provide necessary context for other evidence in the case.

We are persuaded that the court effectively terminated the hearing at the end of the fifth day and "before the plaintiff had a fair opportunity to present evidence on the contested issues." *Szot* v. *Szot*, supra, 41 Conn. App. 242. Although the court did allow for the parties to file briefs after the conclusion of the hearing, it is worth noting that the court also expressed its dissatisfaction with lengthy briefs, stating early in the proceedings that "[a] blizzard of paper is not going to be helpful." Moreover, allowing for the filing of a posthearing brief is not a substitute for an effective presentation of evidence, during which the court is able to assess the credibility of witnesses, particularly in a case involving

numerous and complex issues that occurred over several years, and when the opposing party was nearly unfettered in her ability to present her case.

All of these factors, considered together, make clear that the court's scheduling order reflected an abuse of its discretion, the plaintiff was not afforded a fair opportunity to present evidence on the contested issues, and the hearing was fundamentally unfair. Therefore, it is reasonable to conclude, as the plaintiff argues, that he was hampered in his ability to present testimony and to refute the defendant's evidence generally. The record is abundantly clear that the plaintiff's counsel went to great lengths to express his concern to the court that, as a result of its arbitrary decision to limit his presentation of evidence, the plaintiff would not have sufficient time to adequately present his defense and explain to the court why he could not comply with its orders. Under these facts and circumstances, the proper remedy is to reverse the judgments of the trial court and remand the case for a new hearing.

The judgments are reversed and the case is remanded for a new hearing.

In this opinion the other judges concurred.

NUTMEG STATE CREMATORIUM, LLC, ET AL. *v.* DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION ET AL.

(AC 43834)

Elgo, Suarez and Sullivan, Js.

Syllabus

The plaintiffs appealed to this court from the judgment of the trial court dismissing their administrative appeal from the decision of the Commissioner of Energy and Environmental Protection denying their applications for two new source air permits. The plaintiffs sought the required permits from the defendant Department of Energy and Environmental Protection in order to install and operate two cremation machines at the site of their proposed crematorium. After a hearing, a department hearing officer issued a decision recommending that the plaintiffs' permit applications be denied on the basis that the plaintiffs' cremation system exceeded the maximum allowable stack concentration (MASC) for emissions of mercury pursuant to the applicable regulation (§ 22a-174-29). The commissioner adopted the hearing officer's decision and issued a final decision affirming the denial of the permit applications. *Held*:

1. The plaintiffs could not prevail on their claim that § 22a-174-29 (b) (2) should be interpreted to require mercury to be measured at the property line, at which point the mercury would be in its particulate form and calculating the MASC would be unnecessary, as it was clearly contrary to what a plain reading of the regulation provided; this court, like the commissioner and the trial court, interpreted § 22a-174-29 (b) (2) to require the calculation of the MASC for emissions of mercury in its vapor form at the discharge point from the crematorium stacks.
2. The plaintiffs could not prevail on their claim that the trial court erred by interpreting improperly the term ambient air: the trial court properly interpreted § 22a-174-29 (b) (2), and, in light of this court's review of the record and the considerable discretion afforded to the commissioner on questions of facts, the trial court properly applied that regulation to the facts of the present case when it concluded that the commissioner's decision to deny the plaintiffs' applications was not unreasonable, arbitrary, capricious, illegal or an abuse of discretion, as the data presented to the commissioner demonstrated that the concentration of mercury vapor at the discharge point would exceed the MASC for mercury.
3. The plaintiffs' contention that the trial court went beyond the pleadings and improperly adjudicated issues not raised on appeal was unfounded:

because the plaintiffs claimed that the commissioner misinterpreted and misapplied § 22a-174-29, it was clearly necessary for the court to consider the interpretation of that regulation, along with how it should be applied to the facts of the present case, in order to resolve the plaintiffs' appeal.

4. The plaintiffs could not prevail on their claim that the trial court erred by violating binding legal precedent and the applicable statute (§ 4-183 (j)): although the plaintiffs argued that the commissioner's decision was made upon unlawful procedure on the basis that he improperly admitted a certain letter from department staff into evidence without providing the plaintiffs the opportunity to respond or to cross-examine the staff, the commissioner made clear that the letter was not evidence and, therefore, there was no requirement to afford the plaintiffs the opportunity for cross-examination; moreover, the department's regulations did not prohibit such a letter, and the plaintiffs were able to respond to the letter by filing their objection; furthermore, the plaintiffs' claim that the court misunderstood the evidence and eschewed the expert opinions was simply unsupported by the record and, as this court already concluded, the court properly interpreted the regulations and properly applied the substantial evidence standard in its review of the commissioner's decision.

Argued October 21, 2021—officially released February 1, 2022

Procedural History

Appeal from the decision of the named defendant denying certain permit applications submitted by the plaintiffs, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani*, *J.*; judgment dismissing the appeal, from which the plaintiffs appealed to this court. *Affirmed.*

Matthew S. Carlone, for the appellants (plaintiffs).

Benjamin W. Cheney, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Clare Kindall*, solicitor general, and *Matthew I. Levine*, assistant attorney general, for the appellee (named defendant).

Jesse A. Langer, for the appellee (defendant Coles Brook Commerce Park Owners Association, Inc.).

Opinion

SULLIVAN, J. The plaintiffs, Luke DiMaria and Nutmeg State Crematorium, LLC,[1] appeal from the judgment of the Superior Court dismissing their administrative appeal from the decision of the Commissioner of Energy and Environmental Protection (commissioner), denying the plaintiffs' applications for two new source review air permits (air permits), which had been submitted by the plaintiffs to the defendant Department of Energy and Environmental Protection (department).[2] On appeal, the plaintiffs claim that the trial court erred by (1) concluding that the plaintiffs' cremation system exceeded the maximum allowable stack concentration (MASC) for mercury, (2) interpreting improperly the term "ambient air" to mean all atmosphere external to buildings, (3) adjudicating issues not raised in the administrative appeal, and (4) violating binding legal precedent and General Statutes § 4-183 (j).[3] We affirm the judgment of the court dismissing the plaintiffs' appeal.

[1] DiMaria is the sole member of Nutmeg State Crematorium, LLC. For efficiency, we collectively refer to both as the plaintiffs throughout this opinion.

[2] The other defendants in the underlying appeal to the Superior Court were Coles Brook Commerce Park Owners Association, Inc. (Coles Brook), Prime Locations of CT, LLC, Hasson Holdings, LLC, SMS Realty, LLC, C& G Holdings, LLC, and C&G Holdings II, LLC. Of those defendants, only Coles Brook is participating in this appeal. Coles Brook did not file its own brief but, rather, adopted the department's brief in full.

[3] General Statutes § 4-183 (j) provides in relevant part: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings. . . ."

The following facts and procedural history are relevant to our resolution of this appeal. On October 15, 2014, the plaintiffs submitted to the department their applications for two new air permits, pursuant to § 22a-174-3a (a) (1) of the Regulations of Connecticut State Agencies,[4] to install and operate two cremation machines necessary for cremating human remains at the site of their proposed crematorium located at 35 Commerce Drive in Cromwell. On January 2, 2015, the department issued a notice of sufficiency indicating that the applications were complete. Following the issuance of the notice of sufficiency, the department began to conduct a technical review of the applications. During this review period, department staff performed MASC calculations for various pollutants and compared them to emissions from the proposed crematorium. No MASC calculation was performed for mercury, however, because department staff decided to consider mercury in its particulate form, rather than in its vapor form.[5]

On August 31, 2016, the department issued its tentative determination to recommend approval of the air permits. In response, several business entities filed a request with the department to obtain intervenor status, which was granted on October 27, 2016. Evidentiary hearings were held on February 28, and on March 1

[4] Section 22a-174-3a (a) (1) of the Regulations of Connecticut State Agencies provides in relevant part: "Prior to beginning actual construction of any stationary source or modification not otherwise exempted . . . the owner or operator shall apply for and obtain a permit to construct and operate under this section for any . . . (G) [i]ncinerator for which construction commenced on or after June 1, 2009 . . . ."

[5] The trial court made the following findings regarding mercury. "Mercury in various forms is a hazardous air pollutant . . . regulated under § 22a-174-29 of the Regulations of Connecticut State Agencies. There is evidence in the record that exposure to mercury can harm the brain, heart, kidneys, lungs, and immune system of people of all ages as well as cause death, reduced reproduction, slower growth and development, and abnormal behavior in animals. There is agreement amongst the parties that operation of the proposed cremation machines will emit mercury."

and 2, 2017. At the evidentiary hearings, the intervening parties argued to the department that the plaintiffs were responsible for showing compliance with the MASC for mercury in its vapor form because § 22a-174-29 (b) (2) of the regulations[6] requires that the MASC be calculated for the phase of mercury that it will be in at the discharge point from the crematorium stacks, which is in its vapor form. To support their contention, the intervening parties presented expert evidence from Eric Epner, an engineer with expertise in air permitting and air pollution control. Epner performed a MASC calculation for mercury in its vapor form and concluded that the emissions from the proposed crematorium stacks would not satisfy the MASC for mercury pursuant to § 22a-174-29 (b) (2).

The hearing officer credited the evidence presented by the intervening parties and concluded that, on the basis of a plain reading of § 22a-174-29 of the regulations, the plaintiffs were responsible for showing compliance with the MASC for mercury in its vapor form, rather than in its particulate form. On August 11, 2017, the hearing officer issued his proposed final decision, which recommended that the commissioner deny the plaintiffs' applications. Subsequent to the hearing officer's proposed final decision, the Bureau of Air Management (bureau) at the department submitted a posthearing staff response stating that it would not file an exception to the proposed final decision and that it agreed with the conclusion of the hearing officer. Specifically, this response stated that the bureau agreed

[6] Section 22a-174-29 (b) (2) of the Regulations of Connecticut State Agencies provides in relevant part: "No person, who is required to maintain compliance with a permit under section 22a-174-3a of the Regulations of Connecticut State Agencies shall cause or permit the emission of any hazardous air pollutant listed in Table 29-1, 29-2 or 29-3 of this section from any stationary source or modification at a *concentration at the discharge point* in excess of the maximum allowable stack concentration unless such source is in compliance with the provisions of subsection (d) (3) of this section. . . ." (Emphasis added.)

with the following conclusions of the hearing officer: (1) "[m]ercury vapor will in fact be emitted at the discharge point from the crematories," (2) "[t]he applicant[s] must demonstrate that emissions of mercury vapor from the crematories will comply with the [MASC] for mercury vapor, as calculated based on the hazard limiting value . . . for mercury vapor," and (3) "[t]he applicant[s] ha[ve] not demonstrated, through the permit application and hearing process that the emissions of mercury vapor from the crematories will comply with the [MASC] for mercury vapor, as calculated based on the hazard limiting value . . . for mercury vapor."

On August 28, 2017, the plaintiffs filed an objection to the bureau's response, seeking to strike it from the evidentiary record. The plaintiffs argued that the bureau's response was an improper posthearing submission and that § 22a-3a-6 (y) (3) (A) of the regulations[7] "only provides that a party may submit an exception to the proposed final decision of the hearing officer." On October 24, 2017, the commissioner issued his ruling on the plaintiffs' objection and motion to strike, concluding that "[t]here is nothing in the language of the rule, nor [have] the applicant[s] provided any other authority to support [their] claim that [§] 22a-3a-6 (y) (3) (A) or the related provision in Connecticut's Uniform Administrative Procedure Act . . . prohibits staff [of the department] from filing, or me from considering, [the] staff's [proposed final decision] response. . . . The applicant[s'] motion sought to have [the] staff's [proposed final decision] response stricken from the evidentiary record. . . . However, [the] staff's [proposed final decision] response is not evidence. . . . Since it is not evidence, [the] staff's [proposed final

[7] Section 22a-3a-6 (y) (3) (A) of the Regulations of Connecticut State Agencies provides in relevant part: "[W]ithin [fifteen] days after personal delivery or mailing of the proposed final decision any party or intervenor may file with the Commissioner exceptions thereto. . . ."

decision] response will not be included in the evidentiary record in this matter." (Emphasis omitted.)

On January 8, 2018, the commissioner issued his final ruling denying the plaintiffs' applications for new air permits. The plaintiffs subsequently appealed to the Superior Court, arguing that (1) "their constitutional right to due process was violated when . . . [the department] submitted evidence directly contradicting the evidence it proffered at trial and [in] its posttrial brief" and (2) the . . . commissioner misconstrued the [department's] regulations in justifying an arbitrary and capricious denial of the plaintiffs' applications." (Emphasis omitted.) The trial court rejected the plaintiffs' claims. This appeal followed. Additional facts will be set forth as necessary.

I

On appeal to this court, the plaintiffs first argue that the trial court erred by concluding that their cremation system exceeded the MASC for mercury. Specifically, the plaintiffs argue that § 22a-174-29 of the regulations does not require them to demonstrate that the mercury vapor emitted from the discharge point at the crematorium stacks complies with the regulation. Rather, the plaintiffs contend that the proper reading of the regulation requires the measure of mercury at the property line, at which point the mercury would be in its particulate form and calculating the MASC would be unnecessary. We disagree.

