IN RE EMILY S.*
(AC 44791)

Alvord, Cradle and Lavine, Js.

Syllabus

The respondent father appealed to this court from the judgment of the trial court terminating his parental rights with respect to his minor child, E. The father claimed that the trial court improperly found that the Department of Children and Families made reasonable efforts to reunify him with E and that he was unable or unwilling to benefit from reunification services. *Held* that upon this court's review of the record, and the briefs and arguments of the parties, the judgment of the trial court was affirmed, and this court adopted the trial court's thorough and well reasoned memorandum of decision as a proper statement of the facts and the applicable law on the issues.

Argued January 3—officially released February 9, 2022**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondent's parental rights with respect to his minor child, brought to the Superior Court

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

** February 9, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

in the judicial district of New Britain, Juvenile Matters, where the case was tried to the court, *Huddleston, J.*; judgment terminating the respondent's parental rights, from which the respondent appealed to this court. *Affirmed.*

Albert J. Oneto IV, assigned counsel, for the appellant (respondent father).

Evan O'Roark, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Cynthia Mahon*, assistant attorney general, for the appellee (petitioner).

Opinion

PER CURIAM. The respondent father, Damon F. (respondent), appeals from the judgment of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families, terminating his parental rights with respect to his minor child, Emily S. (child), pursuant to General Statutes § 17a-112 (j). On appeal, the respondent claims that, in terminating his parental rights, the trial court improperly found that the Department of Children and Families (department) made reasonable efforts to reunify him with his child and that he was unable or unwilling to benefit from reunification services. We affirm the judgment of the trial court.

The child was born on August 5, 2018, and her mother left the hospital and the child that same day without providing any information as to the identity of the child's father. At the time the child was born, she was premature and tested positive for cocaine and opiates, and she was placed in the neonatal intensive care unit of the hospital. On August 16, 2018, the commissioner filed an ex parte motion for order of temporary custody of the child and coterminous neglect and termination of parental rights petitions as to the child's mother and

John Doe, as the father.[1] The ex parte motion for order of temporary custody was granted on that same day. After the child was discharged from the hospital, she was placed in a preadoptive home, where she has remained.

After investigating and eliminating other putative fathers, the department contacted the respondent, who was incarcerated in New Hampshire at the time. On September 12, 2019, the commissioner filed amended coterminous petitions for neglect and termination of parental rights, naming the respondent as the child's father. The respondent submitted to a paternity test, and, on October 28, 2019, a finding of paternity entered identifying the respondent as the child's father. The respondent thereafter was appointed counsel.

The respondent did not contest the earlier neglect determination and the matter proceeded to trial on the amended petition to terminate his parental rights on February 8, 2021. The amended petition alleged abandonment and the absence of an ongoing parent-child relationship as the statutory grounds for termination.

By way of a memorandum of decision filed on April 22, 2021, the court granted the petition to terminate the parental rights of the respondent. The court found, "by clear and convincing evidence, that the department made reasonable efforts to locate [the respondent], that [the respondent] was unable or unwilling to benefit from reunification efforts, that there is no ongoing parent-child relationship as defined by . . . § 17a-112 (j) (3) (D), and that to allow further time for the establishment of such a relationship would be detrimental to the best interest of the child." The court further found that the termination of the respondent's parental rights

[1] The parental rights of the child's mother were terminated by consent on July 23, 2019. Since that date, the child's mother passed away. Any reference herein to the respondent is to the child's father only.

and the permanency plan proposed by the petitioner, which provided for the child's adoption following termination, was in her best interest. This appeal followed.

On appeal, the respondent claims that, in terminating his parental rights, the trial court improperly found that the department made reasonable efforts to reunify him with his child and that he was unable or unwilling to benefit from reunification services.

Section 17a-112 (j) provides in relevant part: "The Superior Court . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts . . . ."

"[W]e . . . review the trial court's decision . . . with respect to whether the department made reasonable efforts at reunification for evidentiary sufficiency. . . . [W]e review the trial court's subordinate factual findings for clear error. . . . Similarly, in reviewing a trial court's determination that a parent is unable to benefit from reunification services, we review the trial court's ultimate determination . . . for evidentiary sufficiency, and review the subordinate factual findings for clear error." (Citations omitted; internal quotation marks omitted.) *In re Karter F.*, 207 Conn. App. 1, 14, 262 A.3d 195, cert. denied, 339 Conn. 912, 261 A.3d 745 (2021).

We have examined the record and considered the briefs and arguments of the parties, and conclude that the judgment of the trial court should be affirmed. In granting the petition to terminate the respondent's parental rights, the court issued a thorough and well reasoned memorandum of decision, which is a proper

statement of the relevant facts and the applicable law on the issues. We therefore adopt the decision as our own. See *In re Emily S.*, Superior Court, judicial district of New Britain, Juvenile Matters, Docket No. CP-18-012507-A (April 22, 2021) (reprinted at 210 Conn. App. 585, A.3d). Any further discussion of the issues by this court would serve no useful purpose. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Nussbaum* v. *Dept. of Energy & Environmental Protection*, 206 Conn. App. 734, 741–42, 261 A.3d 1182, cert. denied, 339 Conn. 915, 262 A.3d 134 (2021).

The judgment is affirmed.

APPENDIX

IN RE EMILY S.*

Superior Court, Judicial District of
New Britain, Juvenile Matters
File No. CP-18-012507-A

Memorandum filed April 22, 2021

Proceedings

Memorandum of decision on petition by Commissioner of Children and Families to terminate respondent's parental rights with respect to his minor child and on motion for review of permanency plan. *Judgment terminating respondent's parental rights and approving permanency plan.*

Jeanette Johnson, assistant attorney general, for the petitioner.

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* Affirmed. *In re Emily S.*, 210 Conn. App. 581, A.3d (2022).

In accordance with General Statutes § 46b-124 (b) and Practice Book § 32a-7, the names of the parties to this case are not to be disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and only upon order of the Superior Court.

Chris Oakley, for the respondent.

Patricia Lyga, for the minor child.

Opinion

HUDDLESTON, J.

MEMORANDUM OF DECISION

Emily S. is a young child, born on August 5, 2018. Now pending before the court are an amended coterminous petition for the termination of parental rights as to the child's father, Damon F., and a contested motion for review of a permanency plan. The child was previously adjudicated neglected, and the parental rights of the child's mother were terminated by consent, on July 23, 2019. The child's mother died on November 4, 2019.

A consolidated trial as to all issues relating to Mr. F. was held on February 8, 2021. Mr. F. appeared and was represented by counsel. The child was also represented by counsel.

The court finds that it has jurisdiction over the matter. Proper notice of the proceeding was provided. No action is pending in any other court concerning the custody of this child. No Native American tribal affiliation was claimed, and the Indian Child Welfare Act does not apply.

For all the reasons that will be discussed in this decision, the court finds that the department has proved, by clear and convincing evidence, that a statutory ground for termination exists and that termination is in the child's best interest. The petition is granted and the Commissioner [of Children and Families] is appointed the child's statutory parent. Mr. F.'s objection to the permanency plan is overruled, and the permanency plan is approved as in the best interest of the child.

I

RELEVANT PROCEDURAL HISTORY

Emily was born on August 5, 2018. At her birth, both the child and her mother, Florence M., tested positive for opiates and cocaine. Ms. M. left the hospital against medical advice on the day of the child's birth and did not provide any information concerning the child's father. On August 15, 2018, the Commissioner of the Department of Children and Families (department or DCF) initiated a ninety-six hour hold. On August 16, 2018, the department filed an ex parte motion for order of temporary custody and coterminous neglect and termination of parental rights petitions. The pleadings named Ms. M. as the respondent mother and John Doe as the respondent father. Ms. M. was served by abode service. Publication was ordered as to John Doe.

The ex parte motion for order of temporary custody was granted on August 16, 2018, and sustained by default on August 24, 2018, at the preliminary hearing on the order of temporary custody. At that hearing, the department's counsel orally moved to cite in John S. as the child's putative father, based on information recently provided to the department by Ms. M. That motion was granted. On the plea date of September 12, 2018, Mr. S. appeared, was advised of his rights, and entered pro forma denials. Putative father John Doe was defaulted for failure to appear. The department sought and obtained an order for paternity testing as to Mr. S. On November 13, 2018, the department filed a DNA report which indicated that Mr. S. was excluded as the child's father. The department moved for a judgment of nonpaternity as to Mr. S., which was granted, and Mr. S. was removed from the case.

Also on November 13, 2018, the mother appeared, was appointed counsel, and the previous default was vacated. She was questioned under oath as to possible

fathers and was reminded that she had mentioned Mr. F. as a possible father. She responded that he was not the father and she did not know who the father might be. She said it could have been a man in Bristol. The court ordered service of notice by publication in Bristol for John Doe, which was effected. Doe was defaulted when he did not appear on the plea date of December 6, 2018.

While the case was pending, the department requested and obtained a study under the Interstate Compact on the Placement of Children (ICPC), General Statutes § 17a-175, regarding the possible placement of the child with a maternal uncle and his family in Missouri. The ICPC study was completed and the maternal uncle was initially approved for placement. When the child was classified as a medically complex child, however, additional approval was needed from Missouri. After coming to Connecticut on two occasions to meet the child, her foster mother, the social worker, and the child's medical providers, the maternal uncle ultimately withdrew from ICPC consideration because he did not want to disrupt the child's current placement. He has maintained regular contact with the foster mother up to the present time.

On July 23, 2019, Ms. M. appeared for a coterminous trial on the neglect and termination petitions. She entered a nolo contendere plea to the neglect petition and tendered her consent to the termination petition. John Doe had previously been defaulted for failure to appear at the initial plea hearing and was not present for the trial. After DCF presented its evidence, the court, *Lobo, J.*, adjudicated the child neglected on the ground that she had been denied proper care and attention. The court then terminated the parental rights of Ms. M. and of John Doe. At the request of the assistant attorney general representing the department, the court postponed the disposition on the termination petition to allow the department additional time to speak with

an additional putative father, Mr. F. The department's counsel explained that an anonymous caller had contacted the department's Care Line on July 7, 2019, and provided information about a possible father of the child. The social worker had been able to locate the putative father out of state but had not yet succeeded in making contact with him. Although Ms. M. again denied that Mr. F. could be the father, the court postponed the disposition on the termination petition. The court entered a disposition on the neglect petition, committing the child to the custody of the department.

At an in court review on August 21, 2019, the department's social worker reported that she had communicated with Mr. F. on July 26, 2019. At that time, Mr. F. was incarcerated in Strafford County Corrections in Dover, New Hampshire. Mr. F. told the social worker that he did not believe he was the child's father and he did not wish to have a paternity test. The court, *Lobo, J.*, ordered the department to amend the petition to include Mr. F. as a putative father and to effectuate service. The social worker spoke with Mr. F. again in August, 2019, approximately a month after her first conversation with him, and in that conversation he told her that he might be the child's father and would be willing to participate in a paternity test.

On September 12, 2019, the department filed amended coterminous petitions for neglect and termination of parental rights, naming Mr. F. as the respondent father. On the plea date, October 9, 2019, Mr. F. appeared by telephone, was advised of his rights, and confirmed that he had received the petitions. He declined to apply for appointment of counsel at that time. The department orally moved for paternity testing, which the court ordered. The paternity test subsequently indicated a 99.99 percent probability that Mr. F. is the child's father. A finding of paternity was made

on October 28, 2019. Mr. F. applied for counsel, and counsel was appointed.

Although the neglect petition was amended to name Mr. F. as the sole respondent, neither the neglect adjudication nor the disposition of commitment was opened or modified as a result of the amendment.[1] The amended petition for termination of parental rights, naming Mr. F. as the sole respondent, alleged abandonment and the absence of an ongoing parent-child relationship as the statutory grounds for termination. At a hearing on March 5, 2020, the court ordered specific steps for Mr. F. and reviewed those steps with him. Trial on the termination of parental rights petition was scheduled for March 23, 2020, but was subsequently postponed as a result of the Covid-19 pandemic. On April 6, 2020, the department filed a motion for review of the permanency plan, which proposed a plan of termination of parental rights and adoption. Mr. F., through counsel, filed an objection to the proposed plan, and the contested hearing on the permanency plan was consolidated with the trial on the termination petition.

[1] Where a child's paternity is not known at the time of an adjudication of neglect, the subsequent entry of the father into the proceeding does not invalidate the previous adjudication of neglect. See *In re Zoey H.*, 183 Conn. App. 327, 352–53, 192 A.3d 522 (respondent's later appearance in case did not change historical fact that child was neglected at time of adjudication), cert. denied, 330 Conn. 906, 192 A.3d 426 (2018). Mr. F.'s entry into the ongoing neglect case allowed him to be provided with specific steps and to participate in any dispositional issues that arose. "[A]n adjudication of neglect relates to the status of the child and is not necessarily premised on parental fault. A finding that the child is neglected is different from finding who is responsible for the child's condition of neglect. Although [General Statutes] § 46b-129 requires both parents to be named in the petition, the adjudication of neglect is not a judgment that runs against a person or persons so named in the petition; [*i*]*t is not directed at them as parents*, but rather is a finding that the children are neglected . . . ." (Emphasis in original; internal quotation marks omitted.) *In re T.K.*, 105 Conn. App. 502, 505–506, 939 A.2d 9, cert. denied, 286 Conn. 914, 945 A.2d 976 (2008). At the trial in this matter, no party raised any issue with respect to the neglect adjudication, and the court therefore does not need to address it in this decision.

The consolidated trial on the termination petition and the permanency plan took place on February 8, 2021, as a virtual trial on the Microsoft Teams platform. Mr. F., who remains incarcerated in New Hampshire, appeared by video and was represented by counsel. The court advised Mr. F. of his rights and of the nature of the termination proceeding as required by *In re Yasiel R.*, 317 Conn. 773, 794, 120 A.3d 1188 (2015). The department had previously filed two motions for judicial notice: one for judicial notice of the court record, and a second for judicial notice of copies of ten judicial records, nine of which related to a prosecution pending against Mr. F. in the United States District Court for the District of Maine, and one of which was a copy of a Connecticut Supreme Court decision affirming a prior Connecticut conviction of Mr. F. The motions for judicial notice were granted without objection or limitation.

The department presented the testimony of Courtney E., the foster mother in whose care the child has been placed since her discharge from the hospital after birth, and Margaret DeSena, the department social worker who was assigned to the case.

The department proffered twelve exhibits, some of which were redacted by agreement. The exhibits were admitted in full without objection. The department's exhibits included the following:

- State's Exhibit 1: Social Study in Support of Neglect and Termination of Parental Rights Petition dated September 12, 2018, as redacted

- State's Exhibit 2: Status Report dated May 1, 2019

- State's Exhibit 3: Addendum to the Social Study dated October 8, 2019

- State's Exhibit 4: Status Report dated January 23, 2020, as redacted

- State's Exhibit 5: Motion to Review Permanency Plan and Study in Support Thereof dated March 9, 2020

- State's Exhibit 6: Addendum to the Coterminous Social Study dated February 1, 2021

- State's Exhibit 7: Criminal Conviction Certification record dated February 6, 2020

- State's Exhibit 8: Department of Correction Records dated February 3, 2020

- State's Exhibit 9: Yale-New Haven Health L & M Rehabilitation Services Physical Therapy Summary dated January 3, 2020, as redacted

- State's Exhibit 10: Letter by Amanda Vellali, M.S., CCC-SLP, Pediatric Speech Pathologist dated February 11, 2020, as redacted

- State's Exhibit 11: ProHealth Physician's Letter by Allyson Salek, M.D., dated February 17, 2020, as redacted

- State's Exhibit 12: LEARN Birth-to-Three Letter by Allison Frost, M.S., Special Ed/Early Intervention Specialist, as redacted

After the department rested, Mr. F.'s counsel moved for judgment as a matter of law, arguing that the department had failed to meet its burden of proof with respect to the ground of abandonment. The court reserved decision on that motion.

Mr. F. then testified after being canvassed by his counsel about his decision to testify. In addition, Mr. F. introduced one exhibit, Respondent's Exhibit B, Father's Specific Steps as ordered on March 5, 2020. That exhibit was admitted in full without objection.

The court heard arguments of counsel at the close of the evidence. Among other arguments, counsel for the department and counsel for the minor child argued

that Mr. F. has no relationship with the child, no understanding of the degree and intensity of care the child needs, and that it would be highly detrimental to the child to disrupt her secure placement. Counsel for Mr. F. argued against termination. He emphasized the fundamental constitutional interests at stake for the father and Mr. F.'s desire to parent his child or to have her placed with his family. He argued that the fact of incarceration can never constitute abandonment, and further argued in favor of allowing Mr. F. additional time to establish a parent-child relationship.

The court has carefully considered all the testimonial and documentary evidence in light of the applicable statutes and principles of law. It has considered the demeanor and credibility of the witnesses. It has taken judicial notice of court records as permitted by law. It has considered the arguments of counsel.

II

PRELIMINARY FACTS

A

The Child

Emily was born on August 5, 2018, at the Hospital of Central Connecticut in New Britain. She was premature, weighing approximately four pounds, but her true gestational age was unknown because her mother, Ms. M., received no prenatal care during her pregnancy. Ms. M. had a significant history of substance abuse. Her substance abuse had led to the termination of her parental rights as to her older child, Jadalynn, who was born in 2008. Ms. M. provided no information about Emily's father to hospital staff. She left the hospital against medical advice on the day of Emily's birth and did not return to visit her.

Emily tested positive for cocaine and opiates at birth and was kept in the neonatal intensive care unit (NICU) for ten days. She experienced withdrawal symptoms, which required her to be given morphine. While Emily was in the hospital, the department identified a legal risk licensed preadoptive home. The identified foster mother visited Emily daily while she was in the NICU and learned about the care she would need upon discharge. On August 15, 2018, the department initiated a ninety-six hour hold, and, on the next day, sought and obtained an ex parte order of temporary custody. Emily was discharged from the hospital and placed in the preadoptive home, where she has remained through the date of the trial.

Emily has had substantial medical and developmental issues. She has been diagnosed with neonatal abstinence syndrome. In the first months after her discharge from the hospital, she had severe tremors, cried constantly, and seldom slept. She had severe gastrointestinal issues, including reflux throughout her first year of life. She had difficulty having bowel movements. She lost weight at first, and her weight had to be checked twice weekly at the pediatrician's office or by a visiting nurse. She was on a prescription formula for her first two years.

In her first months of life, Emily lacked the ability to suck and had to be wakened every two hours for feeding. She was referred to a feeding team for therapy to help strengthen the muscles in her mouth and tongue. Although she had made substantial progress with feeding by the age of two and one-half, and, although she is now able to speak, she will continue to need speech therapy to address a lisp and a stutter.

Emily also developed significant respiratory issues that led to multiple visits to the emergency room. When

she was four months old, she was referred to a pulmonologist. She had to be given breathing treatments, each taking about forty-five minutes, three or four times daily. On November 25, 2018, she was diagnosed with pneumonia in an emergency room visit and was given a stronger breathing treatment. Her respiratory issues have continued. She has been diagnosed with severe persistent asthma, which is managed through administration of an inhaled steroid once or twice a day. A dual treatment plan is in place when she develops congestion, because she gets sick very quickly. She is seen by a pulmonologist every four months. Her physician has stated that she is likely to have pulmonary issues throughout her life. As a result of her respiratory issues, she has been classified as a child with complex medical needs, Level 3.[2]

At the age of eighteen months, Emily was tested for Hepatitis C and was found to be positive. She will need to have blood tests every eight months to monitor the effects of the Hepatitis C infection on her liver. She is monitored by the gastroenterology department at the Connecticut Children's Medical Center for this condition. Her medical providers hope to delay treatment for the condition until she is at least five years old because the treatments are harsh for children. Because of the

[2] A Level 3 classification of a child with complex medical needs is defined by the department's practice guide, in relevant part, to mean "a child with a chronic condition that is not well-controlled or which requires daily or regular intensive medical follow-up or treatment, including severe forms of chronic disease such as . . . severe persistent asthma which requires intensive and ongoing medical follow-up or has required an acute hospitalization or [pediatric intensive care unit] admission in the past six months." Department of Children and Families, "Health Care Standards and Practice for Children and Youth in Care," Children with Complex Medical Needs, p. 86, available on the department's website at https://portal.ct.gov/-/media/DCF/Policy/BPGuides/21-5PG-HEALTH-CARE-STANDARDS-AND-PRACTICE-FOR-YOUTH-IN-CARE-PRACTICE-GUIDE.pdf (last visited on April 21, 2021).

Hepatitis C infection, she cannot take certain medications that can harm the liver, and care must be taken to ensure that all of her medical providers are aware of the condition.

Emily was developmentally delayed in both gross and fine motor skills. She has required physical therapy and occupational therapy to address those delays. She had tightness on her left side, and there was a question as to whether she might have cerebral palsy. She has had vestibular issues which are very frustrating for her. She received Birth to Three services from October, 2018, through November, 2020, when she was successfully discharged.

Emily is currently in day care full time, although her foster mother has sometimes kept her home during the pandemic. Emily is in a therapeutic room in her day care setting. Her teacher is a certified therapeutic teacher. The therapeutic room in the day care provides a smaller class with more direct one-on-one attention. The staff is trained to administer Emily's breathing treatment during the day.

Emily has a hard time adapting to strangers and looks to her foster mother as her source of security. Emily received Birth to Three services at the day care because her providers thought it was beneficial to see her interact with other children. Emily's foster mother communicated with the Birth to Three providers regularly to get reports on what they had done and to share what she was noticing about Emily's development.

Although Emily was successfully discharged from Birth to Three services, she continues to need physical and occupational therapy for various issues. She is delayed in developing fine motor skills and still cannot use a fork or spoon. The delay in fine motor skills affects her eating and causes her frustration in playing with toys such as Megablox.

Emily's providers attribute much of Emily's medical and physical progress to the consistent care and attention of her foster mother, who has attended every medical appointment with her and has carefully attended to the various breathing and other medical treatments and physical therapy exercises that have been prescribed for Emily at home. The foster mother's six year old son has also participated in Emily's physical therapy, motivating her to copy his actions.

Emily's pediatrician has indicated that, as a result of her prenatal exposure to drugs, Emily is expected to have learning disabilities and will have an "uphill battle" when she starts school. She will likely require special education services.

B

The Father

Mr. F. was born in February, 1975, in Hartford, Connecticut, in a household with his mother, his sister, and his grandmother. He also has two paternal half-siblings. He told the department that he continues to have a relationship with his mother and all his siblings, who provide financial and emotional support for him. He denied any traumas during his childhood and reported that he did well in school, although he admitted to behavioral issues in school, where he was often in trouble. When he was seventeen, in 1992, he was arrested, and subsequently convicted, on charges of robbery in the first degree, for which he received a five year sentence. He obtained his GED while incarcerated.

Mr. F. has never been married, but he has one older child, Daijah, who is now an adult. The department's records indicate that Mr. F. was substantiated for physical neglect with regard to Daijah in 2003. The social worker testified that Mr. F. had a history of domestic violence and harassment with Daijah's mother and was

convicted of violating a protective order for which Daijah's mother was the protected person. That testimony was corroborated by a copy of a 2006 decision by the Connecticut Supreme Court, which affirmed Mr. F.'s conviction arising from a 2003 incident relating to his child's mother.