We begin our analysis by setting forth the appropriate standard of review. "The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us

first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . Furthermore, [t]he legislature is always presumed to have created a harmonious and consistent body of law . . . [so that] [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction. . . . Because issues of statutory construction raise questions of law, they are subject to plenary review on appeal." (Internal quotation marks omitted.) *Robinson* v. *Tindill*, 208 Conn. App. 255, 264, A.3d (2021).

"Ordinarily, this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when [an] agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference. . . . [I]t is for the courts, and not administrative agencies, to expound and apply governing principles of law. . . . These principles apply equally to regulations as well as to statutes." (Internal quotation marks omitted.) *Cockerham* v. *Zoning Board of Appeals*, 146 Conn. App. 355, 364–65, 77 A.3d 204 (2013), cert. denied, 311 Conn. 919, 85 A.3d 653 (2014), and cert. denied, 311 Conn. 919, 85 A.3d 654 (2014).

With the foregoing principles in mind, we begin with the language of the regulation at issue in the present

case. Section 22a-174-29 (b) (2) of the regulations provides in relevant part: "No person, who is required to maintain compliance with a permit under section 22a-174-3a of the Regulations of Connecticut State Agencies shall cause or permit the emission of any hazardous air pollutant listed in Table 29-1, 29-2 or 29-3 of this section from any stationary source or modification at a *concentration at the discharge point* in excess of the maximum allowable stack concentration unless such source is in compliance with the provisions of subsection (d) (3) of this section. . . ." (Emphasis added.) Several definitions of the terms used in the relevant regulation are pertinent to our resolution of this appeal. The term "discharge point" is defined as "any stack or area from which a hazardous air pollutant is released into the ambient air." Regs., Conn. State Agencies § 22a-174-1 (35). The term "stack" is defined as "any point in a source designed to emit solids, liquids, or gases into the air, including a pipe or duct . . . ." 40 C.F.R. § 51.100 (ff); see Regs., Conn. State Agencies § 22a-174-1 (109) (referring to definition set forth in 40 C.F.R. § 51.100 (ff) but providing "that stack shall also include a flare"). MASC is defined as "the maximum allowable concentration of a hazardous air pollutant in the exhaust gas stream at the discharge point of a stationary source under actual operating conditions." Regs., Conn. State Agencies § 22a-174-1 (68). A MASC calculation is performed using a formula specified in § 22a-174-29 (c) (1) of the regulations. Table 29-3 lists mercury particulate as a hazardous air pollutant but provides no numerical value for the MASC equation. Regs., Conn. State Agencies § 22a-174-29. The table, however, does provide a hazard limiting value for mercury in vapor form. Id., § 22a-174-29, Table 29-3.

The plaintiffs rely on the fact that there is no hazard limiting value for mercury in its particulate form listed in Table 29-3, and, as a result, they contend that there

is no way to calculate the MASC for mercury at the property line. The clear and unambiguous language of § 22a-174-29 (b) (2) of the regulations, however, requires that no hazardous air pollutant be emitted from the *discharge point* in excess of the MASC. It is undisputed that mercury will be in its vapor form at the discharge point at the stacks and that there *is* a hazard limiting value for mercury vapor.

Despite the plain and unambiguous language of § 22a-174-29 (b) (2) of the regulations, the plaintiffs nevertheless contend that this regulation should be interpreted to mean that no hazardous air pollutant found at the *property line* should exceed the MASC. Specifically, the plaintiffs argue that it is unnecessary to perform a MASC calculation as to mercury, using the hazard limiting value for mercury vapor, because mercury vapor will not exist at the property line. Contrary to the plaintiffs' argument, there is nothing in the regulation that provides that a MASC need not be calculated based on the existence or nonexistence of mercury vapor at the property line. Rather, the regulation clearly identifies the relevant point at which to measure the MASC as the *discharge point*. Here, it is undisputed that mercury vapor will be present at the discharge point—the relevant place of measurement per the plain reading of the regulation—not at the property line. The plaintiffs' interpretation is clearly contrary to what a plain reading of the regulation provides.

Although our review is plenary, we agree with the commissioner's and the trial court's interpretation of the regulation. The commissioner determined that § 22a-174-29 (b) (2) of the regulations requires the calculation of the MASC for mercury emissions in its vapor form. Likewise, the trial court concluded that "to determine whether this emission can be permitted, a MASC for mercury vapor in this particular situation must be

calculated and compared to the actual expected emission." On the basis of the plain meaning of the regulation, we conclude that calculating the MASC for mercury vapor is required under § 22a-174-29 (b) (2).

II

The plaintiffs next argue that the trial court erred by interpreting improperly the term "ambient air" to mean all atmosphere external to buildings. Specifically, the plaintiffs contend that "[t]he record unequivocally establishes that the term '[a]mbient [a]ir' must be interpreted as commensurate with the applicant's property line . . . . [T]he MASC formula in [§ 22a-174-29 (b) of the regulations] . . . . is a differential equation constructed to calculate the MASC at the discharge point so that the concentration of only those [hazardous air pollutants] present at the applicant's property line may be calculated . . . ." (Emphasis omitted.) The department contends that "[t]he terms used to define MASC make it clear that MASC is intended to regulate [hazardous air pollutants] emitted from the stack." It further contends that "[t]he hearing officer credited . . . Epner's testimony and that testimony is more than sufficient evidence to show that the plaintiffs' proposed crematorium stacks would not comply with the MASC for mercury." We agree with the department.

In part I of this opinion, we determined the proper interpretation of § 22a-174-29 of the regulations. We now turn to the department's application of that regulation to the facts in the present case. This appeal is brought pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq. Judicial review of an administrative decision in an appeal under the UAPA is limited. See *Nussbaum* v. *Dept. of Energy & Environmental Protection*, 206 Conn. App. 734, 739, 261 A.3d 1182, cert. denied, 339 Conn. 915, 262 A.3d 134 (2021). "[R]eview of an administrative

agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the appellate] court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) Id.

"The substantial evidence rule governs judicial review of administrative fact-finding under the UAPA. . . . An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . The substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency . . . ." (Internal quotation marks omitted.) *Towing & Recovery Professionals of Connecticut, Inc.* v. *Dept. of Motor Vehicles*, 205 Conn. App. 368, 371, 257 A.3d 978, cert. denied, 338 Conn. 910, 258 A.3d 1279 (2021).

Our review of the record persuades us that the judgment of the court should be affirmed. In addressing the plaintiffs' claims on appeal, the court concluded that the commissioner's decision to deny the plaintiffs' applications for two new permits was not unreasonable, arbitrary, capricious, illegal or an abuse of discretion. The court observed that "this decision turns, not on the factual evidence submitted, but, instead, on the legal interpretation of the applicable regulations. Once the regulations are construed, their application to the evidence in this matter becomes uneventful." The court concluded that, "[i]f the regulations require a MASC analysis at the stack, the permits must be denied

because *the uncontroverted record evidence revealed that the MASC for mercury vapor, as calculated and entered into evidence by the intervening parties, was exceeded at the stack* and no emission exceeding the MASC can be allowed." (Emphasis added.) We agree with the court's analysis.

"[T]his court . . . may [not] retry [a] case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact." (Internal quotation marks omitted.) *Towing & Recovery Professionals of Connecticut, Inc.* v. *Dept. of Motor Vehicles*, supra, 205 Conn. App. 375. The commissioner had the evidence of the bureau staff, as well as the testimony of Epner and the entire administrative record before him when making his final decision. This evidence included the MASC, performed by Epner, of mercury in its vapor form at the end of the stack. The data presented to the commissioner demonstrated that the concentration of mercury vapor at the discharge point would exceed the MASC for mercury. In light of the record and the considerable discretion concerning findings of fact afforded to the commissioner, we reject the plaintiffs' claim and conclude that the trial court properly interpreted the regulations and properly applied the facts in the present case.

III

The plaintiffs next argue that the court erred by adjudicating issues not raised on appeal. Specifically, the plaintiffs contend that the court adjudicated three particular issues that were not raised on appeal: (1) whether the mercury emissions should be considered in deciding whether the proposed discharge meets the regulatory requirements for an air permit, (2) how § 22a-174-29 of the regulations regarding mercury emissions and the MASC should be applied, and (3) whether the plaintiffs failed to satisfy § 22a-174-29 because they did

not calculate a MASC for mercury vapor as required by the regulation. The plaintiffs further contend that "[i]t is clear and unequivocal that the court ruled upon issues outside the scope of the pleadings, which is grounds for automatic reversal."

We begin our analysis with the standard of review. "Any argument that the court acted outside the scope of the pleadings implicates its authority to act, which presents a question of law over which our review is plenary. . . . Furthermore, [t]he interpretation of pleadings is always a question of law for the court . . . ." (Citation omitted; internal quotation marks omitted.) *Commerce Park Associates, LLC* v. *Robbins*, 193 Conn. App. 697, 732, 220 A.3d 86 (2019), cert. denied sub nom. *Robbins Eye Center, P.C.* v. *Commerce Park Associates, LLC*, 334 Conn. 912, 221 A.3d 447 (2020), and cert. denied sub nom. *Robbins Eye Center, P.C.* v. *Commerce Park Associates, LLC*, 334 Conn. 912, 221 A.3d 448 (2020).

In their appeal to the Superior Court, the plaintiffs asked the court to vacate and reverse the department's final order denying their air permit applications. Specifically, the plaintiffs alleged, among other things, that, "[i]n denying the plaintiffs' applications the [department] acted arbitrarily, capriciously and illegally by requiring the plaintiffs [to] use the [hazard limiting value] for mercury vapor, rather than mercury particulate, in connection with the plaintiffs' MASC calculations for mercury emissions, in order to demonstrate [that] the proposed cremation systems comply with [§ 22a-174-29 of the regulations]. . . . [T]here are no facts contained in the record which could form a proper legal basis for the [department] to reach its conclusions that [§ 22a-174-29] require[s] the plaintiff[s] to demonstrate compliance with the MASC using the [hazard limiting value] for mercury vapor rather than mercury particulate . . . ."

The plaintiffs' contention that the court went beyond the pleadings is unfounded. The plaintiffs pleaded that the commissioner misinterpreted and misapplied § 22a-174-29 of the regulations; thus, it was clearly necessary for the court to consider the interpretation of that regulation, along with how it should be applied to the facts of the case at bar, in order to resolve the administrative appeal. The interpretation of § 22a-174-29 is clearly a legal question for the court to review, and, accordingly, the court was well within its discretion to adjudicate the appeal in the manner that it did.

IV

The plaintiffs' final claim on appeal is that the court erred by violating binding legal precedent and § 4-183 (j). Specifically, the plaintiffs contend that "[t]he trial court cannot substitute its judgment as to the credibility of witnesses or findings of fact so long as there is a rational basis for the factual findings in the record. . . . The trial court's decision . . . substitutes the court's own judgment in its place without regard to fundamental scientific and mathematical concepts." (Citations omitted.) The plaintiffs further contend that "[i]t is clear from the decision that the court fundamentally misunderstood all of the fundamental scientific and mathematical underpinning[s] central to this case." We disagree.

We previously concluded in parts I and II of this opinion that the court properly interpreted the regulations. This claim is another recitation of the arguments already addressed in this opinion. The court properly applied the substantial evidence standard in its review of the commissioner's decision. The plaintiffs claim that the court substituted its own judgment by "eschewing the expert opinions of every engineer that testified in this case"; however, that assertion is simply unsupported by the record.

Finally, the plaintiffs rely on *Godaire* v. *Dept. of Social Services*, 174 Conn. App. 385, 165 A.3d 1257 (2017), in which this court reversed the trial court's ruling on the ground that the administrative decision was made upon unlawful procedure pursuant to § 4-183 (j) (3) because "the plaintiff did not have a meaningful opportunity to respond to the corrected evidence presented by the department . . . ." (Internal quotation marks omitted.) Id., 399. The plaintiffs assert that *Godaire* should inform our decision in the present case because the commissioner's decision was made upon unlawful procedure. Specifically, the plaintiffs contend that "[the department] submitted an unsworn document into the record, which was never scrutinized under cross-examination, and the gravamen of said document contradicts every representation made by the [department] in the preceeding two years . . . . [The letter was submitted] during a time period wherein the department['s rules of practice prohibit the admission of new evidence . . . ."