Mr. F. has been incarcerated for most of his adult life, with relatively brief periods of liberty followed by new arrests, convictions, and further incarceration. More specifically: Mr. F.'s Connecticut criminal conviction history indicates that, between 1992 and 2012, he was convicted on the following dates on the stated Connecticut charges: (1) December 12, 1992, larceny in the sixth degree; (2) April 23, 1993, robbery in the first degree and conspiracy to commit robbery in the first degree; (3) November 12, 1997, sale of narcotics; (4) May 12, 1999, carrying a pistol without a permit and possession of narcotics; (5) February 14, 2003, disorderly conduct; (6) August 5, 2004, running from police; (7) August 5, 2004, violation of a protective order; and (8) October 18, 2012, violation of a protective order. During those years, he was also convicted of violations of probation in 1999, 2004, and 2012. He spent approximately nineteen of the twenty-three years between 1992 and 2015 in correctional facilities. During some of his periods in the community, he was on probation, parole, or special parole. His criminal history in Connecticut, so far as the record discloses, ended when he was discharged from a period of special parole in April, 2016.

When he was not incarcerated, Mr. F. worked at various jobs. He was most recently employed in 2017, at Boost Mobile, where he worked for eighteen months. Before that, he worked at Hartford Hospital in environmental services for seven months. He has also worked as a truck driver in the past.

Mr. F.'s Connecticut criminal history and incarceration records end in 2016, but his criminal activity did not

end then. Although the department did not introduce a copy of Mr. F.'s criminal conviction history from other states, both the social worker and Mr. F. testified that, when the social worker first spoke with Mr. F. on July 26, 2019, he was incarcerated at Strafford County Correctional facility in Dover, New Hampshire, where he was serving a sentence on state criminal charges from the state of Maine and was also under an order of detention for a pending federal criminal charge. The social worker testified that she believed that Mr. F.'s incarceration began on or about February 19, 2019, and Mr. F. did not offer contradictory testimony.

Evidence as to Mr. F.'s incarceration status as of the date of trial is found in the testimony of both the social worker and Mr. F. and in nine documents related to the criminal charge pending against Mr. F. in federal District Court in Maine. These documents were attached to a motion for judicial notice filed on February 7, 2021, which was granted without objection and without limitation. The documents include an arrest warrant issued on January 20, 2019; the criminal complaint dated January 30, 2019; an indictment synopsis dated June 20, 2019; an order of detention pending trial issued on May 30, 2019; an excerpt from a transcript of a hearing held on February 6 and February 11, 2020, on Mr. F.'s motion to suppress certain evidence in the District Court action; a speedy trial order dated April 30, 2020; a decision on [Mr. F.'s] renewed motion for an expedited and combined plea and sentencing hearing by telephone or videoconference, dated June 2, 2020; a decision on [Mr. F.'s] second renewed motion for an expedited and combined plea and sentencing hearing by videoconference, dated August 24, 2020; and a speedy trial order dated December 11, 2020.

The information that can be gleaned from the federal District Court documents is as follows: The government alleges that, on January 6, 2019, Mr. F. knowingly and

intentionally possessed heroin with intent to distribute it in violation of 21 U.S.C. § 841 (a) (1) (2018). His arrest resulted from a traffic stop in Maine on that date. On the date of the traffic stop, he was out on bond on various Maine state charges. His motion to suppress certain evidence obtained as a result of the traffic stop was denied. He subsequently moved for an expedited and combined plea and sentencing hearing by telephone or videoconference so that he could enter a conditional guilty plea, be sentenced, and then appeal the denial of his motion to suppress. The District Court denied the motion on June 2, 2020, but on August 24, 2020, the District Court granted Mr. F.'s second renewed motion for such a remote hearing. As of the date of trial in this case, the federal plea and sentencing hearing had not yet been scheduled. On at least two occasions, the District Court had issued, on its motion, "speedy trial orders," in which the court excluded certain dates from the calculations under the Speedy Trial Act, attributing the exclusion to the public health crisis caused by the Covid-19 pandemic. The more recent of those orders, dated December 11, 2020, excluded the time between February 1, 2021, and April 5, 2021, from calculations under the Speedy Trial Act.

Mr. F. testified at trial that he hopes to have his federal court sentencing hearing in April, 2021, and he hopes to receive a sentence of time served. He testified that his sentencing range under the Federal Sentencing Guidelines is "thirty or thirty-one months" and he has served "about twenty-one" months. His testimony is not entirely consistent with the federal court documents. In a ruling dated June 2, 2020, the federal district judge observed that, according to a preplea presentence report authorized by the court, Mr. F.'s Guideline range is thirty to thirty-seven months, but the judge noted that Mr. F.'s own motion stated that the Guideline range might be increased to thirty-three to forty-one months

when additional information about his criminal history was considered. The District Court further commented that Mr. F. would not begin to be detained on the federal charge until he completed his sentence on the state charge, an event which was imminent at the time of the District Court's ruling on June 2, 2020. If the District Court's summary is accurate, Mr. F. had served approximately eight months in federal detention by February 8, 2021, the date of the trial in this court, and he may face a Guideline sentence range of as much as forty-one months. If Mr. F.'s testimony was accurate, he was hoping for time served but was exposed to the possibility of eight more months of incarceration. At the time of the trial in this court, it was unknown when his plea and sentencing would be scheduled and what his sentence would be.

There is no evidence in the record as to the exact date when Mr. F. moved from Connecticut to Maine, but it can be inferred to have been at some time between 2016, when he was discharged from special parole in Connecticut, and 2018, when he had a relationship with Florence M., the mother of the child at issue in this case.

The social worker initially spoke with Mr. F. on July 26, 2019. He told the social worker that Ms. M. was with him for "a time" in Maine and that he loved her but could not stay in a relationship with her because she was using heroin and cocaine. (Ex. 3, p. 3.) He made inconsistent statements about whether he knew about Ms. M.'s pregnancy and his potential paternity. In his first conversation with the social worker, he stated that he was aware that Ms. M. had a baby but he did not believe the child was his. At other times he stated that he was unaware that Ms. M. was pregnant or had his child. He admitted that he had not taken phone calls from Ms. M. after their breakup because he was upset with her, but he also said that he had spoken with her in July, 2018, and she did not tell him

she was pregnant. He initially did not want to participate in a paternity test. When the social worker contacted him again a month after their first conversation, however, he said that he might be the father and agreed to a paternity test. He did not want to provide any resources for the child until the paternity test was completed. A DNA test was ordered, and the results received in October, 2019, confirmed Mr. F.'s paternity.

In November, 2019, after his paternity was determined, Mr. F. offered Tabitha Hand as a placement resource. Ms. Hand lived in Madawaska, Maine. On December 12, 2019, Mr. F.'s counsel filed a motion for an order for an expedited ICPC study of Ms. Hand as fictive kin. In the motion, he represented that Ms. Hand lived in the town where Mr. F. planned to live when his prison sentence was concluded and that she was a licensed foster parent in Maine. The social worker spoke with Ms. Hand and began the process of collecting information to assess her suitability. In speaking with Ms. Hand, the social worker learned that Ms. Hand was the mother of a friend of Mr. F. and had only met Mr. F. on a few occasions. The department concluded that Ms. Hand did not qualify as fictive kin because she had never met the child. It also determined that an expedited ICPC study could not be requested because Ms. Hand did not have a biological relationship with the child. Mr. F. did not agree with the department's decision not to consider Ms. Hand and stated that he did not think it would be harmful to the child to change her placement since she was so young. When the social worker attempted to explain the impact of removals at any age, Mr. F. became upset and ended the telephone call. He nevertheless subsequently withdrew his motion for an ICPC study for Ms. Hand.

Mr. F. also proposed his first cousin, Joshua [H.], as a placement resource. Mr. [H.] is employed as a

firefighter in Hartford and also runs an electric business. The department assessed Mr. [H.] as a possible placement resource for Emily. The social worker spoke with him and then met with him with the foster mother, who described the child and provided a summary of her medical conditions and needs. Mr. [H.] and his mother subsequently met with the foster mother and the child for a two hour visit at the foster mother's home, where the foster mother took photographs of the child with Mr. [H.] and his mother. After meeting with the child and the foster mother, Mr. [H.] did not wish to remove the child from her foster home and no longer wished to be considered a placement option. The foster mother, with the department's approval, offered to meet Mr. [H.] in Hartford to take the child to meet Mr. F.'s mother, but Mr. [H.] never responded to that offer.

Mr. F. has not proposed other family members as possible resources for the child. His mother is elderly and unable to care for the child.

Mr. F. was provided with specific steps which required, among other things, that he engage in substance abuse treatment and a mental health assessment and treatment at the correctional facility. He did not do so even when such services were available; he told the social worker he did not think he needed the services. Since the onset of the pandemic, such services by outside providers have been suspended and have not been available to him. The social worker has called Mr. F. on a monthly basis to discuss the child with him. The social worker has not always been able to reach him, in part because he has a job in the correctional facility's laundry and telephone calls have to be scheduled around his work hours. He has participated in telephone calls when the social worker was able to reach him, and more recently the corrections officer who is his supervisor in the laundry provided an e-mail address the social

worker could use to send photographs of the child for him.

Mr. F. has expressed concern for the child and a desire to be able to parent her or to have her placed with his family. Although he has regularly asked about her, he has never sent her a letter or card. The social worker told him that the foster mother was making a memory book for the child about her biological family, including photos of the child's maternal uncle and his family and photos of Mr. [H.'s] visit with the child, but Mr. F. never provided anything to the social worker to be included. He told the social worker that it would be difficult for him to write to the child because he would not know what to say. Mr. F. has never met the child. Although he inquired about visits with her, the department did not provide visits.

Mr. F. acknowledged that the foster mother has taken good care of the child. He admitted that the date of his release from prison is unknown, although he hopes that it will be soon. He further admitted that when he is released from prison, he will need to find housing and employment and will have to engage in services recommended by the department. He nevertheless asks the court to deny the petition to allow him time to be able to care for the child himself or to have her placed with his family.

III

THE PETITION FOR TERMINATION OF PARENTAL RIGHTS

The court is mindful of what is at stake in a proceeding to terminate parental rights. "[T]he termination of parental rights is defined . . . as the complete severance by court order of the legal relationship, with all its rights and responsibilities, between the child and his parent . . . . It is, accordingly, a most serious and

sensitive judicial action. . . . Although the severance of the parent-child relationship may be required under some circumstances, the United States Supreme Court has repeatedly held that the interest of parents in their children is a fundamental constitutional right that undeniably warrants deference and, absent a powerful countervailing interest, protection." (Internal quotation marks omitted.) *In re Tresin J.*, 334 Conn. 314, 324–25, 222 A.3d 83 (2019). With due consideration for the serious nature of this action, the court has carefully considered the petition, all of the evidence presented, the information in the court files judicially noticed in accordance with the standards required by law, and the arguments of the parties.

"A hearing on a petition to terminate parental rights consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the trial court determines whether one of the statutory grounds for termination of parental rights [under General Statutes § 17a-112 (j)] exists by clear and convincing evidence. If the trial court determines that a statutory ground for termination exists, it proceeds to the dispositional phase. . . . In the dispositional phase, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child." (Citation omitted; internal quotation marks omitted.) *In re Gianni C.*, 129 Conn. App. 227, 230, 19 A.3d 233 (2011). "The best interest determination also must be supported by clear and convincing evidence." Id., 230–31. Pursuant to Practice Book § 35a-7 (a), "[i]n the adjudicatory phase, the judicial authority is limited to evidence of events preceding the filing of the petition or the latest amendment, except where the judicial authority must consider subsequent events as part of its determination as to the existence of a ground for termination of parental rights."

In this case, the petition alleges two adjudicatory grounds for termination of Mr. F.'s parental rights: abandonment and the absence of an ongoing parent-child

relationship. The elements of these adjudicatory grounds are set out in § 17a-112 (j), which provides in relevant part as follows: "The Superior Court, upon notice and hearing as provided in sections 45a-716 and 45a-717, may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required, (2) termination is in the best interest of the child, and (3) (A) the child has been abandoned by the parent in the sense that the parent has failed to maintain a reasonable degree of interest, concern or responsibility as to the welfare of the child . . . [or] (D) there is no ongoing parent-child relationship, which means the relationship that ordinarily develops as a result of a parent having met on a day-to-day basis the physical, emotional, moral and educational needs of the child and to allow further time for the establishment or reestablishment of such parent-child relationship would be detrimental to the best interest of the child . . . ." That is, in this case, to prove an adjudicatory ground, the department must prove by clear and convincing evidence that it made reasonable efforts to locate Mr. F.; that it made reasonable efforts to reunify Mr. F. with the child or that Mr. F. was unable or unwilling to benefit from reunification efforts; and either that Mr. F. abandoned the child, or that there is no ongoing parent-child relationship, as those grounds are defined in the statute and further explained by judicial decisions. If one or both of those adjudicatory grounds are proved by clear and convinc-

ing evidence, the department must also prove, by clear and convincing evidence, that termination is in the best interest of the child.

A

ADJUDICATORY FINDINGS

i

Reasonable Efforts

As stated [previously], in a proceeding on a petition for termination of parental rights under § 17a-112 (j), the court must first determine whether there is clear and convincing evidence that the department made reasonable efforts to locate the parent and to reunify the parent and child, unless the court finds that the parent was unable or unwilling to benefit from reunification efforts. "The word reasonable is the linchpin on which the department's efforts in a particular set of circumstances are to be adjudged, using the clear and convincing standard of proof. Neither the word reasonable nor the word efforts is, however, defined by our legislature or by the federal act from which the requirement was drawn. . . . [R]easonable efforts means doing everything reasonable, not everything possible." (Internal quotation marks omitted.) *In re Jason R.*, 129 Conn. App. 746, 767–68, 23 A.3d 18 (2011), aff'd, 306 Conn. 438, 51 A.3d 334 (2012). "[I]n determining whether the department has made reasonable efforts to reunify a parent and a child or whether there is sufficient evidence that a parent is unable or unwilling to benefit from reunification efforts, the court is required in the adjudicatory phase to make its assessment on the basis of events preceding the date on which the termination petition was filed." *In re Shaiesha O.*, 93 Conn. App. 42, 48, 887 A.2d 415 (2006). Because the amended petition naming Mr. F. as the respondent father was filed on

September 12, 2019, the court must assess the department's efforts on the basis of events before that date.

Clear and convincing evidence establishes that the department made reasonable efforts to locate the child's father under the circumstances that existed before the adjudicatory date. The mother left the hospital on the day of the child's birth without providing any information about the child's paternity. The department had difficulty locating the mother for a time. When the mother did speak with department social workers, she gave inconsistent information about the child's possible paternity, naming, at various times, Mr. S., Mr. F., and a man whose name she did not know who lived in Bristol. Mr. S. believed that he might be the father and agreed to a paternity test, which subsequently excluded him. The mother had not received prenatal care and did not know the child's true gestational age.

The social worker testified credibly that, when Ms. M. first mentioned Mr. F. in October, 2018, Ms. M. mentioned his approximate age and said that he might be in jail in Maine. The social worker conducted online searches for him at that time, but without more information, she was unable to locate him. On July 7, 2019, an anonymous caller informed the department's Care Line that her boyfriend, Mr. F., might be the father of Ms. M.'s child. The caller provided sufficient information about Mr. F.'s date of birth and possible location to allow the social worker, with some "digging," to locate him in New Hampshire after speaking with jails in Maine and in New Hampshire. The social worker spoke to Mr. F. for the first time on July 26, 2019.

In light of the mother's inconsistent statements about the child's possible paternity, her inability to provide accurate information about Mr. F.'s date of birth or his location, the existence of at least one other man who could have been the father, and the uncertainty as to

when the child was conceived, the department's efforts to locate Mr. F. were reasonable under the circumstances. The social worker conducted online searches for Mr. F. in October, 2018, but was unable to locate him then. When the mother then identified other putative fathers, the department followed up on those leads. When the department received information that allowed it to conduct a more focused search for Mr. F., the social worker did so promptly, and she soon located him in New Hampshire. She spoke with Mr. F. within three weeks of receiving the information that allowed her to find him.

As to reunification efforts, the termination petition alleges both that the department made reasonable efforts to reunify the father and the child, and in the alternative, that the father was unable or unwilling to benefit from reunification efforts. Either or both of these allegations must be proved by clear and convincing evidence based on events prior to the adjudicatory date of September 12, 2019.

As of the adjudicatory date, the department had made no efforts to reunify Mr. F. with the child. It had only recently located him and his paternity had not yet been determined. See *In re Shaiesha O.*, supra, 93 Conn. App. 49–50 (where coterminous petition was filed before paternity was established, department failed to make reasonable efforts to reunify parent and child by adjudicatory date).

The court finds, however, that clear and convincing evidence establishes that Mr. F. was unable or unwilling to benefit from reunification efforts as of September 12, 2019. As of that date, Mr. F. was incarcerated in New Hampshire on Maine state criminal charges, for which he still had approximately nine months to serve. He had been ordered detained on pending federal charges when he completed his state sentence, and the

outcome of his federal charges was unknown as of the adjudicatory date. The department could not refer him for rehabilitative services in the community, such as drug screening and treatment, mental health issues, and parenting services. Although substance abuse and parenting services might have been available to him through the correctional facility while he was incarcerated, at least initially he did not feel he needed any services. At trial, he acknowledged that he would need to participate in such services when he is released from jail.

"[T]he fact of incarceration, in and of itself, cannot be the basis for a termination of parental rights. . . . At the same time, a court properly may take into consideration the inevitable effects of incarceration on an individual's ability to assume his or her role as a parent. . . . Extended incarceration severely hinders the department's ability to offer services and the parent's ability to make and demonstrate the changes that would enable reunification of the family." (Internal quotation marks omitted.) *In re Tresin J.*, supra, 334 Conn. 325. While imprisonment alone can never constitute abandonment, "[o]n the other hand, the inevitable restraints imposed by incarceration do not in themselves excuse a failure to make use of available though limited resources for contact with a distant child." *In re Juvenile Appeal (Docket No. 10155)*, 187 Conn. 431, 443, 446 A.2d 808 (1982).

Mr. F.'s incarceration in New Hampshire also hindered the department's ability to offer visitation, especially in light of the fact that, as of the date the petition was filed, Emily was a medically complex thirteen month old child with severe respiratory issues that required multiple treatments a day. Nor was telephonic visitation feasible because Emily was not yet verbal. Our courts have recognized that "[t]he logistics of

prison visits with young children, particularly to out-of-state facilities, limit their feasibility." *In re Elvin G.*, 310 Conn. 485, 515, 78 A.3d 797 (2013); see also *In re Luciano B.*, 129 Conn. App. 449, 461, 21 A.3d 858 (2011).

In sum, the court finds, by clear and convincing evidence, that the department made reasonable efforts to locate the father in light of all the circumstances. The court also finds, by clear and convincing evidence, that the father was unable or unwilling to benefit from reunification efforts as of the adjudicatory date and for the foreseeable future.

The court now turns to the adjudicatory grounds alleged in the petition.

ii

Abandonment

The first alleged adjudicatory ground is abandonment. As our courts have often stated, abandonment "occurs where a parent fails to visit a child, does not display love or affection for the child, does not personally interact with the child, and demonstrates no concern for the child's welfare. . . . Section 17a-112 [(j) (3) (A)] does not contemplate a sporadic showing of the indicia of interest, concern or responsibility for the welfare of a child. A parent must maintain a reasonable degree of interest in the welfare of his or her child. Maintain implies a continuing, reasonable degree of concern." (Internal quotation marks omitted.) *In re Jermaine S.*, 86 Conn. App. 819, 839–40, 863 A.2d 720, cert. denied, 273 Conn. 938, 875 A.2d 43 (2005).

There is clear and convincing evidence that as of the adjudicatory date, September 12, 2019, Mr. F. had never seen the child, provided financial support, attempted to communicate with the child, shown an interest in the child's welfare, or requested visitation. There is not, however, clear and convincing evidence that Mr. F.

knew he was the child's father before that date. Ms. M. had moved from Maine to Connecticut before the child's birth. Ms. M. expressed considerable uncertainty about the child's paternity. She told the department on one occasion that Mr. F. might be the father, but on subsequent occasions she denied that he could be the father. At least one other man—Mr. S.—believed that he (Mr. S.) might be the father. Mr. F. himself made contradictory statements to the social worker as to whether he knew that Ms. M. was pregnant or had given birth. Sometimes he said that he had not spoken with her since their relationship ended; sometimes he said he had spoken with her in July, 2018, a few weeks before the child's birth, and she had not told him she was pregnant; sometimes he said that he knew she had a child but did not believe he was the child's father. He admitted she had tried to contact him after they broke up but he had not returned her calls. The fact that a girlfriend of his knew of the child's birth and of his prior relationship with Ms. M. suggests that he *may* have known more than he admitted, but the evidence is not clear and convincing. Because his paternity was not established until after the adjudicatory date, the court is not persuaded that his conduct before the adjudicatory date can fairly be held to constitute abandonment.

iii

Absence of An Ongoing Parent-Child Relationship

The department also alleged, as an adjudicatory ground, that there is no ongoing parent-child relationship between Mr. F. and Emily. Pursuant to § 17a-112 (j) (3) (D), a court may terminate a parent's parental rights if "there is no ongoing parent-child relationship, which means the relationship that ordinarily develops as a result of a parent having met on a day-to-day basis the physical, emotional, moral and educational needs

of the child and to allow further time for the establishment or reestablishment of such parent-child relationship would be detrimental to the best interest of the child . . . ."

In *In re Tresin J.*, supra, 334 Conn. 323–33, our Supreme Court provided a comprehensive summary of its prior decisions concerning the adjudicatory ground of no ongoing parent-child relationship and further addressed the application of this ground to an incarcerated parent. It emphasized that this ground must not be used to place " 'insurmountable burden[s]' " on noncustodial parents. Id., 326. It has explicitly rejected a literal interpretation of the statute, holding that day-to-day absence alone is insufficient to support a finding of no ongoing parent-child relationship. Id.

"The lack of an ongoing parent-child relationship is a no fault statutory ground for the termination of parental rights." (Internal quotation marks omitted.) Id., 325. In *In re Tresin J.*, the Supreme Court reiterated that "the ground of no ongoing parent-child relationship for the termination of parental rights contemplates a situation in which, regardless of fault, a child either has never known his or her parents, so that no relationship has ever developed between them, or has definitively lost that relationship, so that despite its former existence it has now been completely displaced. . . . *The ultimate question is whether the child has some present memories or feelings for the natural parent that are positive in nature.*" (Emphasis in original; internal quotation marks omitted.) Id.

To determine whether there is " 'no ongoing parent-child relationship,' " the court must engage in a two step process. Id. "In the first step, a petitioner must prove the lack of an ongoing parent-child relationship by clear and convincing evidence. In other words, the petitioner must prove by clear and convincing evidence

that the child has no present memories or feelings for the natural parent that are positive in nature. If the petitioner is unable to prove a lack of an ongoing parent-child relationship by clear and convincing evidence, the petition must be denied, and there is no need to proceed to the second step of the inquiry. If, and only if, the petitioner has proven a lack of an ongoing parent-child relationship does the inquiry proceed to the second step, whereby the petitioner must prove by clear and convincing evidence that to allow further time for the establishment or reestablishment of the relationship would be contrary to the best interests of the child. Only then may the court proceed to the disposition phase." (Internal quotation marks omitted.) Id., 326–27.