Contrary to the plaintiffs' assertion, the commissioner made clear that the response letter submitted by the bureau staff was not evidence. The commissioner stated in his ruling on the plaintiffs' objection and motion to strike the response letter that "[t]here is nothing in the language of the rule, nor [have] the applicant[s] provided any other authority to support [their] claim that [§] 22a-3a-6 (y) (3) (A) [of the regulations] or the related provision in [the UAPA] . . . prohibits [the] staff from filing, or me from considering, [the] staff's [proposed final decision] response. . . . The applicant[s'] motion sought to have [the] staff's [proposed final decision] response stricken from the evidentiary record. . . . However, [the] *staff's* [*proposed final decision*] *response is not evidence*. . . . Since it is not evidence, [the] staff's [proposed final decision] response will not be included in the evidentiary record

in this matter." (Emphasis altered.) We agree with the commissioner. The response letter did not constitute evidence; rather, the document outlined the bureau staff's opinion and was properly included in the administrative record.[8] Nor do any of the department's regulations prohibit such a letter. In fact, the regulations explicitly provide for an opportunity to submit exceptions to the commissioner.[9] Moreover, the plaintiffs did respond to this letter through an objection. The commissioner considered and denied their objection, concluding that the bureau staff's response was properly filed and was not evidence, and that, as such, there was no requirement to afford the plaintiffs the opportunity to cross-examine the bureau staff.

In summary, the plaintiffs have failed to show that § 22a-174-29 of the regulations does not require a MASC calculation for mercury at the discharge point or that the commissioner's decision was not based on substantial evidence in the record.

The judgment is affirmed.

In this opinion the other judges concurred.

[8] Section 22a-3a-6 (v) of the Regulations of Connecticut State Agencies provides in relevant part: "(1) . . . [F]or the purposes of a Department proceeding the record shall include: (A) any briefs or exceptions filed before or after issuance of the proposed final decision and (B) any correspondence between the hearing officer or Commissioner and any party, intervenor, or other person concerning the proceeding. (2) The evidentiary record shall be maintained separately from the rest of the record. The evidentiary record shall consist, in addition to the recording of the hearing, of all documents offered into evidence (exhibits), regardless whether they are admitted. Exhibits which are not admitted shall be marked for identification." (Internal quotation marks omitted.)

[9] Section 22a-3a-6 (y) (3) (A) of the Regulations of Connecticut State Agencies provides in relevant part: "Unless otherwise specified by the Commissioner, within [fifteen] days . . . of the proposed final decision any party . . . may file with the Commissioner exceptions thereto."

HALINA OSTAPOWICZ *v.* JERZY WISNIEWSKI
(AC 43944)

Alexander, Clark and Sheldon, Js.

Syllabus

The plaintiff appealed from the judgment of the trial court dissolving her marriage to the defendant. She claimed that the court lacked subject matter jurisdiction to enforce the parties' premarital agreement, erred in finding that certain property constituted the defendant's separate property under that agreement and abused its discretion in assigning to her the debt on the parties' home equity line of credit. *Held*:

1. The plaintiff could not prevail on her claim that the trial court lacked subject matter jurisdiction to enforce the parties' premarital agreement: although the defendant did not comply with the specific pleading requirements of the rule of practice (§ 25-2A), as he did not file a demand for enforcement of the agreement in his prayer for relief, the court, noting that § 25-2A permits the court to exercise its discretion with respect to the time to demand enforcement of an agreement, found that the defendant's filing of a notice containing the agreement constituted a demand for the enforcement of the agreement; moreover, the court had statutory (§ 46b-1) jurisdiction over the dissolution of the parties' marriage, including the premarital agreement, and the rules of practice do not implicate a court's subject matter jurisdiction.
2. The trial court did not abuse its discretion in classifying and assigning the defendant's separate property interests pursuant to the parties' premarital agreement: the plaintiff did not challenge the court's findings that the defendant had complied with the provisions of the agreement related to record keeping and that the plaintiff had removed certain of the defendant's financial records from the marital home, making it difficult for the defendant to trace his property interests in detail; moreover, the court credited the testimony of witnesses that the defendant's family business was an informal venture, and it made detailed findings concerning the value of the family business assets at the time of the parties' marriage and at trial; furthermore, the court did not assign to either party the other party's interest in the family business, thus, the court did not err in not placing a total value on the defendant's interest in the family business pursuant to statute (§ 46b-81 (c)).
3. The trial court abused its discretion in assigning to the plaintiff the entire outstanding debt on the parties' home equity line of credit; the court found that the defendant borrowed $10,000 under this line of credit to pay his attorney's fees in the dissolution proceeding, thus, its order assigning the plaintiff to pay the entire outstanding debt was irreconcilable with its order that the parties were solely responsible for the payment of their respective attorney's fees.

Argued October 7, 2021—officially released February 1, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Caron, J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties' premarital agreement, from which the plaintiff appealed to this court. *Affirmed in part*; *reversed in part*; *further proceedings*.

Keith Yagaloff, for the appellant (plaintiff).

Kevin B. F. Emerson, for the appellee (defendant).

Opinion

CLARK, J. The plaintiff, Halina Ostapowicz, appeals from the judgment of the trial court dissolving her marriage to the defendant, Jerzy Wisniewski. On appeal, the plaintiff claims that the court (1) lacked subject matter jurisdiction to enforce the parties' premarital agreement, (2) erroneously found that certain property constituted the defendant's separate property under the premarital agreement and failed to assign a specific value to that property, and (3) abused its discretion in assigning to her the debt on the parties' home equity line of credit. We agree with the plaintiff's third claim and, therefore, affirm in part and reverse in part the judgment of the trial court.

The following facts, as found by the court, and procedural history are relevant to our resolution of the plaintiff's appeal. The parties were married on August 21, 2006. Prior to their wedding, they both signed a premarital agreement (agreement). The plaintiff commenced the present action for dissolution of the marriage on October 20, 2017, alleging that the marriage had broken down irretrievably. On May 14, 2018, the defendant simultaneously filed an answer in which he alleged that the marriage should be annulled on the basis of fraud,

a cross complaint,[1] and a "notice" to which he attached the agreement. The court tried the case on several days between April 16 and July 19, 2019. The parties and the defendant's daughter, Alice Vautour, and his sister, Barbara Szczypinski, testified at trial.

Following the presentation of evidence and submission of posttrial briefs, the court issued a lengthy and comprehensive memorandum of decision on December 30, 2019. The court found that the plaintiff was fifty-two years old, in good health, and the mother of two adult children. She was born in Poland and came to the United States in 2004 on a tourist visa, but later secured a student visa and attended Central Connecticut State University. When she arrived in the United States, she worked as a private duty nurse. At the time of trial, she was working as a certified nurse's aide at the University of Connecticut Health Center. The plaintiff attained permanent resident status when she married the defendant; she became a United States citizen in 2014.

The defendant was seventy years old and in poor health. He, too, had been born in Poland and came to the United States with his parents when he was fourteen years old. He earned a bachelor's degree in mechanical engineering in 1974. He and his brother owned a machine shop that they sold in 1987. He later was employed by two other businesses. In 2013 and 2014, the defendant had quadruple bypass surgery and two venous thrombectomies. He has difficulty walking and takes a dozen medications daily for his multiple health problems.

[1] The cross complaint alleged that the marriage should be annulled on the grounds of fraud and misrepresentation because the plaintiff allegedly entered the marriage with the sole intent of using the defendant's citizenship to gain permanent residency and citizenship for herself, her children and her son-in-law.

The court also found that, beginning fifty years ago with his parents, continuing with his brother and sister, and now with his children, the defendant and his family have pooled their money, resources, and labor to buy, maintain, and sell investment real estate. At one time, the family owned and maintained twelve investment properties. To further their business, the family has held various bank and investment accounts, each in the name of more than one member of the family. The court found that the family business is an informal venture, and through the generations, there have never been any contracts or written agreements between family members. Names were added to and removed from titles on properties as needed to further the growth of the business. Family members pool their money, putting in and taking out what is necessary, and working together to purchase, renovate, maintain, and sell properties. The court made detailed findings with respect to the family's business assets, both real property and monetary, and related transactions.

The court did not find it surprising that there were no contracts or written agreements between and among members of the defendant's family, stating: "The first generation of immigrants from Poland worked hard and invested well and passed down to their children assets they had accumulated as a family. The next generation, immigrants themselves, continued in the same vein, following the example of their parents, investing money, time and labor as a family. The court does not ascribe any nefarious motives to the informal way the family has conducted its business, nor does it question the fact that there are no written agreements or contracts."

With respect to the parties' relationship, the court found that they had lived together for eleven months in the defendant's Fenwick Street apartment in Hartford before they married. The defendant helped the plaintiff

obtain a student visa and eventually permanent residency. He also helped the plaintiff's daughter and son-in-law attain legal status. The court found that the parties had approximately nine years of a good marriage. In November, 2015, the defendant asked the plaintiff, for probate purposes, to sign an addendum to the agreement so that there would be contemporaneous documentation that the plaintiff would not make any claim against any of the properties or accounts the defendant acquired through his family business prior to or since the date of marriage. The court found the timing of the defendant's request significant, as it occurred shortly after he experienced serious health issues. The plaintiff refused to sign the addendum. Multiple events between 2015 and 2017 put a strain on the parties' relationship, including the defendant's health issues and the death of the plaintiff's mother in Poland. The court found that disagreements and arguments over money and real estate ultimately led the plaintiff to file for divorce.

The court determined that neither party was primarily responsible for the end of the relationship. The court also concluded that the defendant had failed to prove by clear and convincing evidence that the plaintiff married him solely to attain legal status for herself and her family. The court thus found no fraud on the part of the plaintiff and that the parties' marriage was valid.

With respect to the agreement, the court found that, when the defendant asked the plaintiff to sign the agreement, he made clear that his intention was to protect his interest in the family's business. He testified that he would not have married the plaintiff if she had not signed the agreement. At the time the agreement was drafted, the defendant showed the plaintiff bank and account statements regarding the family business.[2] During the marriage, the statements were mailed to the

[2] Four schedules, which listed the parties' respective assets and liabilities, were attached to the agreement.

marital home and, according to the defendant, the plaintiff had full access to and knowledge of the contents of the statements. The plaintiff also accompanied the defendant to the bank on several occasions.

The plaintiff testified that the defendant probably told her that he would not marry her if she did not sign the agreement. According to her, the defendant went through his financial affidavit and told her that most of the money was family money and the Fenwick Street apartment house where they were living was a family house. She acknowledged that the defendant and his family worked hard for their money and kept it together but claimed that the defendant never told her how much of the family money was his.

The defendant helped the plaintiff prepare her financial affidavit and explained the agreement to her in Polish. The plaintiff later met with Jacek I. Smigelski, a Polish-speaking attorney, to review the agreement; the defendant, who had separate counsel, was not present at the meeting. The plaintiff asked Smigelski a few questions about the agreement, which he answered. The defendant signed the agreement on July 5, 2006; the plaintiff signed it on July 7, 2006. The parties were married on August 21, 2006.

The court noted that General Statutes § 46b-36a et seq. governs premarital agreements. Under that act, a premarital contract is not enforceable under the following conditions: it was not signed voluntarily; it is unconscionable; a party was not provided fair and reasonable disclosure of the amount, character and value of property, financial obligations and income of the other party; or a party was not provided a reasonable opportunity to consult with independent counsel before signing it. General Statutes § 46b-36g.

The plaintiff acknowledged that both parties signed the agreement, and she did not claim that it is unconscionable. Instead, she claimed that the defendant did

not tell her that the bank accounts he disclosed were co-owned by family members and that she did not have a meaningful opportunity to review the agreement with counsel.

The court rejected both claims. It noted that, although they were not required by statute to do so, the parties appended financial affidavits to the agreement. The defendant reviewed his financial affidavit with the plaintiff prior to the time she signed the agreement and explained to her that much of the money listed in that financial affidavit belonged to his family and that they had always held those assets together. The plaintiff also testified that, at the time she signed the agreement, she understood that she was giving up any future claim for family money in the event of a dissolution. "Given that background and crediting the defendant's testimony that, at the time of the drafting and prior to the signing of the agreement, he showed the plaintiff all of the bank and account statements regarding his family money and business (which bank accounts contained other family members' names as well as the defendant's)," the court found that the defendant provided the plaintiff with a fair and reasonable disclosure of the amount, character and value of his property.

The court also found that the plaintiff had an opportunity to meet with a Polish speaking attorney to review the agreement approximately one and one-half months before the wedding, which the court considered a reasonable period of time for review. It was the plaintiff's responsibility to ensure that the legal consultation was meaningful to her. The court, therefore, concluded that the agreement was valid and enforceable.

The court then turned to the substance of the agreement. The court noted that, under section A of paragraph IX of agreement, titled "Termination of Marriage," "[n]either party [is entitled to] receive any portion of

the separate property of the other . . . and/or replacements of such property." Section B of paragraph IX further provides that the "parties shall have no right against each other by way of claims for . . . *division of property existing of this date . . . or acquire*[*d*] *in the future separately from separate* [*funds*]."[3] (Emphasis altered.) As a result, the court construed the agreement to mean that "neither party shall have a claim against the separate property (the real estate in schedules C and D [of the agreement]) or a claim against the property existing as of the date of the [a]greement/subsequent marriage (all the assets in schedules A and B), *or of any future real estate or investments that flow from these original assets.*" (Emphasis added.) On the basis of the court's construction of the agreement and its finding that "family business assets listed on the defendant's current financial affidavit [were] a direct result of the premarital assets he was in possession of at the time of the marriage, as they were acquired after the marriage, separately from separate funds," the court concluded that the plaintiff had no right or claim to the defendant's interest in the family business assets he had listed in his current financial affidavit.