"There are two exceptions to the general rule that the existence of an ongoing parent-child relationship is determined by looking to the present feelings and memories of the child toward the respondent parent. The first exception . . . applies when the child is an infant, and that exception changes the focus of the first step of the inquiry. . . . [W]hen a child is virtually a newborn infant whose present feelings can hardly be discerned with any reasonable degree of confidence, it makes no sense to inquire as to the infant's feelings, and the proper inquiry focuses on whether the parent has positive feelings toward the child. . . . Under those circumstances, it is appropriate to consider the conduct of a respondent parent." (Internal quotation marks omitted.) Id., 327.

"The second exception . . . applies when the petitioner has engaged in conduct that inevitably has led to the lack of an ongoing parent-child relationship between the respondent parent and the child. This exception precludes the petitioner from relying on the lack of an ongoing parent-child relationship as a basis for termination. Under these circumstances, even if neither the respondent parent nor the child has present

positive feelings for the other, and, even if the child lacks any present memories of the respondent parent, the petitioner is precluded from relying on [the lack of an ongoing parent-child relationship] as a basis for termination. . . . The interference inquiry properly focuses not on the petitioner's intent in engaging in the conduct at issue, but on the consequences of that conduct. *In other words, the question is whether the petitioner engaged in conduct that inevitably led to a noncustodial parent's lack of an ongoing parent-child relationship*. If the answer to that question is yes, the petitioner will be precluded from relying on the ground of no ongoing parent-child relationship as a basis for termination regardless of the petitioner's intent—or not—to interfere." (Citation omitted; emphasis in original; internal quotation marks omitted.) Id., 327–28.

Applying these principles to the case at hand, the court finds that the department has proved, by clear and convincing evidence, that the child has no positive feelings for or memories of the respondent father. Indeed, that fact is undisputed. She has never been in his care. She has never met him or even seen him. She would not recognize him if she were to see him now.

Although the father did not expressly raise the issue, the court has considered whether the virtual infancy exception applies in this case. The court concludes that it does not. As stated [previously], the virtual infancy exception applies when the child is "virtually a newborn infant whose present feelings can hardly be discerned with any reasonable degree of confidence . . . ." (Internal quotation marks omitted.) Id., 327. The child's age and ability to express her feelings is assessed as of the time of the termination trial. See id., 329. "To determine whether a petitioner has established the lack of an ongoing parent-child relationship, the trial court must be able to discern a child's present feelings toward or memories of a respondent parent. The virtual infancy

exception takes account of the particular problem that is presented when a child is too young to be able to articulate those present feelings and memories. . . . The inability of the court to discern or to be presented with evidence regarding a virtual infant's *present* feelings drives the exception. *That finding must be made at the time of the termination hearing.*" (Emphasis in original; internal quotation marks omitted.) Id.

In this case, at the time of the termination hearing, there was clear and convincing evidence the child was not "virtually a newborn infant." She was two and one-half years old. There was clear and convincing evidence that she is capable of expressing her feelings for the people she regards as family. She refers to her foster mother as "mommy," her foster mother's son as her brother, and her foster mother's parents as her "nana" and "papa." She demonstrates affection and positive feelings for her foster family. Letters from her speech therapist, her physical therapist, her pediatrician, and her Birth to Three developmental therapist all described her trusting relationship with and attachment to her foster mother, as did the testimony of the social worker. Because it is undisputed that the child has no present positive feelings for or memories of Mr. F., whom she has never seen, and because there is clear and convincing evidence that the child's present feelings about parental figures *can* be discerned, the "virtual infancy" exception does not apply.

The court has also considered whether the "interference" exception applies either because the department was unable to locate Mr. F. when he was first mentioned as a possible father in October, 2018, or because the child's mother thereafter repeatedly said that Mr. F. was not the father. The court has previously found that the department's efforts to locate Mr. F. were reasonable under the circumstances, and it now concludes that the department's inability to locate Mr. F. sooner

does not constitute "interference." Nor can the mother's statements directing the department away from the search for Mr. F. be considered as "interference" under *In re Tresin J.* and the cases discussed therein. "Our case law makes clear that the interference exception is akin to the equitable doctrine of 'clean hands' and is triggered only by the conduct of the petitioner rather than that of a third party or some other external factor that occasioned the separation." *In re Tresin J.*, supra, 334 Conn. 332. The clear and convincing evidence establishes that Mr. F.'s separation from the child is a result of his own conduct, from refusing the mother's telephone calls after they broke up to engaging in criminal conduct that resulted in his incarceration in New Hampshire. The petitioner here—the department—did not cause the separation that resulted in the lack of an ongoing parent-child relationship, and the interference exception therefore does not apply.

The court is mindful that incarceration, in and of itself, cannot be the basis for a termination of parental rights, but the court may properly consider the effects of incarceration on a parent's ability to assume a parental role. See id., 325. As the Supreme Court recognized in *In re Tresin J.* and earlier cases, "[e]xtended incarceration severely hinders the department's ability to offer services and the parent's ability to make and demonstrate the changes that would enable reunification of the family. . . . This is particularly the case when a parent has been incarcerated for much or all of his or her child's life and, as a result, the normal parent-child bond that develops from regular contact instead is weak or absent." (Internal quotation marks omitted.) Id. The usual challenges to creating a parent-child relationship that result from incarceration were exacerbated in this case by the fact that Mr. F. was incarcerated out of state when the department located him and

has continued to be incarcerated out of state throughout the entire time he has been a party to this case.

It is noteworthy, moreover, that the social worker encouraged Mr. F. to begin to establish a relationship with Emily by writing to her. He told the social worker it was hard because he would not know what to say. He chose not to provide Emily, through the social worker, with even a note or a letter that might tell her something about himself and how he felt about her. He did not ask for the social worker's help in getting mail to Emily or in thinking about what he might say to her.

In sum, the court finds, by clear and convincing evidence, that no ongoing parent-child relationship exists between Mr. F. and Emily, and no exception to this statutory ground applies.

The court now must determine, by clear and convincing evidence, whether "to allow further time for the establishment or reestablishment of such parent-child relationship would be detrimental to the best interest of the child." General Statutes § 17a-112 (j) (3) (D). The Supreme Court has construed this language to mean the time needed "for the [respondent] to meet 'on a day to day basis the physical, emotional, moral and educational needs' " of the child. *In re Juvenile Appeal (Anonymous)*, 181 Conn. 638, 646, 436 A.2d 290 (1980). Among the factors to be considered in deciding whether it would be detrimental to Emily's best interest to allow further time to develop a parent-child relationship with her father are the length of stay in her foster home, the nature of her relationship with her foster parent, the degree of contact maintained with the natural parent, and the nature of her relationship to her natural parent. See *In re Savanna M.*, 55 Conn. App. 807, 816, 740 A.2d 484 (1999).

Our Supreme Court and our Appellate Court have "noted consistently the importance of permanency in

children's lives. *In re Juvenile Appeal (Anonymous)*, [supra, 181 Conn. 646] (removing child from foster home or further delaying permanency would be inconsistent with his best interest); *In re Victoria B.*, 79 Conn. App. 245, 263, 829 A.2d 855 (2003) (trial court's findings were not clearly erroneous where much of child's short life had been spent in custody [of commissioner] and child needed stability and permanency in her life); *In re Teshea D.*, [9 Conn. App. 490, 493–94, 519 A.2d 1232 (1987)] (child's need for permanency in her life lends added support to the court's finding that her best interest warranted termination of the respondent's parental rights). Virtually all experts, from many different professional disciplines, agree that children need and benefit from continuous, stable home environments." (Internal quotation marks omitted.) *In re Davonta V.*, 285 Conn. 483, 494, 940 A.2d 733 (2008).

There is clear and convincing evidence that to allow further time for the establishment of a parent-child relationship with Mr. F. would be highly detrimental to the best interest of the child. Emily is now two years and eight months old, and she has been in the department's care since she was ten days old. She has been in the same foster home for her entire life; it is the only home she has ever known. Emily is medically complex and developmentally delayed, and her pediatrician has advised the department and her foster mother that she is likely to experience significant challenges when she is school aged. She is shy and sometimes fearful of strangers, and Mr. F. is a stranger to her. Her physical therapist and her speech therapist have stated that her sense of safety and security with a trusted caregiver has been instrumental in the progress she has made in overcoming feeding difficulties, motor weakness, and speech delays, and that continuity in her care is essential. The developmental therapist who worked with her in the Birth to Three program stated that her mental

health would be "negatively compromised and potentially irreparable" if she were to be removed from the consistent and positive environment in which she is placed.

Whether Mr. F. is released from incarceration in April, 2021, as he hopes, or at some unknown time between April, 2021, and 2023, as is possible based on his Guideline range, he will not be ready to assume a parental role in Emily's life for a substantial period of time after his release. As he admitted at trial, when he is released, he will need to obtain housing and a legal income and engage in services to which DCF can refer him. That is only the beginning. Given his criminal history, consisting of numerous convictions and lengthy periods of incarceration since 1992, he would need to demonstrate that he can avoid further criminal activity and incarceration. It is by no means assured that he will succeed. He would also need considerable education concerning child development generally and Emily's many special needs in particular. To allow such further time for the establishment of a parent-child relationship would indefinitely delay the permanency that is critical to Emily's continued development and well-being. The department has proved, by clear and convincing evidence, that it would be detrimental to Emily's best interest to allow further time for the establishment of a parent-child relationship with Mr. F.

B

DISPOSITIONAL FINDINGS

The court has found, by clear and convincing evidence, that an adjudicatory ground for termination exists because there was no ongoing parent-child relationship as defined by § 17a-112 (j) (3) (D) and to allow further time for the development of such a relationship would be detrimental to the child's best interest. The

court must now determine whether clear and convincing evidence establishes that it is in the child's best interest to terminate Mr. F.'s parental rights.

"The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of its environment. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child." (Internal quotation marks omitted.) *In re Anthony H.*, 104 Conn. App. 744, 764, 936 A.2d 638 (2007), cert. denied, 285 Conn. 920, 943 A.2d 1100 (2008).

In deciding whether continuation of the parental rights of Mr. F. is in the child's best interest, the court has considered the importance and value of the child's genetic bond with her biological father. See *In re Savanna M.*, supra, 55 Conn. App. 816 ("the genetic bond shared by a biological parent and his or her child, although not determinative of the issue of the best interest of the child, is certainly a factor to consider" (internal quotation marks omitted)). The court has also considered the child's need for sustained stability and continuity in her environment. "Our appellate courts have recognized that long-term stability is critical to a child's future health and development . . . . Because of the psychological effects of prolonged termination proceedings on young children, time is of the essence in custody cases." (Citation omitted; internal quotation marks omitted.) *In re Anthony H.*, supra, 104 Conn. App. 767.

Pursuant to § 17a-112 (k), except where termination is based upon consent, the court is required to make findings as to seven factors. The seven factors set forth in § 17a-112 (k) "serve simply as guidelines to the court

and are not statutory prerequisites that need to be proven before termination can be ordered." *In re Quanitra M.*, 60 Conn. App. 96, 104, 758 A.2d 863, cert. denied, 255 Conn. 903, 762 A.2d 909 (2000). As to Mr. F., the court makes the following findings as required by § 17a-112 (k).

§ 17a-112 (k) (1)

The timeliness, nature and extent of services offered, provided, and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent

Mr. F. has been incarcerated in New Hampshire since the department located him in July, 2019. The department was therefore unable to refer him to services in the community. The department discussed services available to him in the correctional facility, including substance abuse, mental health, and parenting programs, and recommended that he engage in those programs. Those programs, however, were suspended during the pandemic.

§ 17a-112 (k) (2)

[*W*]*hether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time*

After Mr. F.'s paternity was established, the department made reasonable efforts under the circumstances presented to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997. The social worker contacted him on a monthly basis to provide information about the child, provided photographs of the child to him, assessed his cousin as a placement resource for the child, advised the father to participate in programs to the extent they were available in the correctional facility, and encouraged him to send letters

about himself to be shared with the child. His incarceration in New Hampshire made it impossible to refer him for services in the community. His out-of-state incarceration, Emily's young age and fragile health, and the subsequent emergence of a pandemic precluded the provision of visits.

§ 17a-112 (k) (3)

[T]he terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order

The court ordered specific steps for the department and Mr. F. to facilitate reunification. The department complied with its obligations to the extent that it was possible to do so. Mr. F.'s specific steps, and his compliance or lack of compliance with them, were as follows:

• *Keep all appointments set by or with DCF. Cooperate with DCF home visits, announced or unannounced, and visits by the child(ren)'s attorney and/or guardian ad litem.*

Mr. F. has been incarcerated in New Hampshire throughout the entire time he has been known to the department. He has cooperated with telephone calls from the department.

• *Let DCF, your attorney, and the attorney for the child(ren) know where you and the child are at all time.*

Mr. F. has been incarcerated in New Hampshire since the steps were ordered.

• *Take part in counseling and make progress toward the identified treatment goals: Parenting, Individual, Family. The identified goals are: (1) Create and maintain safe, stable and nurturing home environment free from domestic violence/substance abuse/criminal*

activity. (2) Learn triggers for substance abuse and alternate coping mechanisms. (3) Understand impact of substance abuse on children. (4) Learn and demonstrate age appropriate parenting skills in the areas of supervision, discipline and developmental expectations. (5) Understand danger that criminal activity presents to children. (6) Develop and implement appropriate coping mechanisms to safely address stressors of parenting. (7) Create and maintain nurturing relationship with Emily. (8) Address mental health needs in individual counseling in order to maintain emotion stability and be a stable resource for Emily.

Mr. F. has not complied with this step. He remains incarcerated and, before the onset of the pandemic, had not engaged in any services that were available to him at Strafford County Corrections in the areas of substance abuse, mental health, or parenting. The availability of such programs was curtailed after the pandemic began.

- *Submit to a substance abuse evaluation and follow the recommendations about treatment, including inpatient treatment if necessary, aftercare and relapse prevention.*

Mr. F. has not engaged in substance abuse programming.

- *Submit to random drug testing; the time and method of the testing will be up to DCF to decide.*

Mr. F. has not been referred for drug testing because he is incarcerated.

- *Not use illegal drugs or abuse alcohol or medicine.*

Mr. F. denies use of illegal drugs, alcohol, or medicine as he is currently incarcerated.

• *Cooperate with service providers recommended for parenting/individual/family counseling, in-home support services and/or substance abuse assessment/treatment: Substance abuse treatment at correctional facility; Mental health assessment and treatment at correctional facility.*

Mr. F. has not engaged in substance abuse or mental health services, which the correctional facility suspended as a result of the pandemic.

• *Cooperate with court-ordered evaluations or testing.*

No evaluations or testing have been ordered by the court since the steps were ordered.

• *Sign releases allowing DCF to communicate with service providers to check on your attendance, cooperation and progress toward identified goals, and for use in future proceedings with this court. Sign the release within 30 days.*

Mr. F. has not been asked to sign any releases of information.

• *Sign releases allowing your child's attorney and guardian to review your child's medical, psychological, psychiatric and/or educational records.*

No releases were needed because Emily is committed to the department's care.

• *Get or maintain adequate housing and a legal income.*

Mr. F. is incarcerated and has a job in the correctional facility. He does not have adequate housing or a legal income outside the correctional facility.

• *Immediately let DCF know about any changes in the make-up of the household to make sure that the change does not hurt the health and safety of the child(ren).*

This step did not apply to Mr. F. because he was incarcerated throughout the proceeding.

• *Not get involved with the criminal justice system. Cooperate with the Office of Adult Probation or parole officer and follow your conditions of probation or parole.*

Mr. F. was incarcerated throughout this proceeding. His federal criminal charges remain pending. There was no evidence of new involvement in criminal activity since the steps were ordered.

• *Visit the child(ren) as often as DCF permits.*

The department did not provide visits for Mr. F., who was incarcerated in New Hampshire throughout his involvement in this proceeding.

• *Within thirty (30) days of this order, and at any time after that, tell DCF in writing the name, address, family relationship and birth date of any person(s) who you would like the department to investigate and consider as a placement resource for the child(ren).*

Mr. F. complied with this step. He first proposed an acquaintance in Maine, then proposed a cousin in Hartford as a placement resource.

Having considered the parties' compliance with the specific steps, the court now addresses the remaining factors under § 17a-112 (k).

§ 17a-112 (k) (4)

[*T*]*he feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties*

Emily has never met Mr. F. and has no emotional ties with him. He has never provided any physical care for her. Despite encouragement from the social worker, Mr. F. did not attempt to communicate with Emily by writing letters or cards or having family members provide her with information about him.

Emily has been in the same foster home for two and one-half years, since her discharge from the hospital after her birth. She has been observed by social workers, speech and physical therapists, developmental therapists and her pediatrician to be deeply attached to her foster mother. She calls her foster mother "mommy" and goes to her for comfort when she is upset. The foster mother is willing to adopt Emily if she becomes available for adoption.

§ 17a-112 (k) (5)

[T]he age of the child

Emily was born on August 5, 2018. She was two and one-half years old as of the date of the termination trial. She is now two years and eight months old.

§ 17a-112 (k) (6)

[T]he efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child.

Since his paternity was adjudicated, Mr. F. has spoken monthly with the social worker. He has proposed

placement resources and has asked about Emily's well-being. He has not written to Emily or tried to communicate with her foster parent through the department. Although he inquired about the possibility of visits, he did not move to have visits ordered.

§ 17a-112 (k) (7)

[T]he extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent.

Mr. F. has not been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by his economic circumstances of the parent. He refused telephone contact with Ms. M. after their relationship ended. It was his own criminal activity that led to his incarceration and made him unavailable to develop and maintain a relationship with Emily.

The court has carefully considered the seven factors required by § 17a-112 (k) as well as all evidence concerning Emily's best interests in relation to the continuation of Mr. F.'s parental rights. Mr. F. has testified as to his love and concern for his daughter. Our courts have recognized, however, that love and a biological bond is not enough. See *In re Ashley S.*, 61 Conn. App. 658, 667, 769 A.2d 718, cert. denied, 255 Conn. 950, 769 A.2d 61 (2001). A parent must also be able to provide a safe, stable environment. As a result of his criminal conduct, Mr. F. has never been available to provide a home of any kind for Emily, and it is highly unlikely that he will be able to provide a safe, stable environment within any time that is reasonable in light of Emily's needs.

A parent must also be able to recognize and meet his child's developmental needs. It was clear from the evidence that Mr. F. has a limited understanding of the needs of young children generally and of Emily's specific physical, medical, and emotional needs. At the outset of his involvement in the case, he did not think it would cause any problems to move Emily to the home of a stranger in Maine because she was so young. He became upset with and hung up on the social worker when she attempted to explain the trauma experienced by children with changes in placement. Even at the time of trial, he continued to believe that Emily should be placed with his family rather than with the foster mother, who he acknowledged had provided excellent care. He persisted in this belief even though he had not identified any family member who was willing and able to care for her.

Emily needs a caregiver who is capable of nurturing her, monitoring and attending to her many medical conditions, assisting her in addressing the developmental challenges she currently faces and those she will face as she enters school, and ensuring that she receives the services she will need to continue to develop and grow. Mr. F. is not currently capable of providing such nurture, and it is not foreseeable that he will be able to do so within a reasonable time.

The court has also considered Emily's need for permanence and stability. Mr. F. will have many challenges upon his release from prison, including but not limited to finding legal employment and avoiding further criminal activity. It is not in Emily's best interest to wait for an indefinite but undoubtedly protracted period of time to see if Mr. F. can overcome those challenges.

Considering all the evidence presented, the court finds, by clear and convincing evidence, that continuation of Mr. F.'s parental rights is not in Emily's best

interest, and that termination of Mr. F.'s parental rights is in Emily's best interest.

IV

CONCLUSION AND ORDERS AS TO THE TERMINATION PETITION

In sum, for all the reasons stated [previously], the court finds, by clear and convincing evidence, a statutory ground exists for the termination of Mr. F.'s parental rights. More specifically, the court finds, by clear and convincing evidence, that the department made reasonable efforts to locate Mr. F., that Mr. F. was unable or unwilling to benefit from reunification efforts, that there is no ongoing parent-child relationship as defined by § 17a-112 (j) (3) (D), and that to allow further time for the establishment of such a relationship would be detrimental to the best interest of the child. The court also finds, by clear and convincing evidence, that termination of Mr. F.'s parental rights is in Emily's best interest. Accordingly, the petition for termination of parental rights is granted. Judgment is entered terminating the parental rights of Mr. F. as to Emily, and the Commissioner of the Department of Children and Families is appointed as Emily's statutory parent. The department shall file, within thirty days, a report as to the status of the child and shall also timely file any additional reports that are required by law.

V

PERMANENCY PLAN

On April 6, 2020, after the petition for termination of parental rights had been filed, the petitioner moved for review of a permanency plan for Emily. By objection dated April 15, 2020, Mr. F. opposed the proposed plan.[3]

[3] Because of the temporary closure of the New Britain juvenile clerk's office at the outset of the pandemic, the objection was not stamped as received until June 1, 2020. Under the circumstances, the objection was timely.

The contested motion was consolidated for trial with the termination of parental rights petition.

The proposed permanency plan is termination of the father's parental rights and adoption. The motion for review is governed by General Statutes § 46b-129 (k) and Practice Book § 35a-14. Under each provision, the commissioner has the burden of proving by a fair preponderance of the evidence that the proposed permanency plan is in the child's best interests. Under the statute, at a permanency plan hearing, "the court shall approve a permanency plan that is in the best interests of the child or youth and takes into consideration the child's or youth's need for permanency. The child's or youth's health and safety shall be of paramount concern in formulating such plan." General Statutes § 46b-129 (k) (2). Practice Book § 35a-14 (d) makes clear that review of a permanency plan is a dispositional question, based on the prior adjudication of neglect. The court must also find that the department has made reasonable efforts to achieve the existing permanency plan. See General Statutes § 46b-129 (k) (4) (F); see also Practice Book § 35a-14 (d). The prior plan, filed May 16, 2019, and approved by the court, *Lobo, J.*, on June 26, 2019, was for termination of parental rights and adoption.

For the reasons discussed [previously] in consideration of the petition for termination of the parental rights of Mr. F., the court finds that the proposed permanency plan of termination of the parental rights of Mr. F. and adoption is in Emily's best interest. The court further finds that the department has made reasonable efforts to achieve the most recent permanency plan. Mr. F.'s objection to the proposed permanency plan is overruled. The motion for review of the permanency plan is granted, and the permanency plan is approved. The clerk shall establish dates for the department to file the next permanency plan and for hearing on the plan and notify the parties thereof.

So ordered.

GLEN A. CANNER, EXECUTOR (ESTATE OF CHARLES A. CANNER) *v.* GOVERNOR'S RIDGE ASSOCIATION, INC., ET AL. (AC 42981)

LOUIS D. PUTERI *v.* GOVERNOR'S RIDGE ASSOCIATION, INC., ET AL. (AC 42982)

Prescott, Suarez and DiPentima, Js.

Syllabus

In two separate actions, each plaintiff appealed from the decision of the trial court concluding that all of his claims, including, inter alia, negligence, against the defendants, including G Co., were time barred by the applicable statute of limitations. Each plaintiff was the owner of a condominium unit in G Co.'s common interest community, and each plaintiff alleged various claims against the defendants, seeking damages and an order directing the defendants to repair the foundation of the condominium unit and any damage to that unit resulting from certain problems with the foundation and settling after construction. Following a hearing, the court rendered judgment in favor of the defendants in each case, and each plaintiff filed a separate appeal to this court. *Held*:

1. The trial court properly concluded that the plaintiff C's claims against G Co. brought pursuant to the applicable provision (§ 47-278) of the Common Interest Ownership Act (CIOA) (§ 47-200 et seq.) were barred by the three year tort statute of limitations codified in statute (§ 52-577).

a. The trial court correctly determined that C's claims seeking to enforce a right granted or obligation imposed by the CIOA, or by the declaration or the bylaws of the common interest community did not sound in contract and that § 52-577 was the appropriate statute of limitations: C's claims sounded in tort, as the CIOA creates a statutory duty on a condominium association to maintain, repair, and replace the common elements, and C alleged that G Co. failed, neglected, and refused to maintain its common elements, failed to promptly repair its common elements, and failed to promptly take responsibility for and deal with problems related to common elements in violation of the CIOA; moreover, the claims did not sound in breach of contract because the provisions of G Co.'s governing documents relied on by C did not create a contractual obligation on the part of G Co. to maintain, repair, and/or replace the foundation for the unit but, rather, they made clear that the contractual obligation for G Co. to repair and replace the common elements was contingent on areas of the common interest community for which insurance was required, and it was clear that foundations were excluded areas for purposes of insurance.

b. The trial court's factual findings and legal conclusions were sufficiently supported by the record and were not clearly erroneous: because § 52-577 is a statute of repose, and not a true statute of limitations, the time period within which a plaintiff must commence an action begins to run at the moment the act or omission complained of occurs, and C explicitly described the original wrong as G Co.'s allowing the units to be built on soft ground, such that the closing date, which was the day on which C came into possession of the unit with an allegedly defective foundation, was the date on which the statute of repose period began to run, and C commenced his action beyond the period of time in § 52-577; moreover, the court properly concluded that the doctrine of equitable estoppel did not preclude G Co. from asserting its statute of limitations defense, as, although C asserted that he relied on G Co.'s alleged representations that it would repair the foundation, reliance alone was insufficient to sustain the burden of proof for the imposition of equitable estoppel, and the court explicitly found that the evidence established that C did not exercise due diligence that would have uncovered the alleged initial conduct and that there was simply no evidence that, during the applicable limitation period, G Co., by its conduct or otherwise, did anything to induce C to refrain from filing suit.

c. This court declined to review C's claim that the trial court improperly concluded that his nuisance claims were barred by the statute of limitations: C's claim that the trial court erred in ruling that the nuisance alleged was permanent as opposed to temporary without having the benefit of expert testimony was inadequately briefed; moreover, C's claim that the court erred in ruling that the nuisance alleged was permanent as opposed to temporary without affording C an opportunity to present expert testimony was not properly preserved for appellate review, as a review of the record revealed that C did not seek to introduce expert testimony at any time before or during the limited evidentiary hearing and did not raise any issue about expert witness testimony in his motion to reargue and/or to correct the judgment.

2. For the same legal reasons that C's claims failed, the plaintiff P's claims failed as well, and, even though the underlying facts differed slightly between the appeals, P's briefing on appeal was almost identical to that of C.

Argued March 11, 2021—officially released February 15, 2022

Procedural History

Action, in each case, for, inter alia, negligence, and for other relief, brought to the Superior Court in the judicial district of Fairfield, and transferred to the judicial district of Waterbury, Complex Litigation Docket,

where the cases were tried to the court, *Lager*, *J.*; judgment in each case for the defendants, from which the plaintiff in each case filed an appeal to this court. *Affirmed*.

Glen A. Canner, for the appellant in Docket Nos. AC 42981 and AC 42982 (plaintiff in each case).

Timothy M. Gondek, for the appellee in Docket Nos. AC 42981 and AC 42982 (named defendant).

Deborah Etlinger, with whom, on the brief, was *Erin Canalia*, for the appellees in Docket Nos. AC 42981 and AC 42982 (defendants South Meadow Development, LLC, Glenn Tatangelo, and Anthony O. Lucera).

Adam J. DiFulvio, with whom, on the brief, was *Thomas R. Gerarde*, for the appellees in Docket Nos. AC 42981 and AC 42982 (defendants Town of Trumbull and Donald G. Murray).

Donald W. Doeg, with whom, on the brief, was *Matthew K. Stiles*, for the appellees in Docket Nos. AC 42981 and AC 42982 (defendants Adeeb Consulting, LLC, and Kareem Adeeb).

Opinion

SUAREZ, J. These appeals arise from a dispute concerning the foundations of two condominium units located in the Governor's Ridge common interest community in Trumbull.[1] In Docket No. AC 42981 (first appeal), the plaintiff, Glen A. Canner (Canner), in his capacity as executor of the estate of Charles A. Canner,[2] appeals from the judgment of the trial court in favor of the defendants, Governor's Ridge Association, Inc.

[1] Although the appeals were not consolidated, we resolve both appeals in one opinion for purposes of judicial economy because the claims and factual backgrounds are nearly identical.

[2] In addition to being the plaintiff in a representative capacity as executor in the first appeal, Glen A. Canner is also the attorney of record in both appeals.

(Governor's Ridge); South Meadow Development, LLC (South Meadow), Glenn Tatangelo, and Anthony O. Lucera (South Meadow defendants); the town of Trumbull and Donald G. Murray (town defendants); and Adeeb Consulting, LLC (Adeeb Consulting) and Kareem Adeeb (Adeeb defendants),[3] after the court concluded that each count alleged against the defendants was time barred by the applicable statute of limitations. On appeal, Canner claims that the court improperly concluded that (1) his claim against Governor's Ridge brought pursuant to General Statutes § 47-278 is time barred by the statute of limitations period set forth in General Statutes § 52-577, and (2) his nuisance claims are time barred by the statute of limitations codified in either § 52-577 or General Statutes § 52-584.

In Docket No. AC 42982 (second appeal), the plaintiff, Louis D. Puteri, similarly appeals from the judgment of the trial court in favor of the defendants after the court concluded that each count alleged against the defendants was time barred by the applicable statute of limitations. On appeal, Puteri claims that the court erred for the same reasons Canner asserts in his appeal. We disagree with the plaintiffs and, accordingly, affirm the judgments of the court.

I

AC 42981

The first appeal involves property located at 220 Fitch's Pass, a condominium unit located in the Governor's Ridge common interest community in Trumbull (220 Unit). We begin by setting forth the procedural history of this case as well as the relevant facts that were found by the trial court or are otherwise undisputed.

[3] The Adeeb defendants did not participate in either appeal because the plaintiffs' claims are not directed at them.

In 2000, Governor's Ridge applied to the Trumbull Planning and Zoning Commission (planning and zoning commission) to construct thirty-six detached units constituting phase II of the Governor's Ridge common interest community. The 220 Unit was a part of this phase. A hearing was held on the application on November 27, 2000, and, on January 10, 2001, the planning and zoning commission issued a special permit to Governor's Ridge to construct the units. The permit stated: "A report shall be submitted to the Building Official which specifies the depth of the peat, where it begins and stops, the proposed method of remediation, the proposed depth of the fill, and the proposed depth of the pilings for each individual unit; the report shall be permanently retained at the Trumbull Town Hall." Although the planning and zoning commission's special permit contained provisions related to foundation construction in light of certain soil conditions, the Trumbull Building Department (building department) ultimately retained jurisdiction over how the foundations were constructed and whether to issue a certificate of occupancy for the particular units.

On June 27, 2001, Governor's Ridge sold the phase II development rights to South Meadow, which had been formed by Tatangelo and Lucera. According to Tatangelo, South Meadow was aware at the time that the soil conditions at the phase II location presented certain challenges. As a result, South Meadow hired Adeeb Consulting on June 13, 2001, for limited engineering services concerning the design of the foundations. Kareem Adeeb, a geotechnical and structural engineer, concluded that a piling system for phase II foundations would not be viable. Accordingly, Adeeb designed a foundation system using geo-fabric, footings, and grade beams to "tie all foundation elements together and increase the rigidity of the foundation system" in order "to decrease, if not eliminate, the

chance that differential settlement will take place."[4] Because the soil conditions were different for each unit's location, Adeeb addressed each unit separately by making borings, designing a foundation for each condominium unit, and performing site visits. The building department ultimately approved Adeeb's design and inspected each foundation to determine, inter alia, whether the geo-fabric was properly installed and the footings were properly designed.

On July 27, 2001, South Meadow issued a public offering statement for phase II. The statement included, among other things, architectural drawings for the various phase II unit models. The drawings showed that the foundations would be built with concrete walls and footings, not with piles. On December 28, 2001, Canner, on behalf of his parents, Charles A. Canner (Charles) and Doris L. Canner (Doris), sent South Meadow's attorney a signed contract with a purchaser's rider and a deposit check for the purchase of the 220 Unit. On January 16, 2002, after making borings at the site, Adeeb Consulting issued a report concerning the construction of the unit's foundation. That same day, a building department official issued a building permit that did not require that the foundation for the unit be built on piles.

While construction was in progress, Donald G. Murray, a building department official, issued a certificate of occupancy for the 220 Unit—the final act of the building department's involvement with the 220 Unit. As of the date the certificate was issued, construction

[4] The court found that "Adeeb also stated that '[b]ased on my calculations and analysis, these buildings will not undergo differential settlement. . . . I must emphasize that, in the practice of our profession, we do the best we can by providing sound engineering consultation and recommendations, based on quantitative analysis and calculations. However, we never issue any guarantee or warranty, be it expressed or implied.' "

was substantially complete. On April 30, 2002, Charles and Doris closed on the purchase of the 220 Unit.

Although not within his jurisdiction, Paul Kallmeyer, the Trumbull Director of Public Works and Town Engineer, decided to monitor certain phase II units for settlement.[5] There was no directive from the town to do so. Between November 26, 2003, and September 30, 2008, the Trumbull engineering department went to the 220 Unit to take certain measurements, which Charles later received. Although the town maintained extensive documentation about phase II, Canner was not aware if his father had made any effort to obtain town records between 2003 and 2008.

In 2011, pursuant to a power of attorney, Canner took steps to put the unit on the market, including preparing a residential property condition form, which identified "[m]inor settling problem several years ago" with respect to the foundations and basement but indicated the settling had been repaired and there had been no problems since that time. The 220 Unit was put on the market on March 27, 2011, but it did not sell. On May 10, 2011, the real estate agent marketing the 220 Unit sent Canner an e-mail discussing a prospective buyer's concern "about the very dramatic slope in the floors—from the basement up to the second floor." Canner testified that he did not notice any settlement during the period of time when the unit was on the market, but he also testified that by May 10, 2011, he was aware of a slope in the unit's floors and that by March 27, 2011, Charles had given him the chart containing the 2003 to 2008 engineering measurements.

In June, 2012, Governor's Ridge hired Fuller Engineering & Land Surveying, LLC, to monitor settling at

[5] The court explained: "Notably, in a letter to [Tatangelo] related to sewer issues dated April 23, 2002, Kallmeyer acknowledged that the building department had jurisdiction over 'matters pertaining to the houses.' "

the 220 Unit, in addition to several other units. On February 15, 2013, Canner hired Peter Seirup, a professional engineer, of Home Directions, Inc., to inspect the unit. Seirup's home inspection report took into account, in part, "a table of settlement data taken from 2003 to 2008 . . . ." This presumably was the engineering assessment data that Charles possessed. The report stated that "building settlement occurs most dramatically in the beginning, then trails off." On or around April 26, 2013, Canner sent this report to the property manager for Governor's Ridge and also went to Trumbull Town Hall to talk to town officials. Between that date and January 10, 2016, Canner continued to communicate with Governor's Ridge and the property manager to try to address the unit's settlement. During the same time period, and particularly from 2013 through 2015, minutes of Governor's Ridge board meetings reflect ongoing discussions and actions related to settlement at the 220 Unit.

Doris died on December 11, 2012, and Charles on December 12, 2015. Canner, as the executor of Charles' estate, commenced this action against all the defendants on February 11, 2016, seeking damages and an order directing the defendants to repair the foundation and any damages to the unit resulting from the condition of the foundation. The sixth amended complaint, which is the operative complaint, contains, inter alia, counts against the defendants alleging negligence, nuisance, fraud, fraudulent misrepresentation, breach of contract, and violations of the Common Interest Ownership Act (CIOA), General Statutes § 47-200 et seq.

The defendants raised numerous special defenses in their respective answers to the operative complaint. The court ordered, with the consent of all parties, an evidentiary hearing limited to the statute of limitations defenses and the matters raised in avoidance of the

statutes of limitations.[6] On November 8 and 9, 2018, the court held an evidentiary hearing to determine which statute of limitations applied to each count, and whether those statutes time barred the plaintiff's claims against the defendants. Posthearing briefing was completed by February 28, 2019.

On May 7, 2019, the court issued a memorandum of decision in which it concluded that each count against the defendants was time barred by the applicable statute of limitations and, thus, rendered judgment in favor of the defendants. On May 24, 2019, Canner, pursuant to "Practice Book § 11-11 and/or § 11-12," filed a "motion to reargue and/or correct judgment."[7] On the same date, Canner appealed to this court.

A

Canner's principal argument on appeal is that the court improperly concluded that his claim against Governor's Ridge that he brought pursuant to § 47-278, count one of the operative complaint, was barred by the three year tort statute of limitations codified in § 52-577. In his view, his claim is contractual in nature because the legal duties alleged to have been breached stemmed from Governor's Ridge's governing documents (common interest declaration, bylaws, and handbook)[8] and, accordingly, the six year statute of limita-

[6] For purposes of discovery, the trial court consolidated this action with the action brought against the defendants in *Puteri* v. *Governor's Ridge Association, Inc.*, Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. X10-CV-17-6037281-S, which is the subject of the second appeal addressed in this opinion.

[7] In that motion, the plaintiff claimed that there were inaccuracies in the original memorandum of decision, such as references to incorrect docket numbers and exhibit numbers. On June 17, 2019, the court issued a corrected memorandum of decision. The corrected memorandum of decision does not contain any substantive changes.

[8] Our Supreme Court has held that "[a] declaration is an instrument recorded and executed in the same manner as a deed for the purpose of creating a common interest community. . . . [T]he declaration operates in the nature of a contract, in that it establishes the parties' rights and obligations . . . ." (Citations omitted; internal quotation marks omitted.) *South-*

tions set forth in General Statutes § 52-576[9] is the appropriate limitation period.[10] We disagree.

"The determination of which statute of limitations applies to a given action is a question of law over which our review is plenary." *Vaccaro* v. *Shell Beach Condominium, Inc.*, 169 Conn. App. 21, 29, 148 A.3d 1123 (2016), cert. denied, 324 Conn. 917, 154 A.3d 1008 (2017). Furthermore, to the extent that we must interpret the parties' pleadings, our review also is plenary. See *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 314 Conn. 433, 462, 102 A.3d 32 (2014).

Because § 47-278, which authorizes a cause of action "to enforce a right granted or obligation imposed by [the CIOA], the declaration or the bylaws"; General Statutes § 47-278 (a); does not include an express statute of limitations period, we must decide which statute of limitations period is applicable to the present claim. "Public policy generally supports the limitation of a cause of action in order to grant some degree of certainty to litigants. . . . The purpose of [a] statute of limitation[s] . . . is . . . to (1) prevent the unexpected enforcement of stale and fraudulent claims by allowing persons after the lapse of a reasonable time, to plan their affairs with a reasonable degree of certainty, free from the disruptive burden of protracted and unknown potential liability, and (2) to aid in the

wick at Milford Condominium Assn., Inc. v. *523 Wheelers Farm Road, Milford, LLC*, 294 Conn. 311, 313 n.3, 984 A.2d 676 (2009).

[9] General Statutes § 52-576 (a) provides: "No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues, except as provided in subsection (b) of this section."

[10] We note that Canner originally argued before the trial court that the present action was not subject to any statute of limitations. He argued in the alternative that, if the action was in fact subject to a limitation period, § 52-576 was the applicable statute of limitations. On appeal, Canner no longer pursues the argument that this action is not subject to any statute of limitations.

search for truth that may be impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise. . . . Therefore, when a statute includes no express statute of limitations, we should not simply assume that there is no limitation period. Instead, we borrow the most suitable statute of limitations on the basis of the nature of the cause of action or of the right sued upon." (Emphasis omitted; internal quotation marks omitted.) *Bouchard* v. *State Employees Retirement Commission*, 328 Conn. 345, 359–60, 178 A.3d 1023 (2018), quoting *Bellemare* v. *Wachovia Mortgage Corp.*, 284 Conn. 193, 199, 931 A.2d 916 (2007).

Generally, "[w]hether [a] plaintiff's cause of action is one for [tort or contract] depends upon the definition of [those terms] and the allegations of the complaint." (Internal quotation marks omitted.) *Meyers* v. *Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, 311 Conn. 282, 291, 87 A.3d 534 (2014). "[T]he fundamental difference between tort and contract lies in the nature of the interests protected. . . . The duties of conduct which give rise to [a tort action] are imposed by the law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties. . . . [W]hen a plaintiff seeks to recover damages for the breach of a statutory duty, such an action sounds in tort. See, e.g., *Curtis* v. *Loether*, 415 U.S. 189, 195, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974) (damages action pursuant to statute sounds in tort because it defines new legal duty and authorizes courts to compensate plaintiff for injury caused by defendant's wrongful breach of duty); *Federal Deposit Ins. Corp.* v. *Citizens Bank & Trust Co.*, 592 F.2d 364, 368–69 (7th Cir.) (liability for breach of duty imposed by statute sounds in tort), cert. denied, 444 U.S. 829, 100 S. Ct. 56, 62 L. Ed. 2d 37 (1979)." (Citation omitted; internal quotation

marks omitted.) *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 284 Conn. 200.

"On the other hand, [c]ontract actions are created to protect the interest in having promises performed. Contract obligations are imposed because of [the] conduct of the parties manifesting consent, and are owed only to the specific individuals named in the contract. . . . In short, [a]n action in contract is for the breach of a duty arising out of a contract; an action in tort is for a breach of duty imposed by law." (Citations omitted; internal quotation marks omitted.) Id.

"[I]t is well established that . . . [s]ome complaints state a cause of action in both contract and tort. . . . [O]ne cannot bring an action [under both theories, however] merely by couching a claim that one has breached a standard of care in the language of contract. . . . [T]ort claims cloaked in contractual language are, as a matter of law, not breach of contract claims. . . . To ensure that plaintiffs do not attempt to convert [tort] claims into breach of contract claims by talismanically invoking contract language in [the] complaint . . . reviewing courts may pierce the pleading veil by looking beyond the language used in the complaint to determine the true basis of the claim." (Citations omitted; internal quotation marks omitted.) *Meyers* v. *Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, supra, 311 Conn. 290–91.

Here, our plenary review leads us to conclude that Canner's count one claim sounds in tort. General Statutes § 47-249 creates a statutory duty on an association to maintain, repair, and replace the common elements, "[e]xcept to the extent provided by the declaration, subsection (b) of this section or subsection (h) of section 47-255 . . . ." Canner's claim alleges that Governor's Ridge "failed, neglected, and refused to maintain its common elements," "failed to promptly repair its

common elements," and "failed to promptly take responsibility for and deal with problems related to common elements" in violation of the CIOA. Therefore, we conclude that this claim sounds in tort. See *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 284 Conn. 200 ("when a plaintiff seeks to recover damages for the breach of a statutory duty, such an action sounds in tort").

We must now turn to the question of whether the present action also sounds in contract. We conclude that it does not. By way of background, Canner filed his sixth amended complaint on September 20, 2017, alleging in count one that Governor's Ridge "failed, neglected, and refused to maintain its common elements," "failed to promptly repair its common elements," and "failed to promptly take responsibility for and deal with problems related to common elements" in violation of § 47-249. There was no reference at this time to any contractual obligation codified in the declaration or any specific provision of the declaration that allegedly had been breached by Governor's Ridge.

The special defenses filed by Governor's Ridge on October 20, 2017, put Canner on notice that his claim was time barred by the statute of limitations in § 52-577. He accordingly amended count one of his sixth amended complaint to allege that Governor's Ridge violated §§ 2.6 (a) and 23.1 of the declaration[11] and § 5.2 (b) of the bylaws,[12] in addition to violating the CIOA.[13]

[11] Section 2.6 (a) of the condominium declaration states that "[c]ommon [e]xpenses" include "[e]xpenses of administration, maintenance, repair or replacement of the Common Elements." Section 23.1 of the declaration provides in relevant part: "Any portion of the Common Interest Community for which insurance is required under Article XXII which is damaged or destroyed shall be repaired or replaced promptly by the Association . . . ."

[12] Section 5.2 (b) of the bylaws provides in relevant part: "All maintenance and repairs of and any replacements to the Common Elements and Limited Common Elements . . . shall be made by the Executive Board and be charged . . . as a Common Expense . . . ."

[13] We recognize that an amendment to the sixth amended complaint would make it a seventh amended complaint. Despite subsequent amendments to

We conclude, however, that these amendments were insufficient to transform this claim into one sounding in breach of contract. See *Meyers* v. *Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, supra, 311 Conn. 290. This is because the provisions of the governing documents relied on by Canner do not create a contractual obligation on the part of Governor's Ridge to maintain, repair, and/or replace the foundation for the 220 Unit.

Like many common interest declarations, the Governor's Ridge declaration addresses the manner in which it will repair and replace its common elements. Section 23.1 of the declaration provides in relevant part that "[a]ny portion of the Common Interest Community for which insurance is required under Article XXII which is damaged or destroyed shall be repaired or replaced promptly by the Association . . . ." Article XXII, section 22.1, titled "Maintaining Insurance," provides: "Commencing not later than the time of the first conveyance of a Unit to a person other than a Declarant, the Association shall obtain and maintain insurance required by the Act and the Declaration to the extent reasonably available." Section 2.1 defines "Act" as "[t]he Common Interest Ownership Act, Public Act 83-474, Connecticut General Statutes . . . § 47-200, et seq., Chapter 828 of the Connecticut General Statutes, as it may be amended from time to time." Additionally, § 22.2, titled "Physical Damage," provides in relevant part: "The Association shall maintain Property insurance on the Common Elements insuring against all risks of direct physical loss commonly insured against."

Because the relevant language of § 22.1 references "insurance required by the Act," we turn to the CIOA to help discern the provision's meaning. See *Morales* v. *PenTec, Inc.*, 57 Conn. App. 419, 438, 749 A.2d 47

the sixth amended complaint, the parties have referred to the operative complaint as the sixth amended complaint. We follow their lead.

(2000) ("[w]hen parties execute a contract that clearly refers to another document, there is an intent to make the terms and conditions of the other document a part of their agreement, as long as both parties are aware of the terms and conditions of the second document"). General Statutes § 47-255 (a) provides in relevant part: "[T]he association shall maintain, to the extent reasonably available and subject to reasonable deductibles: (1) Property insurance on the common elements . . . insuring against those risks of direct physical loss commonly insured against . . . *exclusive* of land, excavations, *foundations* and other items normally excluded from property policies . . . ." (Emphasis added.) The language of the statute makes clear that insurance for foundations need not be maintained.