[3] Section III of the agreement, titled "SEPARATE PROPERTY," provides as follows: "Each of the parties agrees that the property described hereafter, shall be defined as the separate [property] of the other party.

"A. All property of [the defendant] listed on 'Schedule C' attached hereto and all property listed of [the plaintiff] listed on 'Schedule D' attached hereto.

"B. All property, whether real or personal or whatsoever nature and wheresoever situated acquired by either party out of the proceeds or income from the separate property or any replacements thereof, or attributable to appreciation in value of said property, or their replacements, whether the enhancement is due to market conditions or to the services, skills or efforts of either of the parties.

"C. The parties shall keep adequate records of their transactions in such separate property and shall make such records available to the other from time to time, the intent being that at all times the separate property will be effectively updated by each of them in such financial records."

Schedules A and B are the parties' respective financial affidavits that were appended to the agreement. Schedules C and D document the title holders of the real estate that was listed in the parties' respective financial affidavits.

With respect to the marital home, however, the court found that the parties had commingled funds to purchase the home and that the plaintiff had helped to maintain it and assisted with improvements. She also had paid the debt on the home equity line of credit. The court concluded, therefore, that the marital home was marital property in which the plaintiff had a legitimate, legal interest.

In dissolving the marriage on the grounds of an irretrievable breakdown, the court ordered, among other things, that the parties are responsible for their respective health insurance and unreimbursed medical expenses; neither party shall receive alimony; the defendant shall quitclaim the marital home to the plaintiff, who "*shall be solely responsible for payment of the* [*home equity line of credit*]," taxes, insurance, and maintenance; the plaintiff has no interest in the defendant's family business; the parties shall retain their respective bank and retirement accounts and pay their respective debts; the defendant shall retain his rights in the family business; the parties shall retain their respective automobiles; and "[*e*]*ach party shall be solely responsible for payment of their respective attorney's fees incurred during the course of this case*." (Emphasis added.)

The plaintiff filed a motion to reargue on the grounds that the court had erred in classifying and assigning the property it determined was the defendant's separate property and in ordering the parties to be responsible for their own attorney's fees while also assigning the debt on the home equity line of credit to her. The defendant objected to the motion to reargue, arguing, among other things, that assigning the home equity loan to the plaintiff was not an order that the plaintiff pay the defendant's attorney's fees, but the "[c]ourt's calculation as to the appropriate award to the defendant (value of property less balance of the [line of credit])." The

court summarily denied the motion to reargue, and the plaintiff did not move for an articulation. This appeal followed.

I

The plaintiff first claims that the court lacked subject matter jurisdiction to enforce the agreement because the defendant did not comply with the requirements of Practice Book § 25-2A.[4] We disagree.

We begin with the standard of review. "Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it." (Internal quotation marks omitted.) *Aley* v. *Aley*, 97 Conn. App. 850, 854, 908 A.2d 8 (2006). Subject matter jurisdiction "may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) Id. A determination of a court's subject matter jurisdiction is a question of law, and, therefore, our review is plenary. See, e.g., *Giulietti* v. *Giulietti*, 65 Conn. App. 813, 846, 784 A.2d 905, cert. denied, 258 Conn. 946, 788 A.2d 95 (2001), and cert. denied, 258 Conn. 947, 788 A.2d 95 (2001), and cert. denied sub nom. *Vernon Village, Inc.* v. *Giulietti*, 258 Conn. 947, 788 A.2d 97 (2001), and cert. denied sub nom. *Giulietti* v. *Vernon Village, Inc.*, 258 Conn. 947, 788 A.2d 96 (2001).

The following procedural facts are relevant to our resolution of this claim. The plaintiff commenced the

[4] Practice Book § 25-2A provides in relevant part: "(a) If a party seeks enforcement of a premarital agreement . . . he or she shall specifically demand the enforcement of that agreement, including its date, within the party's claim for relief. The defendant shall file said claim for relief within sixty days of the return date unless otherwise permitted by the court.

"(b) If a party seeks to avoid the premarital agreement . . . he or she shall, within sixty days of the claim seeking enforcement of the agreement, unless otherwise permitted by the court, file a reply specifically demanding avoidance of the agreement and stating the grounds thereof."

present action in October, 2017. The complaint contained no allegation regarding the agreement. On May 14, 2018,[5] the defendant simultaneously filed three pleadings: an answer, a cross complaint, and a "notice" to which he attached a copy of the parties' agreement, including schedules. The defendant did not expressly reference or demand enforcement of the agreement in his prayer for relief.

On October 18, 2018, approximately six months after the defendant had filed with the court the notice and agreement and just twelve days before trial was scheduled to commence, the plaintiff filed a motion to preclude the agreement on the grounds that the defendant had failed to comply with Practice Book § 25-2A, which provides that a party seeking to enforce a premarital agreement "shall specifically demand the enforcement of that agreement, including its date, within the party's claim for relief" within sixty days of the return date "unless otherwise permitted by the court." The plaintiff argued that the defendant did not include a demand for enforcement of the agreement within his claim for relief, did not file the agreement itself within sixty days of the November 21, 2017 return date, and did not seek permission from the court to file any such claim for relief after the deadline for doing so had passed. As a result, she argued that the agreement was not properly before the court and could not be enforced, citing *Warren* v. *Gardel*, Superior Court, judicial district of Fairfield, Docket No. FA-15-6048865-S (November 28, 2016), and *Olderman* v. *Olderman*, Superior Court, judicial district of New Britain, Docket No. FA-14-4034221-S (August 13, 2014).[6]

[5] In its order denying the plaintiff's motion to preclude the agreement, the court cites different dates on which the answer, cross complaint, and notice were filed. Those dates appear to be the dates the documents were signed or captioned, however. According to the docket prepared by the clerk, all three documents were filed on May 14, 2018.

[6] In *Warren*, the court noted that Practice Book § 25-2A "requires that a party seeking to enforce a pre- or post-nuptial agreement plead the agree-

On the following day, October 19, 2018, the court heard and denied the plaintiff's motion to preclude the agreement. In its order, the court acknowledged that the rules of practice required the defendant to file with his answer and cross complaint a demand for enforcement of the agreement on or before January 21, 2018. The court noted, however, that Practice Book § 25-2A (a) permits "the court to exercise its discretion" with respect to the time to demand enforcement of an agreement. The court also found that the defendant's filing of the "notice" and agreement "constitute[d] a demand for the enforcement of [the] agreement." The court further found that the plaintiff did not file a timely reply pursuant to Practice Book § 25-2A (b) but, instead, waited until the eve of trial to file her motion to preclude the agreement. As a result, the court denied the motion to preclude but continued the trial in order to provide the parties with more time to conduct discovery regarding the agreement.[7]

On appeal, the plaintiff claims that the court lacked subject matter jurisdiction to enforce the agreement because the defendant did not comply with the specific pleading requirements of Practice Book § 25-2A. As a result, she argues that any orders flowing from the agreement are void. We disagree.

ment in the prayer for relief." *Warren* v. *Gardel*, supra, Superior Court, Docket No. FA-15-6048865-S. Because neither party had done so, the court concluded that it did "not have the authority to issue orders enforcing the terms of the pre-nuptial agreement itself." Id. Similarly, in *Olderman*, neither party had pleaded or demanded enforcement of the premarital agreement in accordance with Practice Book § 25-2A. The court concluded, without discussion or analysis, that, "[c]onsequently, a claim for enforcement of the premarital agreement is not properly before this court." *Olderman* v. *Olderman*, supra, Superior Court, Docket No. FA-14-4034221-S. Neither court suggested that a party's failure to comply with Practice Book § 25-2A deprived the court of *subject matter jurisdiction* over the agreement, which is the plaintiff's claim in the present appeal.

[7] The trial was rescheduled for April 16, 2019.

Pursuant to General Statutes § 46b-1, the Superior Court has broad jurisdiction over family matters involving dissolution of marriage, including prenuptial agreements.[8] "Jurisdiction of the [subject matter] is the power [of the court] to hear and determine cases of the general class to which the proceedings in question belong. . . . A court has subject matter jurisdiction if it has the authority to adjudicate a particular type of legal controversy. . . . It is a familiar principle that a court which exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." (Internal quotation marks omitted.) *Muller* v. *Muller*, 43 Conn. App. 327, 331, 682 A.2d 1089 (1996). Under § 46b-1, there is no question that the court had jurisdiction over the dissolution of the parties' marriage, including whether the agreement should be enforced. See *Amodio* v. *Amodio*, 247 Conn. 724, 729, 724 A.2d 1084 (1999) (Superior Court as general jurisdiction tribunal has plenary and general subject matter jurisdiction over legal disputes in family matters). Moreover, it is well settled that the rules of practice, including those pertaining to pleading requirements, do not implicate a court's subject matter jurisdiction. See General Statutes § 51-14 (a) ("[s]uch rules shall not abridge, enlarge or modify any substantive right or the jurisdiction of any of the courts").

Accordingly, the plaintiff's claim that the court lacked subject matter jurisdiction to enforce the agreement fails.[9]

[8] General Statutes § 46b-1 provides in relevant part: "Matters within the jurisdiction of the Superior Court deemed to be family relations matters shall be matters affecting or involving: (1) Dissolution of marriage, contested and uncontested . . . (15) actions related to prenuptial . . . agreements . . . ."

[9] The plaintiff's claim on appeal is that the defendant's failure to comply with the pleading requirements of Practice Book § 25-2A deprived the court of subject matter jurisdiction to enforce the agreement. The only hint of an alternative, nonjurisdictional claim challenging the court's *authority* to enforce the agreement appears in the following sentence of her reply brief:

II

The plaintiff's second claim is that there was insufficient evidence for the court to find that, at the time of the dissolution, certain properties constituted the defendant's "separate property" under the agreement. See footnote 3 of this opinion. The plaintiff argues that the defendant failed to provide sufficient evidence for the court to trace the properties he owned at the time of trial to the separate properties he owned at the time the parties signed the agreement and were married. She also claims that the court erred by failing to assign a specific value to the defendant's ownership interest in the family business. We disagree.

We begin with the applicable standard of review. "[I]n domestic relations cases . . . this court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case . . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies

"Since [the] [d]efendant never pleaded the agreement, the trial court was without [subject matter] jurisdiction to hear it, or, *in the alternative*, could not enforce it." (Emphasis added.) Because the plaintiff did not make such a claim in her principal brief, we need not decide the separate question of whether the pleading requirements of § 25-2A are mandatory, as opposed to directory, and whether the defendant's alleged failure to comply strictly with those provisions deprived the court of the *authority*, as opposed to the jurisdiction, to enforce the premarital agreement. See, e.g., *Calcano* v. *Calcano*, 257 Conn. 230, 244, 777 A.2d 633 (2001) (arguments cannot be raised for first time in reply brief).

the wrong standard of law." (Citations omitted; internal quotation marks omitted.) *Maturo* v. *Maturo*, 296 Conn. 80, 87–88, 995 A.2d 1 (2010). "When a trial court has evidence in a dissolution action sufficient for its decision, garnered from the testimony, exhibits and financial affidavits, its rulings will not be disturbed even though the memorandum of decision is silent as to that evidence." *Russo* v. *Russo*, 1 Conn. App. 604, 606–607, 474 A.2d 473 (1984).

In its memorandum of decision, the court quoted in relevant part the following provision of the agreement: "Neither party shall receive any portion of the separate property of the other . . . and/or replacements of such property. . . . The parties shall have no right against each other by way of . . . *division of property existing* [*as*] *of this date* . . . or acquire[d] in the future separately from separate [funds]." (Emphasis added.) The court found that the "family business assets listed on the defendant's current financial affidavit [were] a direct result of the premarital assets he was in possession of at the time of the marriage, as they were acquired after the marriage, separately from separate funds." As a result, the court concluded that, under the agreement, the plaintiff had no right or interest in any of those family business assets.

At trial, the defendant introduced evidence of the premarital family business assets that he owned on the date the parties married, including the agreement with the attached schedules setting forth each parties' assets at the time of the marriage and the value thereof. The defendant's daughter and sister also testified about the family business and how it operated during the parties' marriage, including the family's acquisition of numerous investment properties during that time frame.

The plaintiff argues that the court was required to trace more precisely the defendant's current assets

back to the separate property he owned at the time the parties married. She points to paragraph C of section III of the agreement, titled "Separate Property," which provides that the "parties shall keep adequate records of their transactions in such separate property and shall make such records available to the other from time to time, the intent being that at all times the separate property will be effectively updated by each of them in such financial records." She also argues that the agreement, in effect, required the court to sit as a "community property state" and not as an "equitable distribution state" and that courts in community property jurisdictions have held that a party seeking to claim assets as separate property "bears a heightened burden of proof to trace any allegedly converted assets to premarital assets."

In making this claim, however, the plaintiff ignores the court's findings that (1) the defendant complied with the agreement's record keeping provision during the course of the marriage and (2) upon commencing these divorce proceedings and without the defendant's consent, the plaintiff removed from the marital home several boxes of documents containing the defendant's financial records and information on the defendant's computer. According to the court, the plaintiff's failure to produce this information during discovery made it "difficult and at times impossible for the defendant to trace in detail and with specificity all of the family business accounts and premarital assets transactions from the date of the marriage to the present." The plaintiff has not challenged these findings on appeal.

As noted earlier in this opinion, the court heard and credited the testimony of witnesses who described the family business as an informal venture. Family members pooled their money, working together to purchase, renovate, maintain, and sell properties. The court did not find it surprising that there were no contracts or

written agreements between and among members of the defendant's family and did not ascribe any nefarious motives to the informal way the family conducted its business. The court made detailed findings concerning the value of the family business assets at the time of the parties' marriage and at trial. It also found that five separate properties in which the defendant had an interest were acquired by the family business during the course of the marriage. With the exception of one such property,[10] the court found that the plaintiff did not contribute any funds toward the purchase of those properties or contribute money or labor toward the renovation, maintenance or upkeep of the properties. The court stated that its findings were based on the evidence and testimony presented at trial and on its observations and assessments of the credibility of the witnesses. "[I]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence." (Internal quotation marks omitted.) *Zilkha* v. *Zilkha*, 167 Conn. App. 480, 487–88, 144 A.3d 447 (2016).

On the basis of our review of the entire record, we conclude that, under the circumstances of this case, there was sufficient evidence to support the trial court's findings with respect to the defendant's separate property. We reach that conclusion in part because the court determined that the plaintiff's removal and failure to produce the defendant's financial records prevented him from performing the kind of detailed tracing the plaintiff claims was required. See *Certo* v. *Fink*, 140 Conn. App. 740, 743, 749–50, 60 A.3d 372 (2013) (court did not commit error in relying on plaintiffs' estimate

[10] With respect to the Fenwick Street property in Hartford, the court found that the plaintiff paid utilities and contributed toward the rent from the time the building was sold out of the family's business in 2014 until the parties moved to the marital home in December, 2015.

of damages when court credited plaintiffs, discredited defendant, and found that plaintiffs had to rely on estimate of damages as result of defendant's failure to provide discovery).

We also reject the plaintiff's claim that the court improperly failed to place a total value on the defendant's interest in the family business, in violation of General Statutes § 46b-81 (c). That statute concerns the court's authority to assign to either spouse all or part of the estate of the other spouse. In this case, the court determined that the defendant's interest in the family business constituted his separate property under the agreement and, in accordance with the agreement, ordered that, upon dissolution, the defendant shall retain his interest in that separate property. Thus, § 46b-81 (c) had no applicability because the court did not assign to either party the other party's interest in the family business. Accordingly, the plaintiff's claim that the court improperly classified and assigned the defendant's separate property interest in the family business fails.

III

The plaintiff's third and final claim is that the court abused its discretion in assigning to her the entire outstanding debt on the parties' home equity line of credit. We agree because that order conflicts with the court's order regarding attorney's fees.

"The construction of a judgment is a question of law for the court. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed.

. . . The judgment should admit of a consistent construction as a whole." (Citations omitted; internal quotation marks omitted.) *Lashgari* v. *Lashgari*, 197 Conn. 189, 196–97, 496 A.2d 491 (1985).

"Our standard of review for financial orders in a dissolution action is clear. The trial court has broad discretion in fashioning its financial orders, and [j]udicial review of a trial court's exercise of [this] broad discretion . . . is limited to the question of whether the . . . court correctly applied the law and could reasonably have concluded as it did." (Internal quotation marks omitted.) *Hammel* v. *Hammel*, 158 Conn. App. 827, 835–36, 120 A.3d 1259 (2015). "This deferential standard of review is not, however, without limits. There are rare cases in which the trial court's financial orders warrant reversal because they are, for example, logically inconsistent . . . or simply mistaken . . . ." (Internal quotation marks omitted.) Id., 836.

The following additional facts are relevant to this claim. In December, 2015, the parties obtained a home equity line of credit and used some of the funds to pay off the plaintiff's personal line of credit, totaling $24,271. The parties also drew on the line of credit for their respective attorney's fees in this dissolution matter. The court specifically found that the defendant borrowed $10,000 under this line of credit to pay his own attorney's fees in this matter but also ordered, among other things, that the "plaintiff shall be solely responsible for payment of the [home equity line of credit],"[11] and that "[e]ach party shall be solely responsible for payment of their respective attorney's fees incurred during the course of this case."

On appeal, the plaintiff argues that the court's order regarding the home equity line of credit conflicts with

[11] The court also ordered that no further funds were to be drawn on the home equity line of credit.

its order that the parties are responsible for the payment of their respective attorney's fees. We agree that the two orders are irreconcilable. We, therefore, reverse the judgment only with regard to the order that the plaintiff is solely responsible for the debt on the home equity line of credit and remand the case with direction to resolve the inconsistency.[12]

The judgment is reversed only as to the order regarding the home equity line of credit and the case is remanded for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

TERRANCE MILLS FREIDBURG *v.* JO-ELLEN KURTZ ET AL.
(AC 43695)

Elgo, Suarez and Palmer, Js.

Syllabus

The plaintiff landlord sought to recover damages for, inter alia, the defendants' alleged violations of a lease agreement entered into in connection with the rental of a furnished, single-family home. Within thirty days of the termination of their tenancy, the plaintiff sent to the defendants an accounting of their security deposit and the alleged damages to the leased property, which indicated that there had been more than $50,000 in damages and that the deposit had been fully expended to cover certain of the expenses incurred in connection therewith. The defendants filed a counterclaim in which they alleged that the plaintiff violated the security deposit statute (§ 47a-21) and the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.). Following a bench trial, the trial court rendered judgment in favor of the plaintiff on his complaint and on the defendants' counterclaim, and the defendants appealed to this court. *Held*:

[12] During oral argument before this court, counsel for the parties agreed that the order regarding payment of the home equity line of credit was severable from the mosaic of the court's financial orders. We agree. See *Tuckman* v. *Tuckman*, 308 Conn. 194, 214, 61 A.3d 449 (2013) (financial order severable when not interdependent with other orders).

1. The defendants could not prevail on their claim that the trial court erred in rendering judgment against them for damages to the premises without determining the age and condition of the property at the time of the commencement of the tenancy and the relative wear and tear of the items at the time of the termination of the tenancy: the trial court had ample evidence before it that supported its calculation of damages, including a comprehensive list of the damaged items and fixtures, photographs of the damage, and receipts for repairs and replacement purchases; moreover, any wear and tear of the individual items was insignificant, given the scope of the documented damage; accordingly, the trial court's damages award was not improper.
2. The defendants could not prevail on their claim that the trial court erred in failing to render judgment in their favor on the counterclaim:

   a. The trial court's finding with respect to the amount of the security deposit paid to the plaintiff was not clearly erroneous: the lease agreement, which was admitted into evidence as an exhibit at trial, substantiated the court's factual finding as to the amount of the security deposit; moreover, the defendants did not offer any documentary evidence at trial, such as receipts or other banking records, of payments made to the plaintiff in excess of the security deposit amount set forth in the lease.

   b. The trial court's determination that the plaintiff properly provided the defendants with a written accounting of the deductions made from the security deposit, as required by § 47a-21 (d) (2), was not clearly erroneous: a comprehensive written statement prepared by the plaintiff, which detailed the damages to the property, the costs incurred in association therewith, and the balance of the security deposit, was introduced into evidence at trial along with evidence that the plaintiff sent such statement to each defendant within thirty days of the termination of their tenancy; moreover, the remaining security deposit funds were properly applied to the damages caused by the defendants because the costs of repairing and replacing the damaged items, as documented in the written statement, exceeded the balance of the security deposit.

   c. This court declined to disturb the trial court's conclusion that the defendants failed to establish that the plaintiff had violated § 47a-21 (h) by failing to retain the security deposit in a separate escrow account: the defendants discussion of the plaintiff's alleged violation of § 47a-21 (h) was limited to the foundation that they laid for their counterclaim under CUTPA and, accordingly, this court's ability to grant relief was conditioned on whether the plaintiff's failure to hold the security deposit in an escrow account was a CUTPA violation; moreover, the plaintiff's alleged conduct, even if found by the court, was not sufficiently unfair or deceptive to constitute a CUTPA violation; furthermore, even if the plaintiff's alleged conduct did amount to a violation of CUTPA, the defendants were barred from recovery because they failed to satisfy the requirements of the applicable statute (§ 42-110g (a)), as they did not put forth any evidence of an ascertainable loss stemming from the plaintiff's

handling of their security deposit and they failed to show that the plaintiff misappropriated or otherwise improperly took money out of the initial security deposit.

Submitted on briefs September 20, 2021—officially released February 1, 2022

Procedural History

Action to recover damages for breach of a lease agreement, and for other relief, brought to the Superior Court in the judicial district of Fairfield and transferred to the Housing Session at Bridgeport, where the defendants filed a counterclaim; thereafter, the matter was tried to the court, *Spader*, *J.*; judgment for the plaintiff on the complaint and on the counterclaim, from which the defendants appealed to this court. *Affirmed.*

Abram J. Heisler, filed a brief for the appellants (defendants).

Matthew R. Russo, filed a brief for the appellee (plaintiff).

Opinion

ELGO, J. In this landlord-tenant dispute, the defendants, Jo-Ellen Kurtz, Andrew Kurtz, and Janice Levy,[1] appeal from the judgment of the trial court, rendered after a bench trial, in favor of the plaintiff, Terrance Mills Freidburg.[2] On appeal, the defendants claim that the court erred (1) in rendering judgment against them for damages to the property that they leased from the plaintiff without determining its age and condition at the commencement of the tenancy and the relative wear

[1] The record indicates that, following the commencement of this action, Jo-Ellen Kurtz legally changed her name to Jo-Ellen Levy. In addition, we note that Janice Levy was named as a defendant by virtue of her status as the guarantor of the other defendants' obligations under the lease agreement between them and the plaintiff. It is undisputed that Janice Levy never resided at the property in question.

[2] The plaintiff testified at trial that, following the commencement of this action, he legally changed his name to Terrance Mills.

and tear of the items at the termination of the tenancy and (2) in failing to render judgment for the defendants on their counterclaim concerning their security deposit that they paid to the plaintiff when they entered into an agreement to lease the property. We affirm the judgment of the trial court.

The following facts, as found by the court or otherwise undisputed, and procedural history are relevant to this appeal. On January 8, 2011, the parties executed a lease agreement pertaining to real property owned by the plaintiff and located at 118 Wilton Road in Westport (property). The initial lease was for a term of one year and six months; the parties renewed the lease for several terms thereafter. When the defendants took possession, a move in inspection was conducted and a document was executed by the parties detailing various " 'luxury items' " on the premises and an associated liquidated damages amount the parties agreed on if the items were damaged. The lease agreement required an initial payment of $27,060, consisting of the first and last months' rent totaling $13,000, a $500 pet deposit, a $560 prepayment of the cost of alarm monitoring at the property for one year, and a security deposit of $13,000. On August 29, 2015, at the end of the defendants' tenancy, the plaintiff sent an accounting to the defendants of the security deposit and the alleged damages to the property. The August 29, 2015 accounting further indicated that the deposit was fully expended and that there was allegedly more than $50,000 in damages to the luxury items previously identified in the inspection document.

The plaintiff commenced the present action on December 7, 2015, alleging violations of the lease agreement and negligence on the part of the defendants. The defendants thereafter filed an answer and a special defense in which they denied liability for the causes of action set forth in the plaintiff's complaint and alleged

that they had "returned the [property] in the same condition in which it was originally tendered, reasonable wear and tear excepted." The defendants also filed a two count counterclaim in which they alleged violations of the security deposit statute, General Statutes § 47a-21,[3] and the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.[4] In his

[3] General Statutes § 47a-21 provides in relevant part: "In the case of a tenant under sixty-two years of age, a landlord shall not demand a security deposit in an amount that exceeds two months' rent.

* * *

"Upon termination of a tenancy, any tenant may notify the landlord in writing of such tenant's forwarding address. Not later than thirty days after termination of a tenancy or fifteen days after receiving written notification of such tenant's forwarding address, whichever is later, each landlord other than a rent receiver shall deliver to the tenant or former tenant at such forwarding address either (A) the full amount of the security deposit paid by such tenant plus accrued interest, or (B) the balance of such security deposit and accrued interest after deduction for any damages suffered by such landlord by reason of such tenant's failure to comply with such tenant's obligations, together with a written statement itemizing the nature and amount of such damages. Any landlord who violates any provision of this subsection shall be liable for twice the amount of any security deposit paid by such tenant, except that, if the only violation is the failure to deliver the accrued interest, such landlord shall be liable for ten dollars or twice the amount of the accrued interest, whichever is greater.