In light of the foregoing, we have little difficulty concluding that the language of the declaration (and provisions of the bylaws and handbook) relied upon by Canner does not create a contractual obligation for Gover nor'sRidge to maintain, repair, and/or replace the foundation at the 220 Unit.[14] Rather, the governing documents make clear that the contractual obligation for Governor's Ridge to repair and replace the common interest community is contingent on areas for which insurance is required under Article XXII of the declaration. Because it is clear that foundations are excluded areas for purposes of insurance; see General Statutes § 47-255 (a); there was no corresponding duty to maintain, repair, and/or replace the foundation at issue. Accordingly, we conclude that the court correctly determined that Canner's claim did not sound in contract

[14] Canner also relies on § 2.6 (a) of the declaration and § 5.2 (b) of the bylaws; see footnotes 11 and 12 of this opinion; in addition to other declaration, bylaw, and handbook provisions he raises for the first time on appeal. A simple review of these provisions similarly reveals no duty on the part of Governor's Ridge to maintain, repair, and/or replace the foundation in question. To say more would be supererogatory.

and, thus, § 52-577 was the appropriate statute of limitations.

B

In conjunction with his initial statute of limitations argument, Canner makes numerous subclaims, many of which are predicated on his unsuccessful contention that the six year statute of limitations period in § 52-576 is the applicable limitation period. More specifically, Canner argues that the court erred in finding that the statute of limitations for his claim pursuant to § 47-278 started to run on April 30, 2002, when Charles and Doris purchased the unit. He argues that the claim did not "accrue" in 2002, and that any statute of limitations "did not start running until 2016." He also argues that the court erred by concluding that Governor's Ridge was not estopped from asserting its statute of limitations defense. We disagree.

"The question of whether a party's claim is barred by the statute of limitations is a question of law, which this court reviews de novo. . . . The factual findings that underpin that question of law, however, will not be disturbed unless shown to be clearly erroneous." (Citation omitted; internal quotation marks omitted.) *Jarvis* v. *Lieder*, 117 Conn. App. 129, 146, 978 A.2d 106 (2009). "The party claiming estoppel . . . has the burden of proof. . . . Whether that burden has been met is a question of fact that will not be overturned unless it is clearly erroneous." (Internal quotation marks omitted.) *Li* v. *Yaggi*, 185 Conn. App. 691, 711–12, 198 A.3d 123 (2018). "A court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . The legal conclusions of the trial court will stand, however, only if they are legally and logically correct and

are consistent with the facts of the case." (Internal quotation marks omitted.) *Blackwell* v. *Mahmood*, 120 Conn. App. 690, 694, 992 A.2d 1219 (2010).

Canner's first subclaim requires little discussion because his argument of accrual is misplaced for a fundamental reason—§ 52-577 is a statute of repose, not a true statute of limitations. See *State* v. *Lombardo Bros. Mason Contractors*, 307 Conn. 412, 416 n.2, 54 A.3d 1005 (2012) ("[w]hile statutes of limitation are sometimes called statutes of repose, the former bars [a] right of action unless it is filed within a specified period of time after [an] injury occurs, [whereas] statute[s] of repose [terminate] any right of action after a specific time has elapsed, regardless of whether there has as yet been an injury" (internal quotation marks omitted)).

Section 52-577, the applicable statute, provides: "No action founded upon a tort shall be brought but within three years from the date of the *act or omission complained of*." (Emphasis added.) As this court has observed, "[§] 52-577 is an occurrence statute, meaning that the time period within which a plaintiff must commence an action begins to run at the moment the act or omission complained of occurs." (Internal quotation marks omitted.) *Pagan* v. *Gonzalez*, 113 Conn. App. 135, 139, 965 A.2d 582 (2009). For that reason, "[w]hen conducting an analysis under § 52-577, the only facts material to the trial court's decision . . . are the date of the wrongful conduct alleged in the complaint and the date the action was filed." (Internal quotation marks omitted.) Id. As our Supreme Court has explained, "the history of [the] legislative choice of language [contained in § 52-577] precludes any construction thereof delaying the start of the limitation period until the cause of action has accrued or the injury has occurred." *Fichera* v. *Mine Hill Corp.*, 207 Conn. 204, 212, 541 A.2d 472 (1988).

Both before this court and the trial court, Canner explicitly described the original wrong as Governor's Ridge's allowing the 220 Unit to be built on soft ground. The operative complaint also contains allegations that, prior to constructing the unit, Governor's Ridge knew that there were issues with the soil on the property where the unit is located, and that there existed a risk that settling could occur if condominium units were built on that property. We agree with the court's finding that the closing date of April 30, 2002, which was the day on which Charles and Doris came into possession of the 220 Unit and the allegedly defective foundation, was the date on which the statute of repose period began to run. This was the point latest in time the construction of the allegedly defective foundation occurred and is when Charles and Doris officially became unit owners and could bring an action pursuant to the law. Accordingly, we conclude that the court's factual findings and legal conclusions are sufficiently supported by the record, and therefore are not clearly erroneous.

Turning to Canner's next subclaim related to his statute of limitations argument—namely, that the court improperly concluded that Governor's Ridge was not estopped from asserting its statute of limitations defense—we conclude that this claim is similarly unavailing.He argues that the court improperly rejected his assertion that Governor's Ridge should be estopped from asserting its statute of limitations defense because it allegedly acknowledged that the foundation is a common element, that it was responsible for the settling that occurred, and that it intended to repair the foundation. He further argues that he relied on those representations, and that his reliance "prevented [him] from selling [the 220 Unit] for eight years." Governor's Ridge argues that there is no evidence that Charles, Doris, or Canner were ever dissuaded from pursuing a legal claim

against it or that it prevented them from obtaining information related to a potential claim. We agree with Governor's Ridge.

A claim of estoppel requires proof of two essential elements: (1) "[T]he party against whom estoppel is claimed must do or say something calculated or intended to induce another party to believe that certain facts exist and to act on that belief," and (2) "the other party must change its position in reliance on those facts, thereby incurring some injury." (Internal quotation marks omitted.) *TD Bank, N.A.* v. *Salce*, 175 Conn. App. 757, 767, 169 A.3d 317 (2017). "It is fundamental that a person who claims an estoppel must show that he has exercised due diligence to know the truth, and that he not only did not know the true state of things but also lacked any reasonably available means of acquiring knowledge." (Internal quotation marks omitted.) Id.

Here, Canner's argument centers on the assertion that Canner and his parents relied on Governor's Ridge's alleged representations that it would repair the foundation. Reliance alone, however, is insufficient to sustain his burden of proof for the imposition of equitable estoppel. See *Celentano* v. *Oaks Condominium Assn.*, 265 Conn. 579, 614–15, 830 A.2d 164 (2003).

This claim is essentially factual in nature. In rejecting the estoppel argument asserted by Canner, the court explicitly found that the evidence "overwhelming[ly] establishe[d]" that Charles, Doris, and Canner did not exercise due diligence that would have uncovered the alleged initial conduct. Similarly, the court found that there was simply no evidence that, during the applicable limitation period, Governor's Ridge, by its conduct or otherwise, did anything to induce them to refrain from filing suit. As the court aptly noted, the public offering statement made clear that the 220 Unit was to be constructed without piles and was available well before

Canner, on behalf of his parents, sent South Meadow's attorney a signed contract for the unit. Moreover, there were numerous public documents available at the building department well before the unit was purchased. For example, one report from a professional engineer questioned Adeeb's foundation design and opined that it created a "risk of some long-term settlement and structural distress." On the basis of our review of the record, we conclude that the court's factual findings are not clearly erroneous and that the court properly interpreted and applied the law to its findings of facts. The court properly concluded that the doctrine of equitable estoppel did not preclude Governor's Ridge from asserting its statute of limitations defense.[15]

[15] It appears that Canner makes three additional subclaims related to his statute of limitations arguments. We decline to review two of them because they are inadequately briefed, and the third fails because this court cannot review a ruling that was not in fact made. We briefly explain.

First, Canner argues in a conclusory manner that the court erred in failing to rule that reaffirmations by Governor's Ridge of its obligation to fix the unit's foundation and settling problems "restarted" the statute of limitations. In support of this assertion, Canner merely cites to one, unpublished Superior Court decision, *Advani* v. *Park Mead Condominium Assn.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-17-6032437-S (August 14, 2018), for the proposition that "an unambiguous reaffirmation of a contractual obligation is a basis on which to 'restart' the statute of limitations applicable to the original claim . . . ." Canner does not provide any legal analysis beyond that assertion and does not brief the issue properly, as applicable to a tort claim pursuant to § 52-577.

Second, Canner appears to claim that the court erred by not concluding that the continuing course of conduct doctrine tolled the statute of limitations. Once again, Canner resorts to a context and analysis free citation to *Vaccaro* v. *Shell Beach Condominium, Inc.*, supra, 169 Conn. App. 43, and a host of conclusory statements with no relevant supporting citations to the record. His brief fails to provide any meaningful analysis about the scope of the duty, if any, owed to him by Governor's Ridge in relation to the foundation pursuant to § 47-249, how that duty was related to the alleged original wrong, or how Governor's Ridge allegedly continued to breach that duty within the meaning of our case law.

"We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Haggerty* v.

C

Canner's final claim is that the court improperly concluded that his nuisance claims are barred by the statute of limitations codified in either § 52-577 or § 52-584.[16] He breaks his claim into two parts. Specifically, he argues that the court erred in finding that the alleged nuisance is permanent as opposed to temporary without (1) hearing expert testimony on the subject, and (2) affording him an opportunity to present expert testimony. The defendants argue that we should decline to review this claim because it is inadequately briefed and because Canner failed to raise or preserve it before the court. Upon our review of the record, we agree with the defendants and conclude that the first part of his claim is inadequately briefed and the second part is unpreserved. Accordingly, we decline to review this claim.

With respect to the first part of his claim, Canner appears to argue that the court, as a matter of law, erred in ruling that the nuisance alleged was permanent as opposed to temporary without benefit of expert testimony. He states in general terms that "[e]xpert testimony is required if the question involved goes beyond

Williams, 84 Conn. App. 675, 684, 855 A.2d 264 (2004). Because Canner has not adequately briefed these subclaims beyond his mere abstract legal assertions, we decline to review them.

Last, it appears that Canner argues that the court erred in finding that Governor's Ridge reasonably exercised its discretion in deciding not to repair the foundation in question. Upon our review of the court's memorandum of decision, no such issue was considered nor was such ruling made. Because we cannot opine on a court's ruling that did not occur, this claim fails. See, e.g., *Lane* v. *Cashman*, 179 Conn. App. 394, 416, 180 A.3d 13 (2018) ("[w]e are unable to review a ruling that was not made"); *State* v. *McLaughlin*, 135 Conn. App. 193, 202, 41 A.3d 694 ("[w]e cannot pass on the correctness of a trial court ruling that was never made" (internal quotation marks omitted)), cert. denied, 307 Conn. 904, 53 A.3d 219 (2012).

[16] The nuisance claims are alleged in count three against Governor's Ridge, count six against the South Meadow defendants, and count twelve against the town defendants.

the field of ordinary knowledge and experience of judges and jurors," and cites two cases in support of this principle. He appears to argue that the court based its finding that the nuisance could not be abated on the testimony of Kevin Moore, the former president of Governor's Ridge, who was not an engineer or a "design professional." He then summarily states that "[w]hether or not [the 220 Unit's] foundation and settling problems can be abated is a matter for . . . expert testimony." He does not, however, cite any case law for this contention, provide relevant citations to the record, or provide analysis of the issue. As we explained previously, "[w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than [mere] abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed." (Internal quotation marks omitted.) *Starboard Fairfield Development, LLC* v. *Gremp*, 195 Conn. App. 21, 31, 223 A.3d 75 (2019). Accordingly, we decline to reach the merits of the first part of his claim.

The second part of Canner's claim fares no better. "It is well established that an appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level." (Internal quotation marks omitted.) *McMahon* v. *Middletown*, 181 Conn. App. 68, 76, 186 A.3d 58 (2018); see also Practice Book § 60-5. "The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to

both the trial court and the opposing party." (Citations omitted; emphasis in original; internal quotation marks omitted.) *McMahon* v. *Middletown*, supra, 76.

In the present case, Canner points us to the court's limited scheduling order, which required that "fact witness depositions related to issues regarding the statute of limitations" be completed by a certain date. Relying on this order, he contends that the court's procedures for the limited hearing on November 8 and 9, 2018, provided *only* for fact witnesses, not experts. He asserts, without support from the record, that the court indicated that the advantage of calling only fact witnesses was so the parties could avoid the expense of expert disclosure and depositions at that stage of litigation. Governor's Ridge argues that the court's limited scheduling order does not "reference or preclude the disclosure of expert witnesses." It points to the fact that the court twice modified the limited scheduling order and that the two prior versions of the order stated that "[t]he scope of the deposition may be expanded by agreement of all counsel." On August 16, 2018, the court held a hearing status conference. Governor's Ridge further argues that "the plaintiff did not identify any expert witnesses he wished to call during [that] status conference," and that he "did not . . . file a single expert witness disclosure."[17]

Our review of the record reveals that the plaintiff did not seek to introduce expert testimony at any time before or during the limited evidentiary hearing. Nor has he directed this court to any place in the record where he did so. He similarly did not raise any issue about expert witness testimony in his motion to reargue and/or to correct the judgment. To allow the plaintiff to advance this unpreserved claim on appeal would be

[17] The South Meadow defendants and the town defendants advance similar arguments in their briefs to this court.

unfair to the court and to the defendants. See, e.g., *Ravetto* v. *Triton Thalassic Technologies, Inc.*, 285 Conn. 716, 730, 941 A.2d 309 (2008) ("[f]or us [t]o review [a] claim, which has been articulated for the first time on appeal and not before the trial court, would result in a trial by ambuscade" (internal quotation marks omitted)). We therefore decline to review this part of his claim because he failed properly to preserve this issue for appellate review.

II

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We next address the claims made by Puteri in his appeal. As previously mentioned, Puteri claims that the court erred for the same reasons Canner asserts in the first appeal. In fact, Puteri's briefing on appeal is almost identical to that of Canner's. For purposes of judicial economy, we do not discuss Puteri's claims to the same extent we did for Canner's in part I of this opinion because Puteri's claims fail for the same legal reasons, even though the underlying facts differ slightly.

We begin by setting forth the following relevant facts, found by the trial court or otherwise undisputed, and the procedural history. This action involves property located at 105 Governor Trumbull Way, which is also a condominium unit located in the Governor's Ridge common interest community in Trumbull (105 Unit). The 105 Unit was purchased by Puteri and his late wife, Loretta G. Puteri (Puteris), on December 26, 2001, from South Meadow.

The 105 Unit was part of phase II of the Governor's Ridge common interest community. In 2000, Governor's Ridge applied to the planning and zoning commission to construct thirty-six detached units constituting phase II of the Governor's Ridge common interest community. A hearing was held on November 27, 2000, and,

on January 10, 2001, the planning and zoning commission issued a special permit to Governor's Ridge to construct the units. Although the planning and zoning commission's special permit contained language related to foundation construction in light of certain soil conditions, the building department ultimately retained jurisdiction over how the foundations were constructed and whether to issue a certificate of occupancy for any particular unit.

On June 27, 2001, Governor's Ridge sold the phase II development rights to South Meadow, which had been formed by Tatangelo and Lucera to develop phase II. According to Tatangelo, South Meadow was aware at the time that the soil conditions at the phase II location presented certain challenges. As a result, South Meadow hired Adeeb Consulting on June 13, 2001, for limited engineering services regarding the design of the foundations. Its principal, Adeeb, is a geotechnical and structural engineer. On June 27, 2001, Adeeb issued a report concerning the foundations for the 105 Unit. The report was based on a boring at the location and recommended a foundation system using geo-fabric, footings, and grade beams. On July 6, 2001, the building department issued a building permit for the unit, which did not require the foundation be built on piles. Although this method of construction was criticized in a letter dated July 22, 2001, written by Herbert L. Lobdell, a professional engineer, that was copied to the building department, the construction of the unit's foundation proceeded in accordance with the plan developed by Adeeb.

On July 27, 2001, South Meadow issued a public offering statement for phase II. The statement included, among other things, architectural drawings for the various phase II unit models. The drawings showed that the foundations would be built with concrete walls and

footings, not with piles. The Puteris entered into a contract to purchase the 105 Unit from South Meadow on November 13, 2001. Soon thereafter, on December 20, 2001, the building department provided the certificate of occupancy for the 105 Unit. At this time, construction of the unit was complete, and neither the building department nor any other town department had any further involvement with the unit.

On December 26, 2001, the Puteris closed on the 105 Unit. The same day, they leased the unit back to South Meadow until March 20, 2002, for use as a model home. After the lease expired, South Meadow addressed a punch list of items for the Puteris, but had no further involvement with the 105 Unit after completing those tasks.

After the Puteris moved in, as early as 2003, but no later than 2005, they began to notice cracks on the exterior and interior of the unit. When they contacted the management company for Governor's Ridge, the problems were addressed. Puteri testified, however, that the cracks would redevelop after they were fixed. He attributed these problems to settling and was aware in the years 2006, 2007, and 2008, that the settling was getting worse. Additional problems developed during this time period, including a large crack on the second floor, a crack in the basement floor, and windows and doors that would not open correctly. Puteri testified that he was not aware of significant settlement problems until he placed the 105 Unit on the market in 2012.

On June 20, 2012, an e-mail from Puteri to the management company described "the most notable defects," but explicitly stated that there were "several structural issues over the years" and "[t]his has been an ongoing issue since the house was originally built and records should show a vast number of phone calls from us

pertaining to this matter and yet a permanent fix has never come."

Thereafter, between 2012 and 2016, Governor's Ridge took various steps to address the settlement, including hiring Fuller Engineering & Land Surveying, LLC, to measure settling at the unit. In mid-December, 2015, after learning that a neighbor had town records about the phase II development, Puteri's daughter, Lorraine Sando, went to the building department, the planning and zoning commission, wetlands, and other town departments to get records about the 105 Unit. Each time she verbally requested records, she received them.

On September 5, 2017, Puteri commenced this action. Like Canner, Puteri seeks to hold the defendants liable for the alleged settling of the 105 Unit. His complaint also contains various counts against the defendants alleging negligence, nuisance, fraud, breach of contract, and violations of the CIOA. The defendants raised numerous special defenses in their respective answers to the operative complaint claiming the respective counts against them were time barred pursuant to the applicable statutes of limitations or repose. A limited evidentiary hearing on the statute of limitations defenses and matters of avoidance was held on November 8 and 9, 2018.[18]

On May 7, 2019, the court issued a memorandum of decision in which it concluded that each count against the defendants was time barred by the applicable statute of limitations and, thus, rendered judgment in favor of the defendants. On May 24, 2019, Puteri, pursuant to "Practice Book § 11-11 and/or § 11-12," filed a "motion to reargue and/or correct judgment," which was denied. The same day, Puteri appealed to this court.

[18] See footnote 6 of this opinion.

A

Like Canner, Puteri first claims that the court erred by concluding that his claim brought pursuant to § 47-278 (count one of his operative complaint) was barred by the three year tort statute of limitations codified in § 52-577. He argues that his claim is contractual in nature because the legal duties alleged to have been breached stemmed from the Governor's Ridge governing documents (common interest declaration, bylaws, and handbook) and, accordingly, the six year statute of limitations set forth in § 52-576 is the appropriate limitation period.

For the same reasons and utilizing the standard of review set forth in part I A of this opinion, Puteri's arguments fail. There is no question that Puteri's count one claim sounds in tort, rather than in contract, because it is clear that he is seeking redress for a breach of a statutory duty. The language of the declaration (and provisions of the bylaws and handbook) relied upon by Puteri—which is the same language relied upon by Canner in his appeal—does not create a contractual obligation for Governor's Ridge to maintain, repair, and/or replace the foundation at the 105 Unit. Instead, the governing documents make clear that the duty for Governor's Ridge to repair and replace the common interest community is contingent on areas for which insurance is required under Article XXII of the declaration. Because it is clear that foundations are excluded areas for purposes of insurance, there was no corresponding contractual obligation to maintain, repair, and/or replace the foundation at issue. Accordingly, the court correctly determined that Puteri's claim did not sound in contract but, rather, sounded in tort. We thus conclude that the court correctly determined that § 52-577 was the appropriate statute of limitations for count one of Puteri's complaint.

With this as our backdrop, we conclude that the court correctly determined that Puteri's closing date of December 26, 2001, was the appropriate starting point for the statute of limitations period. As previously explained, § 52-577 is a statute of repose. Thus, "the time period within which a plaintiff must commence an action begins to run at the moment the act or omission complained of occurs." (Internal quotation marks omitted.) *Pagan* v. *Gonzalez*, supra, 113 Conn. App. 139.

Both before this court and the trial court, Puteri explicitly argues that the original wrong was that Governor's Ridge allowed the 105 Unit to be built on soft ground. We agree with the court that the closing date of December 26, 2001, was when the statute of repose period began to run. This is the date the Puteris officially became unit owners and could pursue an action pursuant to the law, as well as the latest date the construction of the allegedly defective foundation occurred.

We next address Puteri's subclaim that Governor's Ridge should be estopped from asserting its statute of limitations defense. Puteri argues that Governor's Ridge acknowledged that the foundation is a common element, it was responsible for the settling that occurred, and it intended to repair the foundation. He too alleges he relied on those representations.

Like Canner, Puteri failed to satisfy his burden of proving that estoppel applies in the present case. The court found that there was no evidence that during the applicable limitation period Governor's Ridge did anything to prevent Puteri from discovering facts to support a cause of action or to induce him to refrain from filing suit. There similarly is no evidence that Governor's Ridge made any promises or statements to Puteri for the purpose of misleading him about the manner in which the unit's foundation was constructed. On the basis of our review of the record, we conclude that the

court's factual findings are not clearly erroneous and, under our plenary standard of review, the court properly interpreted and applied the law to its findings of facts. We therefore conclude that the court properly determined that Governor's Ridge was not estopped from maintaining its statute of limitations argument.[19]

B

As a final matter, as was the case with Canner, we similarly decline to review Puteri's claim that the court erred in ruling that his nuisance claims are barred by the applicable statute of limitations. He too specifically argues that the court erred in finding that the alleged nuisance is permanent as opposed to temporary without (1) hearing expert testimony on the subject, and (2) affording him an opportunity to present expert testimony. Like Canner, Puteri failed to adequately brief the first part of his claim. See part I C of this opinion; see also *Starboard Fairfield Development, LLC* v. *Gremp*, supra, 195 Conn. App. 31 ("[a]nalysis, rather than [mere] abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly" (internal quotation marks omitted)). Puteri similarly failed to properly preserve the second part of his claim for appellate review, as he never raised the issue of expert testimony nor sought to introduce expert testimony before the trial court. Thus, the court never had a chance to address this issue now raised by Puteri. To allow Puteri to advance this unpreserved claim on

[19] Puteri similarly raises subclaims that the court (1) erred in failing to rule that reaffirmations by Governor's Ridge of its obligation to fix the unit's foundation and settling problems "restarted" the statute of limitations, (2) improperly concluded that the statute of limitations was not tolled by the continuing course of conduct doctrine, and (3) erred in finding that Governor's Ridge reasonably exercised its discretion in deciding not to repair the foundation in question. These subclaims fail for the same reasons that we rejected the same subclaims raised by Canner in the first appeal, as the first two are inadequately briefed and the third is premised on a ruling that was never made. See footnote 15 of this opinion. We need say no more.

appeal would be unfair to the court and to the defendants. See *Guiliano* v. *Jefferson Radiology, P.C.*, 206 Conn. App. 603, 622, 261 A.3d 140 (2021) ("[f]or us [t]o review [a] claim, which has been articulated for the first time on appeal and not before the trial court, would result in a trial by ambuscade of the trial judge" (internal quotation marks omitted)).