* * *

"Each landlord shall immediately deposit the entire amount of any security deposit received by such landlord from each tenant into one or more escrow accounts established or maintained in a financial institution for the benefit of each tenant. Each landlord shall maintain each such account as escrow agent and shall not withdraw funds from such account except as provided in [§ 47a-21 (h) (2)]. . . . The escrow agent may withdraw funds from an escrow account to . . . retain all or any part of a security deposit and accrued interest after termination of tenancy equal to the damages suffered by the landlord by reason of the tenant's failure to comply with such tenant's obligations . . . .

* * *

"[E]ach landlord other than a landlord of a residential unit in any building owned or controlled by any educational institution and used by such institution for the purpose of housing students of such institution and their families, and each landlord or owner of a mobile manufactured home or of a mobile manufactured home space or lot or park . . . shall pay interest on each security deposit received by such landlord . . . ."

[4] General Statutes § 42-110b provides: "(a) No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.

reply, the plaintiff denied the substance of that counterclaim.

A trial was held on October 2, 2019, at which the parties testified. The plaintiff also submitted into evidence exhibits pertaining to the property. On November 25, 2019, the court issued a memorandum of decision wherein it rendered judgment in favor of the plaintiff and awarded $25,600.77 in damages, plus postjudgment interest pursuant to General Statutes § 37-3a (a). The court noted that "the parties agreed to the items that were in the furnished home at the commencement of the lease." The court found "most of the plaintiff's claims of damages credible." The court further found that the plaintiff established to "its satisfaction $33,100.77 in damages beyond normal wear and tear at the end of a tenancy by a fair preponderance of the evidence . . . ." The court subtracted the security deposit balance of $7500 from the total cost of the damages that it found were the responsibility of the defendants.

With respect to the defendants' counterclaim, the court found that the defendants had failed to prove

"(b) It is the intent of the legislature that in construing subsection (a) of this section, the commissioner and the courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15 USC 45(a)(1)), as from time to time amended.

"(c) The commissioner may, in accordance with chapter 54, establish by regulation acts, practices or methods which shall be deemed to be unfair or deceptive in violation of subsection (a) of this section. Such regulations shall not be inconsistent with the rules, regulations and decisions of the federal trade commission and the federal courts in interpreting the provisions of the Federal Trade Commission Act.

"(d) It is the intention of the legislature that this chapter be remedial and be so construed."

General Statutes § 42-110g (a) provides: "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action in the judicial district in which the plaintiff or defendant resides or has his principal place of business or is doing business, to recover actual damages. Proof of public interest or public injury shall not be required in any action brought under this section. The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper."

their claims at trial. Specifically, the court found, the defendants had not demonstrated that the security deposit they paid to the plaintiff exceeded the $13,000 security deposit requirement in the lease agreement. The court ultimately concluded that it was undisputed that the security deposit balance remaining as of August, 2015, was $7500. This appeal followed.

I

On appeal, the defendants challenge the propriety of the damages awarded by the court. They claim that the court erred in rendering judgment against the defendants for damages to the premises without determining the age and condition of the property at the commencement of the tenancy and the relative wear and tear of the items at the termination of the tenancy. They argue that the court should have factored in the age and previous wear and tear of certain damaged items when calculating the damages award. We are not persuaded.

We begin by setting forth the relevant applicable standard of review. "[O]ur appellate courts accord plenary review to the court's legal basis for its damages award. . . . The court's calculation under that legal basis is a question of fact, which we review under the clearly erroneous standard." (Internal quotation marks omitted.) *Carroll* v. *Yankwitt*, 203 Conn. App. 449, 465, 250 A.3d 696 (2021). "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Autry* v. *Hosey*, 200 Conn. App. 795, 799, 239 A.3d 381 (2020).

In the present case, the court had ample evidence before it that supported the court's calculation of damages. At trial, the plaintiff testified that he surveyed the property after the conclusion of the tenancy and

observed significant damage compared to what was listed in the inspection report. In addition, the plaintiff submitted into evidence photographs of damage to various appliances and portions of the property, taken shortly after the defendants vacated the premises. The plaintiff also prepared a document that catalogued the damaged items and fixtures in a comprehensive list, which, along with the corresponding receipts for repairs and replacement purchases, was entered into evidence. On our review of the record, we agree with the trial court that any preexisting wear and tear of individual items or fixtures is insignificant given the scope of the damage documented at the conclusion of the defendants' tenancy. Additionally, insofar as the defendants take issue with the court's inclusion of certain items in its damages award that were not the subject of testimony at trial, we agree with the plaintiff that the record contains ample documentary evidence to support all damages found by the court. It does not affect our analysis of the court's findings that the evidence concerning these items was not testimonial in nature. In light of the foregoing, we conclude that the court's damages award was proper.

II

The defendants also challenge the court's ruling on their counterclaim. The defendants contend that the court improperly rejected their claims that the plaintiff (1) charged an excessive security deposit as a condition of tenancy in violation of § 47a-21 (b) (1); (2) failed to properly provide to the defendants a written accounting of deductions that were made from the security deposit as prescribed by § 47a-21 (d) (2); and (3) failed to store the security deposit in a separate escrow account as mandated by § 47a-21 (h).[5] We disagree.

[5] The defendants also claim that the plaintiff failed to provide the defendants with the interest accrued on their security deposit under § 47a-21 (i). Although the trial court did not expressly address this contention in its memorandum of decision, the court did state generally that the defendants

A

First, we address the portion of the claim in which the defendants argue that the court improperly rejected their claim that the plaintiff charged an excessive security deposit as a condition of tenancy in violation of § 47a-21 (b) (1). The defendants' claim is factual in nature, as it is focused on whether, in rejecting their claim, the court's finding with respect to the amount of the security deposit was clearly erroneous.

As a preliminary matter, we note that "[a] reviewing authority may not substitute its findings for those of the trier of the facts. . . . The factual findings of a [trial court] on any issue are reversible only if they are clearly erroneous. . . . [A reviewing court] cannot retry the facts or pass upon the credibility of the witnesses." (Internal quotation marks omitted.) *Fitzpatrick* v. *Scalzi*, 72 Conn. App. 779, 781–82, 806 A.2d 593 (2002); see also *Pedrini* v. *Kiltonic*, 170 Conn. App. 343, 347, 154 A.3d 1037 ("[i]t is the trier's exclusive province to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony" (internal quotation marks omitted)), cert. denied, 325 Conn. 903, 155 A.3d 1270 (2017).

As previously noted, in its memorandum of decision, the court concluded that the defendants had not proven the claims alleged in their counterclaim. With respect to the actual amount of the security deposit at issue, the court emphasized that "[i]t was never truly established [at trial] how much the initial payment to the plaintiff was. . . . No initial payment amount was ever

had not proven their claims. Moreover, the court was not bound to credit testimony adduced by the defendants in support of their contention concerning the accrual of interest on the security deposit. See, e.g., *Benjamin* v. *Island Management, LLC*, Conn. , , A.3d (2021) ("[t]he trial court is not required to credit a witness' testimony"). Consequently, the defendants are not entitled to prevail on this claim.

established and the court cannot determine what it was." Accordingly, the court found, "based upon the lack of credible evidence otherwise," that "the security deposit was the $13,000 set forth in the lease." The lease agreement was appended to the plaintiff's complaint and was admitted into evidence as an exhibit at trial. That agreement, which was signed by all parties, states in relevant part: "The Tenant shall . . . pay the Security Deposit . . . in advance and upon the signing of this Lease in the amount of $13,000.00." That evidence substantiates the court's factual finding as to the amount of the security deposit. Moreover, the defendants did not offer any documentary evidence at trial, such as receipts or other banking records, of payments made to the plaintiff in excess of that amount.[6] We therefore conclude that the court's finding with respect to the amount of the security deposit was not clearly erroneous.

B

Next, we address the portion of the claim in which the defendants argue that the court improperly rejected their claim that the plaintiff failed to properly provide to the defendants a written accounting of deductions that were made from the security deposit as prescribed by § 47a-21 (d) (2). As this court has explained, "[§] 47a-21 (d) (2) imposes liability for twice the value of any security deposit on a landlord who *violates the provisions of that subsection*. The provisions of the subsection are that within thirty days after termination of a tenancy a landlord must deliver to the terminating tenant either the full amount of the tenant's security deposit plus interest or a written notification advising the tenant of the nature of any damages suffered by [the] landlord by reason of [the] tenant's failure to comply with [the] tenant's obligations. If the landlord

[6] We note that the defendants do not contend that the $13,000 security deposit set forth in the lease was in some way improper under § 47a-21.

chooses to deliver the notification of damages, [she] must deliver, within sixty days after termination of the tenancy, a written statement itemizing the nature and amount of the damages [she] sustained along with any balance of the security deposit plus interest. . . . The court, therefore, *need only determine two factual questions to award twice the value of the security deposit under the statute*: (1) Was the security deposit returned with interest, or a written notification of damages delivered, within thirty days of the tenant's termination; and (2) if a written notification of damages was delivered, was the balance of the security deposit and a statement of damages delivered within sixty days of the termination?" (Emphasis in original; internal quotation marks omitted.) *Pedrini* v. *Kiltonic*, supra, 170 Conn. App. 349–50.

The record before us reflects that the plaintiff provided the defendants with a comprehensive written statement, including the balance of their security deposit and summarizing the damages to the property and the associated costs incurred. That accounting was introduced into evidence at trial, as was evidence that the plaintiff sent it to each defendant within thirty days of the termination of their tenancy. Because the cost of repairing and replacing the damaged items and fixtures exceeded the remaining balance of the security deposit, as documented in the written accounting that the plaintiff timely provided to the defendants, we agree with the trial court that the remaining security deposit funds were "properly applied to the damages caused by the defendants." The defendants, therefore, cannot prevail on their claim that the court erred in not concluding that the plaintiff failed to comply with § 47a-21 (d) (2).

C

Third, we address the defendants' claim that the court improperly rejected their claim that the plaintiff failed

to store the security deposit in a separate escrow account as mandated by § 47a-21 (h). We note that the court made no explicit findings concerning the plaintiff's use or nonuse of an escrow account in retaining the security deposit. Although the defendants point to the plaintiff's testimony indicating that he did not put the security deposit in an escrow account, the court specifically found that the defendants did not establish their claim by a fair preponderance of the evidence. The court was free to assess the credibility and sufficiency of that testimony and make its determination accordingly. We, therefore, must defer to the court's factual findings as laid out in the memorandum of decision and decline to disturb its conclusion that the defendants failed to establish that the plaintiff violated § 47a-21 (h) by failing to retain the security deposit in an escrow account.

Even if we were to conclude that the court improperly found that the plaintiff had not violated the statute by retaining the security deposit in an escrow account, we typically would consider which (if any) remedies were available to the defendants under § 47a-21. The defendants, however, did not request at trial any relief under the applicable provision of § 47a-21 for violations of § 47a-21 (h).[7] The extent to which the defendants address the plaintiff's alleged violation of § 47a-21 (h) in their brief is limited to the foundation they lay for their counterclaim under CUTPA. Our ability to grant the defendants relief on this claim would thereby be conditioned on whether the plaintiff's failure to hold

[7] At trial, the defendants requested in relevant part: "Twice the value of their deposit plus accumulated interest in accordance with the provisions of . . . § 47a-21." This refers to the remedy set forth in § 47a-21 (d) (2) (B). As discussed in part II B of this opinion, however, this remedy is available only for violations of § 47a-21 (d). See *Pedrini* v. *Kiltonic*, supra, 170 Conn. App. 349. Although § 47a-21 (k) (2) does set forth penalties for violations of § 47a-21 (h), the defendants do not reference this subsection of the statute at any point in their counterclaim.

the security deposit in an escrow account can be shown to violate CUTPA.

"In determining whether a tenant can prevail in her claim for damages under CUTPA, the court must first find that the landlord's conduct at issue constitutes an unfair or deceptive trade practice." *Pedrini* v. *Kiltonic*, supra, 170 Conn. App. 354. "It is well settled that whether a defendant's acts constitute . . . deceptive or unfair trade practices under CUTPA, is a question of fact for the trier, to which, on appellate review, we accord our customary deference." (Internal quotation marks omitted.) *Carroll* v. *Yankwitt*, supra, 203 Conn. App. 472.

"[General Statutes §] 42-110b (a) provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the [F]ederal [T]rade [C]omission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some [common-law], statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. . . . Thus a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy. . . . In order to enforce this prohibition,

CUTPA provides a private cause of action to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a [prohibited] method, act or practice . . . .'' (Internal quotation marks omitted.) *Herron* v. *Daniels*, 208 Conn. App. 75, 94–95, 264 A.3d 184 (2021).

The defendants appear to argue that the plaintiff's alleged violations of the security deposit statute amount to per se violations of CUTPA. Aside from reciting the legal standard for a CUTPA claim, the defendants cite no case law in support of the proposition that the plaintiff's actions rose to the level of a violation of CUTPA. Indeed, such an approach would not be consonant with the long-standing principle that our analysis of CUTPA claims depends on the particular facts of the case before us; see id., 96; see also *Pedrini* v. *Kiltonic*, supra, 170 Conn. App. 353 (alleged violation of other provision of § 47a-21 was insufficient to establish violation of CUTPA on its face); a principle no less applicable to CUTPA claims predicated on an alleged violation of § 47a-21 (h) than it is to CUTPA claims predicated on any other alleged impropriety. See *Tarka* v. *Filipovic*, 45 Conn. App. 46, 55–56, 694 A.2d 824 (landlords' violation of § 47a-21 (h) was owed to ''ignorance of their obligations'' and thereby did not violate CUTPA), cert. denied, 242 Conn. 903, 697 A.2d 363 (1997); cf. *Herron* v. *Daniels*, supra, 208 Conn. App. 98–99 (declining to extend holding in *Tarka* in light of ''markedly different'' factual findings with respect to landlord's experience dealing with rental property and ''continued'' § 47a-21 violations ''with respect to other tenants . . . up to and through the trial''). In the absence of any findings that the plaintiff violated § 47a-21, beyond failing to hold one tenant's security deposit in an escrow account, we cannot conclude that the plaintiff's alleged conduct, even if found by the court, was sufficiently unfair or deceptive to constitute a CUTPA violation.

Additionally, even if the plaintiff's failure to hold the security deposit in an escrow account did amount to a violation of CUTPA, that alone would not entitle the defendants to damages under CUTPA. See *Scrivani* v. *Vallombroso*, 99 Conn. App. 645, 651–52, 916 A.2d 827 ("Our courts have interpreted [General Statutes] § 42-110g (a) to allow recovery only when the party seeking to recover damages meets the following two requirements: 'First, he must establish that the conduct at issue constitutes an unfair or deceptive trade practice. . . . Second, he must present evidence providing the court with a basis for a reasonable estimate of the damages suffered.' . . . 'Thus, in order to prevail in a CUTPA action, a plaintiff must establish both that the defendant has engaged in a prohibited act *and* that, "as a result of" this act, the plaintiff suffered an injury. The language "as a result of" requires a showing that the prohibited act was the proximate cause of a harm to the plaintiff.' " (Citations omitted; emphasis in original.)), cert. denied, 282 Conn. 904, 920 A.2d 309 (2007). In *Herron*, this court further expanded on the requirement set forth in § 42-110g (a) as follows: "The ascertainable loss requirement [of § 42-110g] is a threshold barrier which limits the class of persons who may bring a CUTPA action seeking either actual damages or equitable relief. . . . Thus, to be entitled to any relief under CUTPA, a plaintiff must first prove that he has suffered an ascertainable loss due to a CUTPA violation. . . . [F]or purposes of § 42-110g, an ascertainable loss is a deprivation, detriment [or] injury that is capable of being discovered, observed or established. . . . [A] loss is ascertainable if it is measurable even though the precise amount of the loss is not known. . . . Under CUTPA, there is no need to allege or prove the amount of the actual loss. . . . Of course, a plaintiff still must marshal some evidence of ascertainable loss in support of her CUTPA allegations, and a failure to do so is indeed fatal to a

CUTPA claim . . . .'' (Internal quotation marks omitted.) *Herron* v. *Daniels*, supra, 208 Conn. App. 100.

The record before us reflects that the defendants have failed to put forth any evidence of an ascertainable loss stemming from the plaintiff's handling of their security deposit. The defendants made no showing that the plaintiff misappropriated or otherwise improperly took money out of the initial security deposit. In light of this, as well as the conflicting information regarding the amount of the security deposit at issue, we conclude that the defendants' failure to meet the standard set forth in § 42-110g (a) would bar them from recovery even if the court had found that the plaintiff violated CUTPA.

The judgment is affirmed.

In this opinion the other judges concurred.

CRAIG SALAMONE ET AL. *v.* WESLEYAN UNIVERSITY ET AL.
(AC 43819)

Elgo, Cradle and Flynn, Js.

Syllabus

The plaintiffs sought to recover damages from the defendant university for personal injuries they sustained as a result of allegedly being sexually assaulted by B while he was a student at the university and a resident advisor or head resident in a dormitory on the university's campus. The plaintiffs alleged that, when they were between thirteen and fifteen years old, B had sexually assaulted them in his dormitory room after he had arranged to meet them there to teach them exercise and stretching routines. The plaintiffs alleged that their injuries were caused by the university's negligent supervision of B in his capacity as a resident advisor or head resident. The trial court granted the university's motion for summary judgment on the ground that the plaintiffs failed to demonstrate that there was a genuine issue of material fact that the alleged sexual assaults were reasonably foreseeable. From the judgment rendered thereon, the plaintiffs appealed to this court. *Held* that the trial court properly rendered summary judgment in favor of the university,

that court having correctly determined that the plaintiffs failed to demonstrate the existence of a genuine issue of material fact as to whether the alleged sexual assaults were reasonably foreseeable, as the university presented undisputed evidence that B had no criminal history, complaints or accusations either before or during his tenure as a student and resident advisor or head resident at the university, and the plaintiffs failed to present any evidence from which it reasonably could be inferred that the university knew or should have known that B would sexually assault them in his dormitory room.

Argued November 9, 2021—officially released February 1, 2022

Procedural History

Action to recover damages for, inter alia, the named defendant's alleged negligence, brought to the Superior Court in the judicial district of Middlesex, where the court, *Hon. Edward S. Domnarski*, judge trial referee, granted the named defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Eamon T. Donovan, for the appellants (plaintiffs).

Richard E. Fennelly III, with whom were *Jonathan P. Ciottone* and *Eric S. Larson*, for the appellee (named defendant).

Opinion

CRADLE, J. The plaintiffs, Craig Salamone and Doug Cartelli, commenced this action, claiming that they were sexually assaulted by a resident advisor or head resident on the campus of the defendant Wesleyan University.[1] In this appeal, the plaintiffs challenge the summary judgment rendered in favor of the defendant on the ground that a genuine issue of material fact existed as to whether the harm alleged was reasonably foreseeable. We affirm the judgment of the trial court.

[1] The Young Men's Christian Association of Northern Middlesex County and Andrew Barer also were named as defendants in this action but are not parties to this appeal. Accordingly, any reference herein to the defendant is to Wesleyan University only.

The record before the court, viewed in the light most favorable to the plaintiffs as the nonmoving parties, reveals the following relevant facts and procedural history. In September, 2017, the plaintiffs commenced this action, claiming that they were sexually assaulted on the defendant's campus between 1982 and 1984. By way of a revised complaint dated September 26, 2018, they alleged that they were sexually assaulted by Andrew Barer, while he was a student and a resident advisor or head resident in a dormitory on the defendant's campus. At the time of the alleged incidents, Barer also "was a member of the official basketball team for the defendant" and "used the basketball facilities located on the property owned by the defendant . . . to engage with minor children, including the plaintiff[s]," who were between the ages of thirteen and fifteen at the time. The plaintiffs alleged that "Barer's . . . engagement with minor children was in the guise of instructing them in plyometrics, stretching, and other physical activity in order to enhance their athletic ability, but, in reality, it was a means to allow him to commit sexual abuse, sexual assault, and sexual exploitation of said minor children." They further alleged that, in the winter of 1983, as to Salamone, and between 1982 and 1984, as to Cartelli, "Barer made arrangements for [each of them] to meet with Barer alone in Barer's dormitory room located in the housing facilities on the [defendant's] campus." They alleged that "Barer's arranging the meeting with [them] in [his] dormitory room was in the guise of teaching [them] exercise and stretching routines when the actual purpose was for Barer to sexually abuse, sexually assault, and sexually exploit [them]." The plaintiffs alleged that Barer allowed them into the dormitory in his capacity as a resident advisor or head resident, and that, at the meetings in Barer's dormitory room, "under the guise of teaching [them] exercise and stretching routines, Barer sexually abused,

sexually assaulted, and sexually exploited [them]." The plaintiffs alleged that, prior to the incidents involving them, Barer "engaged in a pattern of behavior wherein he lured other minor children into his dormitory room and sexually abused, sexually assaulted, and sexually exploited them" and that the "general risk of harm or injury of the type suffered by the plaintiff[s] . . . was foreseeable by the defendant . . . ." The plaintiffs alleged that the defendant "failed to properly monitor and supervise [Barer] in order to prevent injuries to minors such as [them]" and "allowed [Barer] to be alone with [them] inside housing facilities owned by the defendant . . . without monitoring or supervising him in any way."[2] The plaintiffs alleged that, as a result of the defendant's negligence and carelessness, they suffered bodily injury and severe emotional distress.

On April 15, 2019, the defendant filed a motion for summary judgment, claiming that it was entitled to judgment as a matter of law on the grounds that Barer was not an employee of the defendant when the alleged sexual assaults involving the plaintiffs occurred and that those incidents were not reasonably foreseeable. On September 6, 2019, the plaintiffs filed an objection to

[2] The plaintiffs also alleged in their revised complaint that the defendant "failed to investigate, warn, or inform parents and guardians of children, including those of the plaintiff[s] . . . of the danger that [Barer] posed to children" and "negligently hired [Barer] when a reasonable investigation or background check would have uncovered the danger that [he] posed to children, including the [plaintiffs]." The undisputed evidence submitted by the defendant in support of its motion for summary judgment disclosed that Barer had never been accused of any crime or misconduct during or prior to his tenure as a student of the defendant, so a background check would not have revealed any basis for not hiring him. At oral argument before this court, the plaintiffs conceded that they had no evidence that the defendant had actual knowledge of the danger Barer allegedly posed to the plaintiffs. Thus, the defendant could not have warned the plaintiffs' parents or guardians of such alleged danger, and, therefore, the plaintiffs acknowledged that they were proceeding only on their claims of negligent supervision of Barer in his capacity as a resident advisor or head resident.

the defendant's motion for summary judgment, arguing that there existed genuine issues of material fact as to whether Barer was "an agent, servant, and/or employee of the defendant" and whether the defendant had a duty to supervise Barer and to alleviate danger posed to the plaintiffs due to the fact that the defendant knew or should have known of prior instances of Barer engaging in similar conduct. In support of their objection, the plaintiffs submitted affidavits from three individuals, who averred that, prior to the incidents involving the plaintiffs, Barer brought those individuals, who were teenage boys at the time, to his dormitory room on the defendant's campus, "without concealing [their] presence and in plain sight," and sexually assaulted them.

On September 20, 2019, the defendant filed a reply to the plaintiffs' objection to the motion for summary judgment, arguing that the plaintiffs had failed to show that a genuine issue of material fact existed that the alleged sexual assaults were foreseeable because, "[e]ven if Barer brought the affiants into [his] dorm-[itory] 'without concealing them' and 'in plain sight,' these facts are insufficient to show that [the defendant] should have known that Barer would likely commit sexual assault." The defendant argued that, because there was no record that Barer had committed any crimes, had never been accused of a crime, had never been accused of unlawful sexual conduct, and had never been the subject of any complaints, there was no evidence demonstrating that the defendant had any reason to know that Barer would engage in the alleged conduct.

On October 3, 2019,[3] the plaintiffs filed a surreply to the defendant's reply to their objection to the motion

[3] On October 2, 2019, the plaintiffs filed a motion for a continuance of the hearing on the defendant's motion for summary judgment to conduct further discovery. In support of that motion, the plaintiffs' attorney attached an affidavit, in which he averred: "[I]n order to adequately respond to the [defendant's] response to the plaintiff's objection to [the defendant's] motion

for summary judgment, reiterating their argument that

for summary judgment it is necessary to take the deposition of the member of [the defendant] who is best situated to testify as to [the] following: the hiring, training and supervising of . . . resident advisors [at the defendant] for the years 1980 through 1984; the policies and procedures for documenting non-students accessing the buildings on [the defendant's campus] for the years 1980 through 1984; and reporting procedures for . . . resident advisors [at the defendant who] fail[ed] to comply with regulations and/or guidelines. . . . [S]uch discovery is necessary to establish that there is a genuine issue of material fact as to whether [the defendant] knew or should have known of the risk posed to the plaintiffs and that such risk was foreseeable to the defendant . . . ." On October 3, 2019, the court summarily denied the plaintiff's motion for a continuance.