The judgments are affirmed.

In this opinion the other judges concurred.

RICHARD T. O'DONNELL *v.* AXA EQUITABLE LIFE INSURANCE COMPANY (AC 44215)

Moll, Cradle and Bishop, Js.

Syllabus

The plaintiff brought a putative class action seeking to recover damages from the defendant, an insurance company organized under New York law, for its alleged breach of contract. The plaintiff and the other putative class members had purchased variable annuity policies from the defendant. The plaintiff alleged that the defendant had breached its contract with him and the other putative class members by changing the investment strategy associated with their policies without seeking approval from the New York State Department of Financial Services (NYDFS), as required by the terms of the contract and New York law. The defendant filed a motion to strike the original complaint, which the trial court granted. The trial court concluded that the plaintiff had failed to adequately allege that the defendant's actions caused him damages because he did not allege that the NYDFS would have prevented the defendant from implementing the new investment strategy had it known the full extent of the changes that the new investment strategy would make to the annuity policies. The plaintiff then filed an amended complaint pursuant to the applicable rule of practice (§ 10-44). The defendant filed a motion for entry of judgment or, alternatively, to strike the sole count of the amended complaint. In granting the defendant's motion, the trial court concluded that, despite certain new allegations, the plaintiff's amended complaint was not materially different from the original complaint and, therefore, the plaintiff had failed to file a new pleading within the meaning of Practice Book § 10-44. The trial court rendered judgment for the defendant, from which the plaintiff appealed to this court. *Held*:

1. The trial court improperly concluded that the plaintiff's amended complaint was not materially different from his original complaint: when viewed in the light most favorable to the plaintiff, the new allegations set forth in the plaintiff's amended complaint constituted a good faith effort to plead causation and address the legal insufficiency of the original complaint identified by the trial court, as there were significant factual additions describing the defendant's new investment strategy, how it was implemented, and how it allegedly caused the plaintiff damages in specified amounts, independent of anything the NYDFS did or did not do.
2. This court, having determined that the amended complaint was materially different from the original complaint and, therefore, that the plaintiff had not waived his right to appeal that ruling, concluded that the trial court improperly granted the defendant's motion to strike the amended complaint: the plaintiff alleged facts sufficient to state a cause of action for breach of contract, as he included in his amended complaint, among other things, facts describing how the defendant's breach allegedly caused him damages, and, therefore, whether the plaintiff could prove causation was a question for the finder of fact.

Argued October 12, 2021—officially released February 15, 2022

Procedural History

Action to recover damages for the defendant's alleged breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the case was transferred to the judicial district of Stamford-Norwalk; thereafter, the court, *Lee*, *J.*, granted the defendant's motion to strike the plaintiff's original complaint; subsequently, the court, *Hon. Charles T. Lee*, judge trial referee, granted the defendant's motion for judgment on the plaintiff's amended complaint, and rendered judgment thereon for the defendant, from which the plaintiff appealed to this court. *Reversed*; *further proceedings*.

David A. Slossberg, with whom were *Sara A. Sharp*, and, on the brief, *Daniella Quitt*, pro hac vice, for the appellant (plaintiff).

Jay B. Kasner, pro hac vice, with whom were *Kurt Wm. Hemr*, pro hac vice, *John W. Cerreta* and *Thomas D. Goldberg*, for the appellee (defendant).

Opinion

BISHOP, J. In this putative class action, the plaintiff, Richard T. O'Donnell, appeals from the judgment of the trial court rendered after it granted the motion filed by the defendant, AXA Equitable Life Insurance Company,[1] for entry of judgment on the plaintiff's stricken complaint. On appeal, the plaintiff claims that the court improperly concluded that his amended complaint (1) was not "materially different" from his original complaint and (2) failed to adequately allege that the defendant's actions caused him damages.[2] We agree with the plaintiff, and, accordingly, we reverse the judgment of the trial court.

The plaintiff alleges the following facts in his amended complaint. The plaintiff is a resident of the state of Connecticut. The defendant is a company organized under New York law with its principal place of business also in New York. The defendant is authorized to do and does business in Connecticut. The defendant offers a broad portfolio of life insurance products and a variety of annuity products, including fixed deferred annuities, payout annuities, and variable annuities. A variable annuity, the product at issue in the present action, is a contract between the purchaser, also known as the "annuitant," and the insurance company. Pursuant to the contract, the insurance company agrees to make periodic payments to the annuitant, beginning either immediately or at some future date. The defendant's annuity policies permitted the policyholders to allocate their premiums toward various investment options, each with different risk-reward characteristics.

[1] The defendant changed its name in 2020 and is now known as the Equitable Financial Life Insurance Company. Because the defendant has been referred to as AXA Equitable Life Insurance Company in all prior proceedings, we use that name in this appeal.

[2] In his principal brief, the plaintiff sets forth four claims of error. For convenience, we have distilled the plaintiff's arguments and address them in the two aforementioned claims.

In November, 2008, the plaintiff purchased a variable annuity policy from the defendant. The policy that the plaintiff and other putative class members purchased permitted them to acquire, for an additional premium, a guarantee that certain benefits would increase by a minimum percentage each year.[3] The policy also included a reset provision, which provided that the value of guaranteed benefits could only increase and never decrease. The guarantee, in combination with the reset provision, effectively immunized the benefits of the policy from the risks of stock market volatility. The policy also provided that the defendant (1) would comply with all applicable laws, (2) had established and would maintain the accounts under New York law, (3) would not change the investment strategy for the variable annuity policy unless approved by the Superintendent of Insurance of New York State (superintendent) or deemed approved in accordance with such law or regulation, and (4) would not make a material change to the policy without prior approval of the superintendent. Although the policy did grant the defendant some discretion over investment options, it did not permit the defendant to make material changes to the investment strategy without complying with applicable New York law.

In 2011, after the plaintiff had already purchased his annuity policy from the defendant, the defendant changed the investment strategy associated with the plaintiff's and other putative class members' policies. The defendant implemented the new investment policy, referred to as the "AXA Tactical Manager Strategy" (ATM Strategy), without seeking approval from the New York State Department of Financial Services (NYDFS), as required by the terms of the contract and New York

[3] The plaintiff seeks class action certification for this matter, a determination not made by the court because of the timing and manner in which the litigation was terminated.

law. The ATM Strategy was a material change to the investment policy pursuant to New York Insurance Law § 4240 (e),[4] which required the defendant to seek approval of the change from the NYDFS prior to its implementation. Under § 4240 (e), an amendment that changes the investment strategy is not automatically approved but, rather, is treated as an original filing. An amendment that does not change the investment strategy is automatically deemed approved after thirty days, unless the superintendent disapproves. Because the defendant did not properly inform the NYDFS of the nature of the changes and that the changes should be treated as an original filing, the ATM Strategy was automatically, but improperly, deemed approved. By not seeking the requisite approval from the NYDFS, the defendant breached the terms of the contract.

The plaintiff also alleged the following facts. The breach caused the plaintiff and other policyholders

[4] Section 4240 (e) of New York Insurance Law provides: "No authorized insurer shall make any such agreement in this state providing for the allocation of amounts to a separate account until such insurer has filed with the superintendent a statement as to its methods of operation of such separate account and the superintendent has approved such statement. Subject to the approval of the superintendent, any such statement may apply to one or more groups of separate accounts classified by investment policy, number or kinds of separate account participants, methods of distribution of such agreements or otherwise. In determining whether or not to approve any such statement, the superintendent shall consider, among other things, the history, reputation and financial stability of the insurer and the character, experience, responsibility, competence and general fitness of the officers and directors of the insurer. If the insurer files an amendment of any such statement with the superintendent that does not change the investment policy of a separate account and the superintendent does not approve or disapprove such amendment within a period of thirty days after such filing, such amendment shall be deemed to be approved as of the end of such thirty day period, except that if the superintendent requests further information on the statement during such period from the insurer, such period shall be extended until thirty days after the day on which the superintendent receives such information. An amendment of any such statement that changes the investment policy of a separate account shall be treated as an original filing." N.Y. Ins. Law § 4240 (e) (McKinney 2007).

damages. To implement the ATM Strategy, the defendant sold all or substantially all of the plaintiff's and other policyholders' investment positions without their permission. This left the plaintiff's and other policyholders' accounts with no equity exposure. After the market recovered, the defendant bought these positions back at much higher prices, immediately resulting in substantial losses passed on to the plaintiff and other policyholders. In other words, alleged the plaintiff, the ATM Strategy reduced the defendant's risks and costs by using derivatives to hedge its own equity exposure to market volatility at the expense of the variable annuity customers who purchased their policies, in part, for the opportunity to benefit from market volatility. The ATM Strategy altered the very nature of the product held by policyholders. It materially changed the variable annuity products and reduced the value of the annuity accounts. The reduction of the value of the accounts also diminished the periodic reset amounts built into the policies. In the case of the plaintiff, the defendant's breach cost him approximately $90,000, or almost 20 percent of his original investment. The members of the putative class lost in excess of $100 to $200 million dollars during the relevant period.

Soon after the defendant's implementation of the ATM Strategy, the NYDFS commenced an investigation of the defendant concerning the implementation of the ATM Strategy. The focus of the investigation was whether the defendant had properly informed the NYDFS of the implementation of the ATM Strategy. After the conclusion of the investigation, the NYDFS found that the defendant had failed to seek the requisite approval for the material changes to the investment strategy under the ATM Strategy. Specifically, the NYDFS found that while the ATM Strategy effectively changed the nature of the product the policyholders had purchased, the defendant failed to explain in its

filings with the NYDFS that it was making such changes to the policies. The absence of detail and discussion in the filings regarding the significance of the implementation of the ATM Strategy had the effect of misleading the NYDFS regarding the scope and potential effects of the changes. The NYDFS had approved the filings on the false belief that the changes were merely routine additions of funds or similar alterations. As a result, the defendant entered into a consent order with the NYDFS on March 14, 2014.[5] According to the consent order, "[h]ad the [NYDFS] been aware of the extent of the changes, it may have required that the existing policyholders affirmatively opt in to the ATM Strategy." The consent order required the defendant to (1) pay $20 million to the NYDFS, (2) seek all necessary approvals in connection with the ATM Strategy in the future, and (3) issue written reports to the NYDFS concerning changes to certain accounts on a quarterly basis for a period of five years from the date of the consent order.

The plaintiff commenced this putative class action against the defendant on August 21, 2015. In his complaint, the plaintiff asserted a single claim for breach of contract against the defendant. On December 27, 2018, the defendant filed both a motion to strike the sole count of the plaintiff's complaint and a motion to dismiss the plaintiff's complaint to the extent that it purported to assert claims on behalf of members of a putative class who are not Connecticut residents. The court heard oral argument on the two motions on May 6, 2019.

The court granted the defendant's motion to strike, concluding that "the causation of damages the plaintiff has alleged for his breach of contract claim are speculative, and that, as a result, his complaint fails to plead facts that sufficiently allege the causation element of

[5] The consent order was attached to the plaintiff's original complaint.

his breach of contract claim." The plaintiff then filed an amended complaint pursuant to Practice Book § 10-44.[6] The defendant filed a motion for entry of judgment, or alternatively, to strike the sole count of the amended complaint. After hearing oral argument on the defendant's motion, the court granted the defendant's motion for entry of judgment and rendered judgment in favor of the defendant. This appeal followed. Additional facts and procedural history will be set forth as necessary.

We begin by setting forth the applicable principles of law and standard of review that guide our analysis. "Our review of the court's ruling on the defendant['s] motion to strike is plenary." *St. Denis* v. *de Toledo*, 90 Conn. App. 690, 694, 879 A.2d 503, cert. denied, 276 Conn. 907, 884 A.2d 1028 (2005). "In ruling on a motion to strike, we take the facts alleged in the complaint as true." Id., 691. "After a court has granted a motion to strike, the plaintiff may either amend his pleading [pursuant to Practice Book § 10-44] or, on the rendering of judgment, file an appeal. . . . The choices are mutually exclusive [as] [t]he filing of an amended pleading operates as a waiver of the right to claim that there was error in the sustaining of the [motion to strike] the original pleading. . . . If the allegations in [the plaintiff's] substitute complaint are not materially different from those in his original complaint . . . the waiver rule applies, and the plaintiff cannot now challenge

[6] Practice Book § 10-44 provides in relevant part: "Within fifteen days after the granting of any motion to strike, the party whose pleading has been stricken may file a new pleading; provided that in those instances where an entire complaint, counterclaim or cross complaint, or any count in a complaint, counterclaim or cross complaint has been stricken, and the party whose pleading or a count thereof has been so stricken fails to file a new pleading within that fifteen day period, the judicial authority may, upon motion, enter judgment against said party on said stricken complaint, counterclaim or cross complaint, or count thereof. . . . Nothing in this section shall dispense with the requirements of Sections 61-3 or 61-4 of the appellate rules."

the merits of the court's ruling striking the amended complaint." (Citations omitted; internal quotation marks omitted.) Id., 693–94; see also *Lund* v. *Milford Hospital, Inc.*, 326 Conn. 846, 851, 168 A.3d 479 (2017) ("if the allegations in a complaint filed subsequent to one that has been stricken are not materially different than those in the earlier, stricken complaint, the party bringing the subsequent complaint cannot be heard to appeal from the action of the trial court striking the subsequent complaint" (internal quotation marks omitted)). In short, by filing an amended complaint, a plaintiff is said to have waived the right to appeal from the court's order striking the original complaint.

"If the plaintiff elects to replead following the granting of a motion to strike, the defendant may take advantage of this waiver rule by challenging the amended complaint as not materially different than the [stricken] . . . pleading that the court had determined to be legally insufficient. That is, the issue [on appeal becomes] whether the court properly determined that the [plaintiff] had failed to remedy the pleading deficiencies that gave rise to the granting of the [motion] to strike or, in the alternative, set forth an entirely new cause of action. It is proper for a court to dispose of the substance of a complaint merely repetitive of one to which a demurrer had earlier been sustained." (Internal quotation marks omitted.) *Lund* v. *Milford Hospital, Inc.*, supra, 326 Conn. 850. If the amended complaint is not materially different, the court properly granted the motion to strike and the plaintiff is then bound by the court's judgment striking the amended complaint. See *Parker* v. *Ginsburg Development CT, LLC*, 85 Conn. App. 777, 782, 859 A.2d 46 (2004) (holding that amended complaint was not materially different, binding plaintiff to court's judgment striking amended complaint).

"However, there is an exception to the waiver rule. If the plaintiff pleads facts in the substitute complaint

which are 'materially different' from those in the original complaint, then the waiver rule does not apply." Id., 780. When the waiver rule does not apply, the plaintiff can challenge the merits of the court's ruling striking the amended complaint. See *Parsons* v. *United Technologies Corp.*, 243 Conn. 66, 76, 700 A.2d 655 (1997) (reaching merits of court's ruling striking amended complaint after concluding waiver rule did not apply).

I

The plaintiff first claims that the trial court improperly concluded that his amended complaint was not "materially different" from his original complaint and, therefore, that he had failed to file a new pleading within the meaning of Practice Book § 10-44. Specifically, the plaintiff claims that the court erred by applying the wrong legal standard in its review of the amended complaint, causing it to conclude that the amended complaint was not "materially different" from the original complaint. The plaintiff claims that the changes in the amended complaint are material because they reflect his good faith effort to cure the causation defect identified by the court in striking the original complaint. We agree.

"The law in this area requires the court to compare the two complaints to determine whether the amended complaint advanced the pleadings by remedying the defects identified by the trial court in granting the earlier motion to strike. . . . In determining whether the amended pleading is 'materially different,' we read it in the light most favorable to the plaintiff." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Lund* v. *Milford Hospital, Inc.*, supra, 326 Conn. 851.

To determine whether the amended complaint was "materially different" from the original complaint, "we

first examine the ruling striking the first . . . complaint." *St. Denis* v. *de Toledo*, supra, 90 Conn. App. 694. In the ruling in the matter at hand, the court held that the complaint alleged insufficient facts to support the requisite element of causation. The court concluded that the causation of damages the plaintiff allegedly suffered was speculative. The court found the present case similar to *Meadowbrook Center, Inc.* v. *Buchman*, 149 Conn. App. 177, 193, 90 A.3d 219 (2014) (*Meadowbrook*), because, according to the court, the plaintiff based his damages on what the NYDFS may have done had the defendant adequately informed it about and explained the significance of the changes the ATM Strategy made to the annuity policies. The court explained that the plaintiff did not allege that, had the NYDFS known the full extent of the changes that the ATM Strategy made, it would have prevented the defendant from implementing it. Therefore, the plaintiff could not rely on what the NYDFS may have done in order to plead causation. The court concluded "that the plaintiff's breach of contract claim fails as a matter of law because he has failed to adequately allege that the defendant's actions caused him damages." It is clear from the court's ruling that the defect it identified in striking the original complaint was that the complaint alleged insufficient facts to support the requisite element of causation, specifically, that the defendant's actions caused the plaintiff damages.

In the ruling that is the subject of this appeal, the court reviewed the amended complaint and ultimately concluded that it was not "materially different from the original complaint" and was not a " 'new pleading' " within the meaning of Practice Book § 10-44. The plaintiff argues that the court improperly concluded that the amended complaint was not "materially different" from the original complaint "based solely on its finding that the plaintiff's new allegations failed to *cure* the defect

identified by the trial court in striking the original complaint." (Emphasis added.) The plaintiff argues that "[u]nder the proper legal standard, however, the fact that changes contained in an amended pleading fail to *successfully* cure an earlier defect does not determine the materiality of such changes. . . . [C]hanges in an amended pleading are material if they reflect a *good faith effort* to file a complaint that states a cause of action in a manner responsive to the defects identified by the trial court in its grant of the motion to strike the earlier pleading." (Emphasis in original; internal quotation marks omitted.) The plaintiff contends that "the amended complaint reflects [a] good faith effort to remedy the defect previously identified by the trial court in striking the original complaint" because the amended complaint "included new facts intended to render his claim legally sufficient by providing further support for his allegation that the defendant's unlawful implementation of the ATM strategy resulted in [his] damages." We agree with the plaintiff.

Our Supreme Court has explained that "[c]hanges in the amended pleading are material if they reflect a good faith effort to file a complaint that states a cause of action in a manner responsive to the defects identified by the trial court in its grant of the motion to strike the earlier pleading. . . . Factual revisions or additions are necessary; mere rewording that basically restate[s] the prior allegations is insufficient to render a complaint new following the granting of a previous motion to strike. . . . The changes in the allegations need not, however, be extensive to be material." (Citations omitted; internal quotation marks omitted.) *Lund* v. *Milford Hospital, Inc.*, supra, 326 Conn. 852–53, citing, inter alia, *Parsons* v. *United Technologies Corp.*, supra, 243 Conn. 75–76.

On the basis of our review of the decision striking the original complaint and the plaintiff's amended complaint, we conclude that the changes are materially different.

The plaintiff's amended complaint includes the following relevant additions to the original complaint: "[The] [d]efendant, in breach of the express language of its contract with the plaintiff, took exclusive control of the plaintiff's investment portfolio and sold all or substantially all of the plaintiff's entire equity portfolio for its exclusive benefit and to the extreme financial detriment of the plaintiff. . . . When [the defendant] implemented the ATM Strategy in 2011, [the defendant] sold all or substantially all of the plaintiff's and the other variable annuity policyholders' investment positions without their permission. Later in 2011, after the market rallied, [the defendant] then bought these positions back at much higher prices. . . . [The] plaintiff and other policyholders suffered large losses . . . . Soon after [the defendant's] implementation of the ATM Strategy in 2011, and in the face of the resulting losses suffered by policyholders, the [NYDFS] commenced its investigation into [the defendant].

* * *

"The mechanics of the implementation of the ATM Strategy were the following: [The defendant] sold the equivalent of all of the equity securities in the plaintiff's investment account by means of selling matching S&P 500 futures contracts. This left the plaintiff's account with no equity exposure. When [the defendant] repurchased the S&P 500 futures contracts, it did so at a higher price, immediately resulting in substantial losses passed onto the plaintiff and other similarly situated policyholders. In summary, [the defendant] used the ATM Strategy to hedge its equity exposure and pass on the losses to its clients. By way of example, in the

case of the plaintiff, [the defendant's] actions in liquidating his equity exposure cost him approximately $90,000, or almost 20 [percent] of his original investment. The class lost in excess of $100 to $200 million during the relevant period. . . . Shortly thereafter, [the defendant] ceased using the ATM Strategy in the policies purchased by the class members. . . . Unfortunately, by the time the NYDFS commenced its investigation, the plaintiff's and other policyholders' non-speculative losses were etched in stone. . . . As discussed above, the NYDFS issued the consent order regarding its investigation into [the defendant's] implementation of the ATM Strategy on March 17, 2014. . . . As the ATM Strategy was no longer being applied to any existing policies at that time, the [NYDFS'] findings under the consent order were directed towards [the defendant's] future implementation of the ATM Strategy. . . . In the consent order, the NYDFS required [the defendant] to agree, at minimum, to seek all necessary approvals with regard to New York Insurance Law § 4240 (e) and provide [NYDFS]-approved communications to policyholders when revising fund choices in connection with the ATM Strategy in the future. . . . In addition, the NYDFS required [the defendant] to issue a written report to [the NYDFS] concerning changes to the plan of operations for separate accounts A, 45, and 49 and respond to the [NYDFS'] questions thereon on a quarterly basis for a period of five years. . . . Although the market conditions which triggered [the defendant's] initial use of the ATM Strategy reoccurred, [the defendant] has never sought approval from the NYDFS to use the ATM Strategy again in the manner in which it was used in 2011. The ATM Strategy has not been used in connection with separate accounts A, 45, and 49 since the NYDFS commenced its investigation in 2011. . . . Nevertheless, the damages suffered by the plaintiff and policyholders which resulted from [the defendant's]

unlawful implementation of the ATM Strategy in 2011 had already been incurred. . . . Had [the defendant] sought to use the ATM Strategy again, it would have been required to, at minimum, provide policyholders with notice via communications approved by the NYDFS prior to implementing the ATM Strategy." (Internal quotation marks omitted.)

Despite these additions, the trial court concluded that the amended complaint was not materially different from the original complaint because the new allegations failed to address what the court viewed as the essential failing of the original complaint, namely, that causation was "premised on speculation as to what the regulatory body might have done with respect to the changes in the variable annuity policy at issue."

Factual additions, even if limited, can be read as an attempt to address the defect identified by the trial court in striking the plaintiff's original complaint. *Parsons* v. *United Technologies Corp.*, supra, 243 Conn. 74–75 (only difference between original complaint and amended complaint was addition of specific location in Bahrain to which plaintiff was to be sent for employment, which addressed defect in original complaint). Furthermore, "adding statutory and constitutional references, even if inapposite, may be read as attempting to address the legal insufficiency specifically identified by the trial court . . . making the count materially different." (Internal quotation marks omitted.) *Lund* v. *Milford Hospital, Inc.*, supra, 326 Conn. 854 n.7, citing *Emerick* v. *Kuhn*, 52 Conn. App. 724, 734, 737 A.2d 456, cert. denied, 249 Conn. 929, 738 A.2d 653, cert. denied, 528 U.S. 1005, 120 S. Ct. 500, 145 L. Ed. 2d 386 (1999). Additional language can reflect a good faith effort to remedy the defect identified by the court in striking the original complaint. See *Doe* v. *Marselle*, 38 Conn. App. 360, 365, 660 A.2d 871 (1995) (despite failing to include word "wilful" in amended complaint after being alerted

to defect, additional language sufficient to demonstrate good faith effort), rev'd on other grounds, 236 Conn. 845, 675 A.2d 835 (1996). However, merely reiterating or rewording the same allegations in the amended complaint as in the original complaint does not reflect a good faith effort to address the defect identified in the original complaint and, therefore, does not constitute a material change. See, e.g., *St. Denis* v. *de Toledo*, supra, 90 Conn. App. 696.

The plaintiff's amended complaint does more than merely reiterate the facts alleged in the original complaint. There are significant factual additions describing how the defendant's actions caused the plaintiff damages apart from whatever action the NYDFS may or may not have taken, and these allegations attempt to address the legal insufficiency identified by the trial court. Specifically, the amended complaint includes new facts describing the defendant's ATM Strategy, how it was implemented, and how it allegedly caused the plaintiff damages in specified amounts. The amended complaint contains factual additions that allege that, pursuant to the ATM Strategy, the defendant "sold the equivalent of all of the equity securities in the plaintiff's investment account" by selling certain futures contracts that "left the plaintiff's account with no equity exposure." According to the amended complaint, the defendant then repurchased those futures contracts "at a higher price, immediately resulting in substantial losses passed onto the plaintiff and other similarly situated policyholders." The amended complaint then alleges that, "[i]n summary, [the defendant] used the ATM Strategy to hedge its equity exposure and pass on the losses to its clients. By way of example, in the case of the plaintiff, [the defendant's] actions in liquidating his equity exposure cost him approximately $90,000 or almost 20 [percent] of his original investment. The [putative] class lost in excess of $100 to $200 million

during the relevant period." These additions seek to explain, in more detail, how the defendant's actions, independent of anything the NYDFS did or did not do, caused the plaintiff damages.

We conclude that, when viewed in the light most favorable to the plaintiff, the new allegations set forth in the plaintiff's amended complaint "constitute a good faith effort"; (internal quotation marks omitted) *Lund* v. *Milford Hospital, Inc.*, supra, 326 Conn. 857; to plead causation and, accordingly, the amended complaint is materially different from the original complaint.

II

Because we conclude that the amended complaint is materially different from the original complaint and, therefore, the waiver rule does not apply, we address the plaintiff's challenge to the merits of the court's ruling striking the amended complaint. See *Parsons* v. *United Technologies Corp.*, supra, 243 Conn. 75–76 ("The plaintiff appears to have made a good faith effort to file a complaint that states a cause of action. We are persuaded, accordingly, that by failing to appeal the striking of the [original] complaint, the plaintiff has not waived his right to appeal from the merits of the motion to strike . . . his [amended] complaint."); see also *Lund* v. *Milford Hospital, Inc.*, supra, 326 Conn. 858 ("The new allegations in the substitute complaint . . . materially differ from those in the original complaint for purposes of preserving the plaintiff's right to appeal after repleading pursuant to Practice Book § 10-44. Accordingly, we reach the merits of the plaintiff's claims on appeal.").

The plaintiff claims that the court improperly determined that the amended complaint failed to sufficiently plead causation. Specifically, the plaintiff claims that the court erred by (1) applying the wrong legal standard in concluding that the plaintiff's amended complaint

failed to adequately plead causation and (2) relying upon findings of fact at the pleading stage. We agree.

In Connecticut, the complaint must "contain a concise statement of the facts constituting the cause of action . . . ." Practice Book § 10-20.[7] " 'Connecticut is a fact pleading jurisdiction . . . .' *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 626, 99 A.3d 1079 (2014). Therefore, a pleading must 'contain a plain and concise statement of the material facts on which the pleader relies, but not of the evidence by which they are to be proved . . . .' Practice Book § 10-1.[8] The purpose of fact pleading is to put the defendant and the court on notice of the important and relevant facts claimed and the issues to be tried." (Footnote added; internal quotation marks omitted.) *Godbout* v. *Attanasio*, 199 Conn. App. 88, 111–12, 234 A.3d 1031 (2020). "A motion to strike shall be used whenever any party wishes to contest: (1) the legal sufficiency of the allegations of any complaint, counterclaim or cross claim, or of any one or more counts thereof, to state a claim upon which relief can be granted . . . ." Practice Book § 10-39 (a).

"Whether the court applied the proper legal standard in ruling on the motion to strike presents a question of law over which we exercise plenary review. . . . The legal standard applicable to a motion to strike is well settled. The purpose of a motion to strike is to contest

[7] Practice Book § 10-20 provides: "The first pleading on the part of the plaintiff shall be known as the complaint. It shall contain a concise statement of the facts constituting the cause of action and, on a separate page of the complaint, a demand for relief which shall be a statement of the remedy or remedies sought. When money damages are sought in the demand for relief, the demand for relief shall include the information required by General Statutes § 52-91."

[8] Practice Book § 10-1 provides in relevant part: "Each pleading shall contain a plain and concise statement of the material facts on which the pleader relies, but not of the evidence by which they are to be proved . . . ."

. . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted. . . . A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. . . . [The court takes] the facts to be those alleged in the complaint . . . and [construes] the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . Moreover . . . [w]hat is necessarily implied [in an allegation] need not be expressly alleged. . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. . . . Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Citations omitted; internal quotation marks omitted.) *Plainville* v. *Almost Home Animal Rescue & Shelter, Inc.*, 182 Conn. App. 55, 63, 187 A.3d 1174 (2018).

In Connecticut, "[t]he elements of a breach of contract action are [1] the formation of an agreement, [2] performance by one party, [3] breach of the agreement by the other party and [4] damages." (Internal quotation marks omitted.) *A.C. Consulting, LLC* v. *Alexion Pharmaceuticals, Inc.*, 194 Conn. App. 316, 329, 220 A.3d 890 (2019). "Although this court has intimated that causation is an additional element thereof . . . proof of causation more properly is classified as part and parcel of a party's claim for breach of contract damages." (Citation omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, supra, 149 Conn. App. 186. Causation focuses on whether the plaintiff's loss "may fairly and reasonably be considered [as] arising naturally, i.e., according to the usual course of things, from such breach of contract itself." (Internal quotation marks omitted.) *West Haven*

Sound Development Corp. v. *West Haven*, 201 Conn. 305, 319, 514 A.2d 734 (1986). "[I]n order to recover for breach of contract, a plaintiff must prove that he or she sustained damages as a direct and proximate result of the defendant's breach." *Warning Lights & Scaffold Service, Inc.* v. *O & G Industries, Inc.*, 102 Conn. App. 267, 271, 925 A.2d 359 (2007). "Causation [is] a question of fact for the [fact finder] to determine . . . ." (Internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, supra, 193.

In its motion for entry of judgment, the defendant argued that the amended complaint "[did] not sufficiently plead a breach of contract" because it "fail[ed] to plead facts that sufficiently allege the causation element." (Internal quotation marks omitted.) In the defendant's view, the "plaintiff impermissibly bases his damages on speculation concerning what the [NYDFS] may have done had certain regulatory filings made by [the defendant] not been deficient . . . ." (Internal quotation marks omitted.) At oral argument on the motion, the defendant argued that the plaintiff's amended complaint failed to adequately plead that the defendant's breach caused the plaintiff damages because the complaint included "no allegations of what would have happened had the [NYDFS] gotten the information," that the defendant was required to provide it, and whether the NYDFS "would . . . have done something differently." The defendant further argued that "the plaintiff pleads no facts that would allow the inference that had the [NYDFS] known the full extent of the changes, it would have prevented the defendant from implementing it or that the [NYDFS] would have required the defendant to allow existing policyholders to opt out or that it would have prevented implementation."

The plaintiff agreed that what the NYDFS would have done had the defendant filed the requisite application

under New York Insurance Law § 4240 (e) was speculative because the defendant did not follow the proper procedures, but asserted that what the NYDFS would have done had the defendant followed New York Insurance Law § 4240 (e) was not relevant to the court's consideration of the legal viability of the complaint. The plaintiff argued that the defendant breached the contract by not obtaining the requisite permission from the NYDFS to change the plaintiff's annuity policy, as required by the contract, and that the breach caused the plaintiff damages because the defendant "sold or substantially sold, the equity position, and repurchased it." According to the plaintiff, the "defendant unlawfully made a material change to the strategy that was designed to protect the defendant and it was done at the plaintiff's expense" and, therefore, "what would have happened had [the NYDFS] required notice [prior to the implementation of the ATM Strategy] is something we'll never know because it happened in 2011." In short, the plaintiff argued that because the defendant improperly changed the annuity policy without prior approval, the changes to the policy were automatically approved by the NYDFS, and this caused the plaintiff damages because the changes liquidated the plaintiff's equity exposure, resulting in damages to the plaintiff in the amount of approximately $90,000 or about 20 percent of his original investment. The plaintiff alleges that his damages were incurred immediately upon the implementation of the ATM strategy and, therefore, the speculation concerning what the NYDFS would have done had the defendant followed the proper procedures was entirely irrelevant.

In granting the defendant's motion to strike the original complaint, the court relied on *Meadowbrook Center, Inc.* v. *Buchman*, supra, 149 Conn. App. 193, to find that "the causation of damages the plaintiff has alleged for his breach of contract claim are speculative, and

that, as a result, his complaint fails to plead facts that sufficiently allege the causation element of his breach of contract claim." The court stated: "Like the plaintiff in *Meadowbrook*, the plaintiff here bases his damages on speculation concerning what the NYDFS may have done had the defendant adequately informed and explained the significance of the changes that the ATM Strategy made." In granting the defendant's motion for entry of judgment on the amended complaint, the court referred to its reliance on *Meadowbrook* and held that "[i]n this case, the plaintiff did not supply the essential allegation of fact as to what the [NYDFS] would have done if the defendant had filed a proper disclosure in 2011, probably because this key element is inescapably a matter of speculation. Although the amended complaint contains several new allegations, they fail to address the essential failing of the plaintiff's single contract count, where causation is premised on speculation as to what the regulatory body might have done with respect to the changes in the variable annuity policy at issue."

In response, the plaintiff claims that the court applied the wrong legal standard in relying on *Meadowbrook Center, Inc.* v. *Buchman*, supra, 149 Conn. App. 177. We agree with the plaintiff that *Meadowbrook* is inapposite to the present case. First, we note that *Meadowbrook* did not involve a motion to strike. Rather, *Meadowbrook* involved factual findings by the court and a judgment on the merits. In *Meadowbrook*, after a bench trial took place, the court rendered judgment for the plaintiff and awarded it damages. Id., 182–84. The defendant appealed and claimed, inter alia, that the award of damages stemming from his breach of the contract was impermissibly speculative. Id., 184. On appeal, this court reversed the judgment of the trial court, holding that because the "plaintiff failed to establish that its loss . . . naturally and directly resulted

from the defendant's conduct, the award of [damages was] improper." Id., 194. In sum, *Meadowbrook* is materially distinct from the present case because the judgment in that case was rendered following a bench trial.

The plaintiff also claims that the court improperly relied on prospective findings of fact at the pleading stage to determine that he had failed to adequately plead causation. The plaintiff argues that, to the extent it is relevant, what the NYDFS might have done had the defendant followed the proper procedures is ultimately a question of fact reserved for the trier of fact after an evidentiary hearing. According to the plaintiff, at the pleading stage, his "amended complaint adequately alleges each element required to sustain a breach of contract action, including adequately alleging 'damages resulting from the breach.' "

At the pleading stage, a plaintiff is not required to prove that he sustained damages as a result of the defendant's breach. See *Godbout* v. *Attanasio*, supra, 199 Conn. App. 111–12 ("[A] pleading must contain a plain and concise statement of the material facts on which the pleader relies, but not of the evidence by which they are to be proved . . . . The purpose of fact pleading is to put the defendant and the court on notice of the important and relevant facts claimed and the issues to be tried." (Citation omitted; internal quotation marks omitted.)). Rather, "[t]o survive a motion to strike, the plaintiff's complaint must allege all of the requisite elements of a cause of action." (Internal quotation marks omitted.) *A.C. Consulting, LLC* v. *Alexion Pharmaceuticals, Inc.*, supra, 194 Conn. App. 329.

Here, we conclude that the plaintiff has alleged facts sufficient to state a cause of action for breach of contract. The plaintiff has included in his amended complaint, among other things, facts describing how the defendant's breach has allegedly caused him damages.

Specifically, the plaintiff has alleged that his contract required the defendant to (1) comply with all applicable laws, (2) establish and maintain the plaintiff's annuity account pursuant to New York law, and (3) seek approval from the NYDFS prior to making a material change or a change to the investment strategy. The amended complaint alleges that the defendant did not seek approval from the NYDFS prior to implementing the ATM Strategy, as required by the contract, resulting in a breach. The plaintiff alleges that, as a result of the breach, the ATM Strategy automatically went into effect. Under the newly implemented ATM Strategy, the plaintiff alleges, the defendant sold the equivalent of all of the equity securities in the plaintiff's account, leaving his account with no equity exposure. Then, according to the plaintiff, the defendant repurchased the securities at a higher price, immediately resulting in the losses to him and the putative class.

"[Construing] the complaint in the manner most favorable to sustaining its legal sufficiency"; (internal quotation marks omitted) *Plainville* v. *Almost Home Animal Rescue & Shelter, Inc.*, supra, 182 Conn. App. 63; we conclude that these facts allege all of the requisite elements of a cause of action for breach of contract. Whether the plaintiff can prove causation properly should be left to the finder of fact. See *Meadowbrook Center, Inc.* v. *Buchman*, supra, 149 Conn. App. 193 ("[c]ausation [is] a question of fact for the [fact finder] to determine" (internal quotation marks omitted)).

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

In this opinion the other judges concurred.

WILLIAM L. ROACH *v.* TRANSWASTE, INC.
(AC 43861)

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

Syllabus

The plaintiff sought damages from the defendant for the alleged wrongful termination of his employment in violation of statute (§ 31-51q). The plaintiff, who was employed as a truck driver by the defendant, alleged that his employment was terminated after raising safety complaints to the defendant. After a jury trial, the court rendered judgment for the plaintiff in accordance with the jury's verdict. The plaintiff thereafter filed a motion for attorney's fees, seeking an amount calculated pursuant to the lodestar method, in which the number of hours expended by counsel on the litigation and counsel's hourly rate are used to determine reasonable attorney's fees. The court, however, awarded attorney's fees on a one-third contingency basis. The court concluded that the plaintiff's fee agreement with his counsel was ambiguous because the agreement stated both that the law firm's employment was on a contingency fee basis and that time would be kept on an hourly basis, and, in the event a recovery is made and attorney's fees are awarded, the law firm shall receive whichever amount was greater. The plaintiff appealed and the defendant filed a cross appeal, claiming that the court erred by awarding attorney's fees to the plaintiff, by failing to set aside the jury's award of damages, by rendering judgment in favor of the plaintiff, and by providing an incorrect charge to the jury. *Held*:

1. The trial court erred by failing to apply the lodestar method in calculating the amount of attorney's fees awarded to the plaintiff: in resolving the alleged ambiguity in the fee agreement, the court, with no further explanation, awarded attorney's fees in the amount of one third of the damages that the plaintiff received; the fee agreement contemplated both the one-third contingency and lodestar methods of calculating attorney's fees but clearly stated that the law firm shall receive as its fee whichever was the greater of the two, and, because the court failed to apply the provision of the fee agreement under which the plaintiff sought an award of attorney's fees and failed to consider that such an award may be greater than one based solely on the jury's award of damages, the court's award was improper and a new hearing was required.
2. The defendant could not prevail on its claim that the trial court erred in awarding any attorney's fees to the plaintiff, which was based on its claim that the plaintiff failed to satisfy the legal standard for granting attorney's fees and did not raise or preserve his claim in his complaint or at trial: the plaintiff obtained a judgment in his favor and was awarded damages, § 31-51q provides for reasonable attorney's fees should a party

prevail in an action brought under that statute, and the plaintiff included a claim for attorney's fees in the prayer for relief in his complaint; moreover, the defendant did not cite any requirement that a claim for attorney's fees must be made in the body of a complaint to constitute sufficient notice.

3. The defendant's claim that the trial court erred by failing to set aside the jury's award of damages because it was not supported by sufficient evidence was unavailing; notwithstanding the defendant's claim that the plaintiff failed to provide evidence of his lost wages, the plaintiff's testimony constituted sufficient evidence to support the jury's verdict.
4. The defendant could not prevail on its claim that the trial court erred by rendering judgment in favor of the plaintiff because there was no evidence to support the jury's conclusion that the plaintiff's employment had been terminated for filing safety complaints; the plaintiff testified that he believed his employment was terminated because he could not say what was on his mind, he made complaints about safety violations and his employment was terminated shortly thereafter, and he felt that he was discriminated against because the employment of other individuals, despite those individuals taking various actions, including stealing and smashing up trucks, was not terminated.
5. The trial court correctly instructed the jury concerning the applicable standard of proof; the defendant, in arguing that the court's use of the term "substantially motivating factor" in its instructions discussing the reason for the plaintiff's discharge rendered the charge vague, confused the standard for causation with the applicable burden of proof, which the court clearly set forth in its charge, and this court concluded that it was not reasonably probable that the jury was misled.

Argued November 18, 2021—officially released February 15, 2022

Procedural History

Action to recover damages for, inter alia, the allegedly wrongful termination of the plaintiff's employment, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Noble, J.*; verdict and judgment for the plaintiff; thereafter, the court, *Noble, J.*, awarded the plaintiff attorney's fees, and the plaintiff appealed and the defendant cross appealed to this court. *Reversed in part*; *further proceedings*.

Zachary T. Gain, with whom, on the brief, was *James V. Sabatini*, for the appellant-cross appellee (plaintiff).

Glenn L. Formica, for the appellee-cross appellant (defendant).

Opinion

VERTEFEUILLE, J. This appeal arises from an employment retaliation action brought by the plaintiff, William L. Roach, against the defendant, Transwaste, Inc. In his two count complaint, the plaintiff alleged that his employment was wrongfully terminated in violation of public policy and that this termination violated General Statutes § 31-51q.[1] After a jury trial, the court rendered judgment in accordance with the jury's verdict in favor of the plaintiff. The plaintiff thereafter filed a motion for attorney's fees seeking an amount calculated pursuant to the lodestar method.[2] The court, however, awarded the plaintiff attorney's fees on a one-third contingency basis. The plaintiff appealed, claiming that the court erred by failing to apply the lodestar method in calculating the amount of the award of attorney's fees. The defendant filed a cross appeal, claiming that the court erred by (1) awarding any attorney's fees to the plaintiff, (2) failing to set aside the jury's award of damages because it was not supported by sufficient evidence, (3) rendering judgment in favor of the plaintiff because there was no evidence to support the jury's

[1] General Statutes § 31-51q provides in relevant part: "Any employer . . . who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages. . . ."

[2] The lodestar method entails "examining the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate" to calculate an amount of reasonable attorney's fees. (Internal quotation marks omitted.) *A Better Way Wholesale Autos, Inc.* v. *Saint Paul*, 192 Conn. App. 245, 262, 217 A.3d 996 (2019), aff'd, 338 Conn. 651, 258 A.3d 1244 (2021).

conclusion that the plaintiff's employment had been terminated for filing safety complaints, and (4) providing an incorrect charge to the jury. We agree with the plaintiff and reverse the judgment of the court with respect to the calculation of attorney's fees. We affirm the judgment in all other respects.

The following facts and procedural history, as set forth in the court's memorandum of decision deciding various postjudgment motions filed by the parties, are relevant to our resolution of the claims of both parties on the appeal and the cross appeal. "The plaintiff possesses a commercial driver's license and was employed as a truck driver by the defendant from 2013 through 2015. The defendant is a trucking company located in Wallingford . . . that specializes in the transportation and disposal of special and hazardous waste. The owner and president of the defendant is John Barry. The plaintiff testified that he was terminated by Barry after raising safety complaints to the defendant.

"In July, 2015, the plaintiff complained of a problem with the steering link [in his tractor] while driving in Pennsylvania. Barry denied the plaintiff's request to buy a replacement and ordered the plaintiff to drive back to Wallingford. [The plaintiff testified that] [t]his was unsafe because the failed steering link, one of two, controlled the steering of one of the two front tires [of his tractor]. The next day [the plaintiff] was told not to show [up] for work . . . . [H]e [later] found out that his tractor had been driven, unrepaired, by another driver. The plaintiff was not paid for the day he missed. In August, 2015, while in Pennsylvania, a trailer [the plaintiff] was driving suffered a blown tire. Barry denied the plaintiff's requests to buy a replacement tire despite [his] expression of concern that it was unsafe to drive the loaded trailer without the normal two tire combination at the end of the axle. The plaintiff was nevertheless ordered to complete his trip with only one tire rather

than the two tires with which he had been driving. Another incident occurred in August, 2015, in which the plaintiff complained over the course of [several] weeks of a problem with vibration in his tractor . . . . [The plaintiff] was told by Barry that [his tractor] had been inspected, there was nothing wrong with it and [that] he should continue to drive it. Ultimately, the plaintiff refused to drive the tractor and after continued complaints was told to take it to [a] dealer, who diagnosed [the issue] as [a] failure of the universal joint.

"On November 10, 2015, one tire of a two tire assembly on the plaintiff's tractor blew. [The plaintiff] [pleaded] with the office manager to buy a new tire . . . [but was told] that Barry did not like to buy tires on the road. Ultimately, [the office manager] told the plaintiff to buy a used tire, and he did so. Finally, on November 16, 2015, the plaintiff noticed [the] check engine light [in his tractor] that appeared approximately twenty miles after he left the defendant's location in the early morning hours [at the] start [of] a trip. [The plaintiff] returned to the defendant's garage and left the tractor there with the engine running so that the mechanic would be able to diagnose the problem. The plaintiff locked the truck before he left the defendant's yard and returned home. He was fired [later] that day without being given a reason. Barry testified at trial that he terminated the plaintiff because it was unsafe to permit the engine [of his tractor] to idle for . . . several hours.

"The plaintiff testified that he was out of work for about six months. [While employed by the defendant] [h]e was paid by the mile at a rate of [forty-six cents] per mile and he averaged a little [more] than 2000 miles per week. He also testified that during the two years he worked for the defendant he drove [a total of] approximately 230,000 miles. At the conclusion of the

plaintiff's case, the defendant moved for a directed verdict. The court denied the motion. The jury [then] returned a verdict [in favor of the plaintiff] for $24,288."

After the jury returned its verdict, the defendant filed a motion for judgment notwithstanding the verdict, a motion for remittitur, and a motion to set aside the verdict. The court denied each of the defendant's motions. The plaintiff filed a motion for attorney's fees, seeking reasonable fees calculated pursuant to the lodestar method. See footnote 1 of this opinion. The court granted the plaintiff's motion but rejected the use of the lodestar method, and instead awarded the plaintiff attorney's fees in the amount of $8087.90, or one third of the award of damages in his favor. Additional facts and procedural history will be set forth as necessary.