The plaintiffs claim on appeal that the court erred in denying their motion for a continuance. We note that, on January 17, 2018, the parties signed a scheduling order providing, inter alia, that the depositions of all fact witnesses would be completed by June 15, 2018. On July 2, 2018, that date was extended to August 31, 2018. On January 4, 2019, the parties entered into a new scheduling order that required the depositions of all fact witnesses to be completed by June 1, 2019. The scheduling order also required all dispositive motions to be filed by April 15, 2019. Despite the foregoing scheduling orders, and the fact that the plaintiffs had filed this action in September, 2017, and thus had more than two years to conduct discovery, they sought additional time to take the deposition of at least one fact witness to support their argument opposing the defendant's motion for summary judgment, and they challenge on appeal the denial of their motion for a continuance to do so. The plaintiffs have failed, however, to argue that the trial court abused its discretion in denying their motion for a continuance, which is the only basis on which such a ruling may be reversed. See, e.g., *Bevilacqua* v. *Bevilacqua*, 201 Conn. App. 261, 268, 242 A.3d 542 (2020) ("Appellate review of a trial court's denial of a motion for a continuance is governed by an abuse of discretion standard that, although not unreviewable, affords the trial court broad discretion in matters of continuances. . . . An abuse of discretion must be proven by the appellant by showing that the denial of the continuance was unreasonable or arbitrary." (Internal quotation marks omitted.)). Although the plaintiffs set forth the abuse of discretion standard in their appellate brief and alleged that the trial court abused its discretion in denying their motion for a continuance, they did not brief that claim. Rather, they simply asserted that they needed the discovery they sought because it was "necessary to establish that there is a genuine issue of material fact as to whether the defendant . . . knew or should have known of the risk posed to the plaintiffs and that such [risk] was foreseeable to the defendant . . . ." Indeed, at oral argument before this court, when asked if he was claiming that the trial court abused its discretion when it denied the plaintiffs' motion for a continuance, the plaintiffs' attorney responded: "My argument on that, Your Honor, is that I would have had

the affidavits that they previously filed with the court were evidence of prior instances of Barer bringing teenage boys into his dormitory room for the purpose of sexually assaulting them. They contended that such evidence gave rise to a genuine issue of material fact as to whether the defendant knew or should have known of the danger Barer posed to teenage boys in general and to the plaintiffs specifically.

By way of a memorandum of decision filed on January 8, 2020, the court granted the defendant's motion for summary judgment on the ground that there was no genuine issue of material fact that the alleged sexual assaults of the plaintiffs were not reasonably foreseeable.[4] The court concluded that the defendant did not know or have reason to know that Barer would allegedly sexually assault the plaintiffs in his dormitory room. The court reasoned that the defendant met its burden of demonstrating the absence of any genuine issue of material fact as to the foreseeability of the alleged sexual assaults of the plaintiffs when it submitted evidence indicating that Barer had no criminal history before or during his enrollment as a student at the defendant or before or during his period of allegedly serving as a resident advisor or head resident at the defendant, that it never received any complaints about Barer during his attendance at the defendant, and that it did not locate any records indicating that disciplinary action

more information to present to the trial court on the argument for summary judgment had I been allowed to proceed with the depositions. That's as far as an argument as I am going to make today." The plaintiffs were on notice from the date of their revised complaint as to what they would have to prove to prevail on their claim of negligent supervision and the need to conduct discovery for that proof. Moreover, the plaintiffs' attorney conceded that there had been previous opportunities to conduct the discovery for which he sought the continuance. The plaintiffs, therefore, cannot prevail on this claim.

[4] Because the court concluded that the alleged incidents were not reasonably foreseeable, it declined to address the defendant's argument that Barer was not its agent, servant, and/or employee at the time they occurred.

has ever been taken against him. The court therefore reasoned that the burden shifted to the plaintiffs to present evidence to demonstrate the existence of a factual dispute as to the issue of foreseeability. The court noted the affidavits submitted by the plaintiffs in opposition to summary judgment and reasoned: "With regard to the alleged negligent monitoring or supervision of Barer, the plaintiffs do not submit any additional evidence to suggest that anyone personally witnessed or would have witnessed Barer leading the boys to his dormitory room, that any particular campus security protocols were breached . . . or that anyone reported any suspicious behavior to [the defendant] that would have provided [the defendant] with the requisite knowledge to prompt an investigation.

"Therefore, it appears that the plaintiffs merely rely on (1) the affidavits stating that Barer brought teenage boys . . . to his dormitory room 'without concealing [their] presence and in plain sight' . . . and (2) the broad-brush allegation in their complaint that 'administrators, professional staff, coaching staff, security officers and other employees knew, should have known or could have known upon investigation, that . . . Barer . . . took the plaintiff[s] . . . into his dorm[itory] room . . . on . . . [the defendant's] campus.' . . . Without more evidentiary support to suggest that someone in particular witnessed the incidents or reported Barer's improper conduct to [the defendant], however, this is insufficient to dispute the defendant's evidence demonstrating that [the defendant] had no knowledge that Barer allegedly had or would sexually assault the plaintiffs or anyone else." (Citations omitted; footnote omitted.) On that basis, the court concluded that the plaintiffs failed to demonstrate the existence of a genuine issue of material fact as to whether the alleged incidents were reasonably foreseeable and,

accordingly, rendered summary judgment in favor of the defendant. This appeal followed.

"The fundamental purpose of summary judgment is preventing unnecessary trials. . . . If a plaintiff is unable to present sufficient evidence in support of an essential element of his cause of action at trial, he cannot prevail as a matter of law. . . . To avert these types of ill-fated cases from advancing to trial, following adequate time for discovery, a plaintiff may properly be called upon at the summary judgment stage to demonstrate that he possesses sufficient counterevidence to raise a genuine issue of material fact as to any, or even all, of the essential elements of his cause of action. . . .

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

"It is not enough . . . for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court . . . . [T]ypically [d]emonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence outside

the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . . Only if the defendant as the moving party has submitted no evidentiary proof to rebut the allegations in the complaint, or the proof submitted fails to call those allegations into question, may the plaintiff rest upon factual allegations alone. . . .

"[I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Carolina Casualty Ins. Co.* v. *Connecticut Solid Surface, LLC*, 207 Conn. App. 525, 532–33, 262 A.3d 885 (2021).

The following additional legal principles guide our consideration of the plaintiffs' claim that a genuine issue of material fact existed as to whether the harm they allegedly sustained was reasonably foreseeable. "[A]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal. . . . [A]s a general matter, a defendant is not responsible for anticipating the intentional misconduct of a third party . . . unless the defendant knows or has reason to know of the third party's criminal propensity. . . .

"[T]here are [however] exceptions to this general rule. More specifically . . . [t]here are . . . situations in which the actor, as a reasonable man, is required to

anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where . . . the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account. . . . One situation in which the actor will be required to guard against the intentional misconduct of another is [w]here the actor acts with knowledge of peculiar conditions which create a high degree of risk of [such] intentional misconduct. . . . For purposes of this exception, [t]he actor's conduct may be negligent solely because he should have recognized that it would expose [another] person . . . to an unreasonable risk of criminal aggression. If so, it necessarily follows that the fact that the harm is done by such criminal aggression cannot relieve the actor from liability . . . . [Moreover], it is not necessary that the conduct should be negligent solely because of its tendency to afford an opportunity for a third person to commit the crime. It is enough that the actor should have realized the likelihood that his conduct would create a temptation which would be likely to lead to its commission. . . .

"[I]t is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal misconduct. As in other cases of negligence . . . it is a matter of balancing the magnitude of the risk against the utility of the actor's conduct. Factors to be considered are the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take. Where the

risk is relatively slight in comparison with the utility of the actor's conduct, he may be under no obligation to protect the other against it. . . .

"Thus, for purposes of this exception, the issue is twofold: (1) whether the defendant's conduct gave rise to a foreseeable risk that the injured party would be harmed by the intentional misconduct of a third party; and (2) if so, whether, in light of that risk, the defendant failed to take appropriate precautions for the injured party's protection." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Doe* v. *Boy Scouts of America Corp.*, 323 Conn. 303, 316–18, 147 A.3d 104 (2016).

In the present case, the plaintiffs claim that the defendant's supervision of Barer was inadequate and, consequently, gave rise to the foreseeable risk that Barer would sexually assault them. In support of its motion for summary judgment, the defendant presented undisputed evidence that Barer had no criminal record, complaints, or accusations either before or during his tenure as a student at the defendant. As the trial court aptly noted, this undisputed evidence rebutted the plaintiff's allegations that the defendant knew or should have known that Barer would sexually assault the plaintiffs, and the burden then shifted to the plaintiff to demonstrate the existence of a genuine issue of material fact as to foreseeability. In support of their position, the only evidence submitted by the plaintiffs were the affidavits of three individuals who averred that they, like the plaintiffs, had been sexually assaulted by Barer in his dormitory room. Although the affiants averred that they were brought to the defendant's campus prior to the alleged incidents involving the plaintiffs, the affidavits do not contain the circumstances under which they were there or any specifics as to how or when they were brought to the campus, or whether anybody, including a member of the defendant's administration or staff,

saw them on campus. Moreover, even if the affiants had been observed by an agent or representative of the defendant on campus or in a dormitory, they did not allege that anybody observed any improper conduct by Barer or was aware that they allegedly were sexually assaulted by Barer at those times. Accordingly, the plaintiffs failed to present any evidence from which it reasonably could be inferred that the defendant knew or should have known that Barer would sexually assault them in his dormitory room.

This case is readily distinguishable from cases in which our Supreme Court has held that the issue of foreseeability involves a fact intensive inquiry that is not amenable to determination on summary judgment but, rather, should be resolved by a jury. For instance, in *Doe* v. *Boy Scouts of America Corp.*, supra, 323 Conn. 303, the court determined that the issue of foreseeability was a question of fact because a jury reasonably could infer that promoting opportunities for groups of minors, who are either unsupervised or can easily evade supervision, to spend extended periods of time together in remote and secluded places increased the risk of sexual misconduct to an unreasonable degree and that the defendant knew or should have known of the increased risk. Id., 328. In that case, the plaintiff also presented evidence that the defendant was aware of numerous instances of sexual abuse of participants in the Boy Scouts during scouting activities in the years preceding the patrol leader's sexual abuse of the plaintiff. Id., 331.

Similarly, in *Doe* v. *Saint Francis Hospital & Medical Center*, 309 Conn. 146, 72 A.3d 929 (2013), in which our Supreme Court held that the issue of whether it was reasonably foreseeable that the defendant hospital's failure to supervise a physician who was conducting a growth study within its facility "would result in the sexual abuse of the plaintiff, even though the hospital

did not know or have reason to know of [that physician's] pedophilia, presented a question of fact for the jury." Id., 188. The court based its determination on the plaintiff's evidence that, "for years, parents were persuaded to have their children participate in the growth study based in large part on the good name and reputation that the hospital enjoyed in the community," and the hospital "exercised no supervision whatsoever over the study, even though it knew or should have known that [the physician] was touching, photographing and filming the genitalia of naked children in his office, sometimes for hours, without a chaperone present and without any legitimate medical or scientific reason for conducting such a study in the first place." Id., 188–89. The court noted that the plaintiff sought to, and did, persuade the jury that "there was a foreseeable risk that the children who had been volunteered to participate in the study—children who, unbeknownst to their parents, were required to strip naked so that [the physician] could physically examine, photograph and film their genitalia—would be sexually exploited or abused in some manner, such that the hospital was required to take at least *some* precautions to protect this highly vulnerable group of subjects." (Emphasis in original.) Id., 189.

In both cases, the defendants played some role in creating or fostering the circumstances or relationship that gave rise to the harm sustained by the plaintiffs. See also *Gutierrez* v. *Thorne*, 13 Conn. App. 493, 501, 537 A.2d 527 (1988) ("question of foreseeability [was] not such as would lead to only one conclusion; rather, under the circumstances of [the] case, the foreseeability of whether the defendant's conduct in permitting [its employee] to have a key to the plaintiff's apartment would result in a sexual assault . . . [was] a question to be resolved by the trier of fact"). That is not the case here. In the present case, the plaintiffs have alleged

that the defendant should have supervised Barer in his role as a resident advisor or head resident and that its failure to do so created a reasonably foreseeable risk that the plaintiffs would be sexually assaulted by him. They have provided no evidence, nor have they alleged any facts, that the defendant even knew that Barer was in contact with younger teenage boys, particularly in his capacity as a resident advisor or head resident. The plaintiffs have also failed to allege how Barer's position as a resident advisor or head resident distinguished him from any other student residing in the defendant's dormitories in terms of creating a reasonable risk that he would sexually assault younger teenage boys whom he brought to his dormitory room. Indeed, during argument on the motion for summary judgment, the plaintiffs argued that, "because a college student brings three individuals . . . who are younger than college age onto campus . . . [t]hat should give rise to the notice and foreseeability that unacceptable conduct would occur." In the absence of evidentiary support, this bald assertion was insufficient to create a material issue of fact as to whether the defendant's conduct created an unreasonable risk that Barer would bring young teenage boys to his dormitory room and sexually assault them. Because the plaintiffs made no showing of evidentiary facts or presented any evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred as to whether the defendant knew or should have known of the risk to the plaintiffs in this case, the court properly rendered summary judgment in favor of the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.