I

THE PLAINTIFF'S APPEAL

The plaintiff claims that, because he was a prevailing party under § 31-51q, he should have been awarded reasonable attorney's fees calculated pursuant to the lodestar method, as required by his fee agreement with his counsel. Specifically, the plaintiff argues that his fee agreement with his counsel unambiguously provided that he was entitled to recover as attorney's fees "33 1/3% of the total recovered" or attorney's fees based on the hourly time records of counsel billed at counsel's hourly rate, "*whichever is the greater of the two*." (Emphasis added.) He argues that the court's failure to award attorney's fees pursuant to the fee agreement was an abuse of discretion. In response, the defendant argues that the plaintiff is not entitled to attorney's fees at all, and that, in the alternative, the court properly awarded attorney's fees to the plaintiff in accordance with terms of the fee agreement. We agree with the plaintiff.

We begin by setting forth the applicable standard of review. "It is well established that we review the trial court's decision to award attorney's fees for abuse of discretion. . . . This standard applies to the amount of fees awarded . . . and also to the trial court's determination of the factual predicate justifying the award. . . . Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) *Noel* v. *Ribbits, LLC*, 132 Conn. App. 531, 534–35, 35 A.3d 1078 (2011).

In the present case, in addressing the plaintiff's motion for attorney's fees, the court concluded that the plaintiff's fee agreement was ambiguous because it states both that the "employment is on a contingency fee basis" and that "[t]ime shall nevertheless be kept on an hourly basis [and] in the event that a recovery is made and attorney['s] fees are awarded by statute or a court . . . then the law firm shall receive the amount as its legal fee, *whichever is the greater of the two*." (Emphasis added; internal quotation marks omitted.) In resolving this alleged ambiguity, the court, with no further explanation, opted to award the plaintiff attorney's fees in the amount of $8087.90, or one third of the damages that he received. In resolving this claim, we conclude that the relevant facts of *Noel* are nearly identical to those in the present case. Accordingly, our decision in that case controls our resolution of the plaintiff's claim in the present case.

In *Noel*, an employment discrimination case, the plaintiffs' fee agreements with their attorneys stated: "In the event of a successful resolution of the case, I

agree that my attorneys shall be compensated at the rate of one-third of the entire settlement or judgment I receive in connection with my claims *or an award of reasonable attorney's fees, whichever is greater*." (Emphasis in original; internal quotation marks omitted.) *Noel* v. *Ribbits, LLC*, supra, 132 Conn. App. 534. After a jury trial, the court rendered judgment in part in favor of the plaintiffs, awarding one plaintiff $1600 in economic damages and the other plaintiff no damages. Id., 533. The plaintiffs then filed a motion seeking an award of reasonable attorney's fees. Id. The court denied the motion as to the plaintiff who did not recover any monetary damages and awarded the plaintiff that did receive $1600 in damages attorney's fees in the amount of $533.33, or one third of the award in her favor. Id., 533–34. In its memorandum of decision, the court stated that it based its award on the one-third contingency provision of the fee agreements. Id., 533. The plaintiffs then appealed, claiming that "the court improperly based its award of attorney's fees solely on the one-third contingency provision of their fee agreements to the exclusion of other pertinent language in their fee agreements." Id., 534. This court reversed the judgment of the trial court, holding that its award of attorney's fees was improper because, "[i]n fashioning [the] award, [it] did not consider the provision in the agreements for a reasonable award that might be greater than one based solely on the jury's award of damages." Id., 535.

In the present case, as previously set forth in this opinion, the fee agreement between the plaintiff and his attorney contemplated both the one-third contingency and lodestar methods of calculating attorney's fees but clearly stated that "the law firm shall receive . . . as its legal fee . . . whichever is the greater of the two." As in *Noel*, the court in the present case, "in considering the plaintiffs' claims for attorney's fees . . . limited its

consideration to [only one] provision of the fee [agreement]." *Noel* v. *Ribbits, LLC*, supra, 132 Conn. App. 535. Because the court failed to apply the provision of the fee agreement under which the plaintiff sought an award of attorney's fees and failed to consider that such an award may be greater than one based solely on the jury's award of damages; see, e.g., id.; we conclude that the court's award was improper. Furthermore, because the court did not determine the reasonableness of the plaintiff's claimed attorney's fees based on the hours spent by the attorneys at their hourly rates, a new hearing on the plaintiff's motion for an award of attorney's fees is required, employing the lodestar method.

II

THE DEFENDANT'S CROSS APPEAL

In its cross appeal, the defendant claims that the court erred by (1) awarding any attorney's fees to the plaintiff, (2) failing to set aside the jury's award of damages because it was not supported by sufficient evidence, (3) rendering judgment in favor of the plaintiff because there was no evidence to support the jury's conclusion that the plaintiff's employment had been terminated for filing safety complaints, and (4) giving an incorrect charge to the jury concerning the applicable standard of proof. We address each of the defendant's claims in turn.

A

The defendant's first claim is that the court erred by awarding any attorney's fees to the plaintiff. Specifically, the defendant argues that the plaintiff (1) failed to satisfy the legal standard for granting attorney's fees, and (2) "did not raise or preserve his claim for attorney's fees in [his] . . . complaint and did not preserve his claim at trial." In response, the plaintiff argues that (1) he satisfied the legal standard for awarding attorney's

fees because he had a valid "hybrid fee" agreement with his attorney, and (2) his complaint "clearly made a claim for attorney's fees in the prayer for relief." We agree with the plaintiff.

We first set forth the applicable legal standard. "Any determination regarding the scope of a court's subject matter jurisdiction or its authority to act presents a question of law over which our review is plenary. . . . Generally, it is clear that [t]he court is not permitted to decide issues outside of those raised in the pleadings. . . . Pleadings have an essential purpose in the judicial process. . . . For instance, [t]he purpose of the complaint is to put the defendants on notice of the claims made, to limit the issues to be decided, and to prevent surprise. . . . [T]he concept of notice concerns notions of fundamental fairness, affording parties the opportunity to be apprised when their interests are implicated in a given matter. . . . Whether a complaint gives sufficient notice is determined in each case with reference to the character of the wrong complained of and the underlying purpose of the rule which is to prevent surprise upon the defendant. . . . [A]ny judgment should conform to the pleadings, the issues and the prayers for relief. . . . [G]enerally . . . the allegations of the complaint provide the measure of recovery, and . . . the judgment cannot exceed the claims pleaded, including the prayer for relief." (Citations omitted; internal quotation marks omitted.) *Lynn* v. *Bosco*, 182 Conn. App. 200, 213–15, 189 A.3d 601 (2018). Accordingly, the question before us is whether the court properly found that the plaintiff, through his complaint, put the defendant on sufficient notice of his claim for attorney's fees.

The plaintiff instituted the present action against the defendant pursuant to § 31-51q, which provides in relevant part: "Any employer . . . who subjects any employee to discipline or discharge on account of the

exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and employer, shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and *for reasonable attorney's fees as part of the costs of any such action for damages*. . . ." (Emphasis added.) Additionally, in his prayer for relief in his complaint, the plaintiff clearly included a claim for attorney's fees. The defendant fails to cite any requirement that a claim for attorney's fees must be made in the body of a complaint to constitute sufficient notice. This court has explicitly held that, for purposes of determining sufficiency of notice, the prayer for relief should be considered. See *Lynn* v. *Bosco*, supra, 182 Conn. App. 215. Accordingly, for a party to be awarded attorney's fees pursuant to § 31-51q, that party must succeed on his or her retaliation claim against the employer. In the present case, the court rendered judgment in favor of the plaintiff on his claim after the jury returned its verdict in the plaintiff's favor and awarded him damages. Because the plaintiff succeeded on his claim, his is entitled to an award of reasonable attorney's fees pursuant to § 31-51q, and the defendant's argument fails.

Moreover, the defendant's argument that the plaintiff did not properly raise or preserve his claim for attorney's fees is easily disposed of because, as the plaintiff argues, he clearly included a claim for attorney's fees in his prayer for relief in his complaint. Accordingly, we conclude that the plaintiff provided the defendant with sufficient notice of his claim for attorney's fees, and reject the defendant's claim that the court erred by awarding attorney's fees to the plaintiff.

B

The defendant's second claim is that the court erred by failing to set aside the jury's award of damages because the verdict was not supported by sufficient evidence. Specifically, the defendant argues that the plaintiff "failed to provide any evidence of his claimed lost wages." In response, the plaintiff argues that his testimony at trial constitutes sufficient evidence to support the jury's verdict. We agree with the plaintiff.

After the jury returned its verdict, the defendant filed a motion for remittitur seeking to have the court "remit the award of damages [to the plaintiff] to zero dollars." According to the defendant, remittitur was appropriate because "[t]he [jury's] verdict [was] excessive [and] because . . . [the plaintiff] failed to provide either tangible evidence or even to testify with any specificity [as] to the amount of damages." The court denied the defendant's motion, holding that "the plaintiff provided sufficient evidence that the jury was able to, and did, [use to] arrive at a reasonable estimate of his lost wages." Specifically, the court pointed to the plaintiff's testimony that he was paid forty-six cents per mile, drove approximately 230,000 miles over a two year period, and was out of work for "[a]bout six months."

The court further explained: "The jury found, as indicated on its responses to the jury interrogatories, that the plaintiff was owed for 2200 miles per week at a rate of forty-six cents per mile over a period of twenty-four weeks for a total of $24,288. The jury reasonably and logically reached these conclusions based on a division of 230,000 miles over two years by the number of weeks in two years, 104, to arrive at an estimate of weekly mileage of approximately 2211 miles rounded to the awarded figure of 2200. The latter figure, when multiplied by [forty-six cents] per mile yields a weekly income of $1012. In turn, this number may be multiplied

by twenty-four weeks—an estimate of four weeks per month for six months—to arrive at the jury's award of damages in the amount of $24,288. While the calculations so inferred from the testimony and jury interrogatories are not reflective of absolute precision, they nevertheless arrive at a *reasonable estimate derived from the trial evidence*." (Emphasis added.)

We now turn to the applicable standard of review for sufficiency of the evidence. "With respect to appellate review . . . [our Supreme Court has] explained that our review of the trial court's decision [to grant or deny remittitur] requires careful balancing. . . . [T]he decision whether to reduce a jury verdict because it is excessive as a matter of law . . . rests solely within the discretion of the trial court. . . . [T]he same general principles apply to a trial court's decision to order a remittitur. [Consequently], the proper standard of review . . . is that of an abuse of discretion. . . . [T]he ruling of the trial court . . . is entitled to great weight and every reasonable presumption should be given in favor of its correctness. . . . Even under this deferential standard of review, however, we have not shied away from ordering remittitur when the record failed to support the jury's award of damages." (Citations omitted; internal quotation marks omitted.) *Ashmore* v. *Hartford Hospital*, 331 Conn. 777, 783–84, 208 A.3d 256 (2019).

Considering the record, and our deferential standard of review, we conclude that the court did not abuse its discretion in declining to set aside the jury's award of damages. As we previously set forth in this opinion, there is clear evidence in the record from which the jury could have arrived at its verdict and the amount of the award of damages to the plaintiff. Moreover, the court, "having observed the trial and evaluated the testimony firsthand, is better positioned . . . to assess . . . the aptness of the award"; id., 783; and the court

concluded "that the jury could reasonably and legally have reached the verdict that it did." Accordingly, we reject the defendant's claim.

C

The defendant's third claim is that the court erred in rendering judgment in favor of the plaintiff because there was insufficient evidence to support the jury's conclusion that the plaintiff's employment had been terminated for filing safety complaints. In response, the plaintiff argues that the jury's conclusion was reasonable in light of the plaintiff's testimony "that he felt that his termination was discriminatory . . . [and] that he made complaints about safety violations and was terminated shortly thereafter." (Citation omitted.) We agree with the plaintiff.

We begin with our standard of review. "A party challenging the validity of the jury's verdict on grounds that there was insufficient evidence to support such a result carries a difficult burden. In reviewing the soundness of a jury's verdict, we construe the evidence in the light most favorable to sustaining the verdict. . . . We do not ask whether we would have reached the same result. [R]ather, we must determine . . . whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict . . . . If the jury could reasonably have reached its conclusion, the verdict must stand." (Internal quotation marks omitted.) *Wager* v. *Moore*, 193 Conn. App. 608, 616, 220 A.3d 48 (2019).

In the present case, the defendant claims that the plaintiff, through his testimony, was "unable to prove or establish that [the defendant] violated a public policy, much less terminated him because he complained about a violation." The record, however, belies this claim. The plaintiff clearly testified that he believed that his employment was terminated because he could not

"really say [what was] on [his] mind," and that "[he felt it was] discriminatory . . . [because] certain people at that job [could] smash up trucks, have tow aways out of state, steal, and [did not] get terminated." Although this testimony, as the trial court stated, "is insufficient to establish directly the grounds for [the plaintiff's] termination," the jury reasonably could have inferred from it that the plaintiff's employment was terminated for filing safety complaints. For this reason, we reject the defendant's claim.

D

The defendant's final claim is that the court erred by giving an incorrect charge to the jury. Specifically, the defendant argues that "[t]he charge was both vague and confusing as to the standard of proof in the case." In response, the plaintiff argues that the court properly instructed the jury because it precisely followed the relevant statutory language when it charged the jury. We agree with the plaintiff.

"[W]e [now] set forth the standard of review applicable to claims of instructional error. A jury instruction must be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. . . . Therefore, [o]ur standard of review on this claim is whether it is reasonably probable that the jury was misled." (Internal quotation marks omitted.) *Allen* v. *Shoppes at Buckland Hills, LLC*, 206 Conn. App. 284, 288–89, 259 A.3d 1227 (2021).

In the present case, the court charged the jury as follows: "In this case, the plaintiff claims that the defendant terminated him in retaliation for reporting issues related to commercial motor vehicle safety, including unsafe conditions relating to overweight loads, mechanical problems including vibration in his [tractor] caused by a missing or damaged universal joint, and his insistence on not driving with a missing tire. The court instructs you that . . . commercial motor vehicle safety involves important public policy issues related to the safety of the public and the plaintiff on public highways. In order to prevail on his claim for wrongful discharge, the plaintiff must then prove by a fair preponderance of the evidence that the defendant terminated him in retaliation for his complaints about the safety issues.

"Wrongful discharge in violation of [§] 31-51q: The statute creates a cause of action for damages to protect [an] employee from retaliatory action—in this case discharge—illegally grounded in the employee's exercise of enumerated constitutionally protected rights. In this case the right at issue is the type of speech. Specifically, speech that implicates serious wrongdoing or threats to health and safety on a matter of public concern. Additionally, the speech must be one in which the employee's interest in the speech outweighs the employer's interest in the efficient performance of services. Therefore, in order for the plaintiff to prove a violation of the statute, he must prove that he engaged in speech which, one, addresses serious wrongdoing or threats to health and safety on a matter of public concern, and, two, the employee's interest in the speech outweighs the employer's interest in promoting the efficient performance of its work. He must also prove, three, that there was a causal relationship between the protected speech and his discharge, and further that,

four, the speech did not substantially or materially interfere with his bond fide job performance or with his working relationship with his employer. . . .

"In this case, the court has found, as a matter of law, that the complaints, that is [the plaintiff's] speech as . . . previously described, [was] on a matter of public concern. The plaintiff must still prove, however, that his complaints addressed serious wrongdoings or threats to health and safety on this matter of public concern. The parties agree that [the plaintiff] was discharged from his employment.

"You must . . . determine whether there was a causal relationship between the protected speech and his discharge. Cause in this case means that his discharge was substantially motivated by his complaints. If you do find that a substantially motivating factor in the plaintiff's discharge was . . . his complaints, you will continue to your deliberations on this claim. If you do not find that his protected speech was a substantially motivating factor in his discharge, you must find in favor of the defendant.

"In order for the plaintiff to recover, you must also find that he has proven that his speech, here the complaints, did not substantially or materially interfere with his bona fide job performance or with his working relationship with his employer.

"If you find that the plaintiff has proven all of these factors, and only if you find that the plaintiff has proven all of these factors, you shall find in favor of the plaintiff on this claim."

After the court finished charging the jury, the defendant's counsel objected to the court's use of the term substantially motivating factor. According to the defendant's counsel, the court "should have either not used the term [substantially motivating factor] or better

explained the difference between the substantially motivating factor and the burden of proof." The defendant argues that the court's use of the term "substantially motivating factor" rendered the charge "both vague and confusing as to the standard of proof in the case, [i]n effect . . . creat[ing] two standards for the [j]ury to decide." (Emphasis omitted; internal quotation marks omitted.) In making this argument, however, the defendant has confused the standard for causation with the applicable burden of proof, which the court clearly set forth earlier in its charge: "[I]n this case the plaintiff has the burden of proof with respect to his claims . . . . In order to meet his burden of proof, the plaintiff must satisfy you that his claims on an issue are more probable than not. . . . In civil cases such as this one . . . [t]he party who asserts a claim has the burden of proving it by a fair preponderance of the evidence. That is, the better or weightier evidence must establish that, more probably than not, the assertion is true." Having reviewed the charge in its entirety, we conclude that it is not reasonably probable that the jury was misled because the charge was clear as to the applicable burden of proof and it is highly unlikely that the jury was confused as to the applicable standard of proof. Accordingly, we reject the defendant's claim.

The judgment is reversed only with respect to the award of attorney's fees and the case is remanded for a new hearing on the plaintiff's motion for attorney's fees; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

KIMBERLY KARANDA *v.* SHELBY BRADFORD (AC 43749)

Elgo, Suarez and Vertefeuille, Js.

Syllabus

The plaintiff sought to recover damages for personal injuries that she allegedly sustained during a motor vehicle accident as a result of the defendant's negligence. Thereafter, the trial court granted the defendant's

motion for an order of compliance and ordered the plaintiff to comply with the defendant's outstanding discovery requests. Subsequently, the defendant filed motions for an order compelling the plaintiff's deposition, which the court granted, and for a judgment of nonsuit on the basis of the plaintiff's continued failure to comply with discovery requests. The court ordered the plaintiff to comply fully with the defendant's discovery requests or face the imposition of sanctions. Thereafter, the defendant filed two motions for a judgment of nonsuit on the bases that the plaintiff had failed to comply with a substantial portion of the discovery requests and that the plaintiff had not attended her deposition as ordered by the court. Following argument, the court granted the defendant's motions and rendered judgment dismissing the plaintiff's action on July 1, 2019. The plaintiff filed a motion to open the judgment on October 28, 2019, but did not attach an affidavit as required by statute (§ 52-212 (c)), and, although the plaintiff filed an affidavit on November 7, 2019, that date fell outside of the four month range permitted by § 52-212. The court denied the plaintiff's motion. On appeal, *held* that the trial court did not abuse its discretion in denying the plaintiff's motion to open the judgment of nonsuit: the plaintiff filed her motion without the affidavit required by § 52-212 (c), and the affidavit that she subsequently filed was untimely; moreover, the court properly determined that the plaintiff's affidavit did not meet the substantive requirements of § 52-212 (a), as the plaintiff merely alleged that she had maintained a good cause of action but did not show that a good defense existed at the time the judgment of dismissal was rendered.

Argued October 5, 2021—officially released February 15, 2022

Procedural History

Action to recover damages for personal injuries sustained by the plaintiff as a result of the defendant's alleged negligence, brought to the Superior Court in the judicial district of Hartford and transferred to the judicial district of Tolland, where the court, *Farley, J.*, granted the defendant's motions for a judgment of nonsuit and rendered judgment dismissing the action; thereafter, the court denied the plaintiff's motion to open the judgment, and the plaintiff appealed to this court. *Affirmed.*

Erica A. Barber, for the appellant (plaintiff).

Kelly B. Gaertner, with whom, on the brief, was *Carmine Annunziata*, for the appellee (defendant).

Opinion

ELGO, J. The plaintiff, Kimberly Karanda, appeals from the judgment of the trial court denying her motion to open a judgment of nonsuit due to her noncompliance with a discovery order. The plaintiff claims that the court did not properly evaluate her motion pursuant to General Statutes § 52-212a and Practice Book § 17-43. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. On March 14, 2016, the plaintiff and the defendant, Shelby Bradford, were involved in a motor vehicle collision on an on-ramp to Route 2 in Glastonbury. On March 22, 2018, the plaintiff brought an action alleging the defendant's negligence. On August 6, 2018, the defendant filed an answer and a claim for a jury trial. On August 15, 2018, the plaintiff filed a certificate of closed pleadings.

On February 13, 2019, the defendant filed a motion for an order of compliance pursuant to Practice Book § 13-14. The defendant alleged that the plaintiff had failed to respond to several interrogatories and requests for production and outlined in her motion a comprehensive list of materials that the plaintiff had not yet provided. On February 25, 2019, the court ordered the plaintiff to comply with the defendant's outstanding discovery requests "by March 22, 2019."

On March 28, 2019, the defendant filed two motions. The defendant first moved for the court to compel the plaintiff's deposition to take place on June 7, 2019, relying on the fact that trial was scheduled to begin on October 1, 2019, and the plaintiff's deposition already had been postponed twice.[1] The defendant also moved

[1] The plaintiff's deposition was originally scheduled for January 22, 2019. The defendant's counsel postponed the deposition on account of the plaintiff's failure to "compl[y] with the defendant's 7/26/18 standard discovery requests." The deposition was then rescheduled for March 21, 2019, only to be postponed again due to a conflict with the plaintiff's availability.

for a judgment of nonsuit against the plaintiff, pursuant to Practice Book § 13-14, on the ground that the plaintiff failed to comply with numerous discovery requests[2] in violation of the court's February 25, 2019 order. On April 14, 2019, the court granted the defendant's motion to compel the plaintiff's deposition on the requested date of June 7, 2019. Shortly thereafter, on April 29, 2019, the court ordered the plaintiff to fully comply with the defendant's discovery requests by May 17, 2019. The court noted that a "[f]ailure to fully comply" with the order "may result in the imposition of sanctions."

The defendant subsequently filed two additional motions for judgment of nonsuit. The first such motion, filed on May 23, 2019, relied in large part on the same grounds as the defendant's prior motion for nonsuit with respect to the plaintiff's failure to comply with the defendant's discovery requests. The defendant added that, although the plaintiff had filed two notices of compliance between that date and the court's April 29, 2019 order, the plaintiff still had not complied with a substantial portion of the defendant's requests. On June 17, 2019, the court scheduled argument on the defendant's May 23, 2019 motion for July 1, 2019. The defendant filed another motion for a judgment of nonsuit on June 19, 2019, on the ground that the plaintiff did not attend her deposition as ordered by the court on April 14, 2019. That motion was originally designated to be taken on the papers, but the court and the parties agreed that it would be considered together with the defendant's May 23, 2019 motion for nonsuit.

[2] In her motion, the defendant alleged that, "[s]pecifically, the plaintiff has failed to provide the following . . . [a]ll records and bills for treatment with Dr. Tushak and Dr. Miller . . . [c]omplete responses to interrogatories # 6 and #11–14 . . . [d]ocumentation of any liens in place . . . [r]ecords for prior treatment for sleep issues . . . [and] [a]ll records and bills for treatment after 4/24/18," and that, "[t]o date, the plaintiff has also failed to comply with the defendant's supplemental Medicare discovery requests."

The court heard argument from the parties on those motions for nonsuit on July 1, 2019. The plaintiff initially argued that she continued to seek the requested records, and that nonresponsiveness on the part of her health care provider was to blame for the delay. In a colloquy with the plaintiff's counsel, the court emphasized that it "had entered an order not that you work on [complying with the discovery requests], but that you respond by a certain date and you didn't do that. . . . I said you have until next date to get this done and you didn't get it done." When asked by the court why the plaintiff did not attend her June 7, 2019 deposition, the plaintiff's counsel conceded that he could not "really give an explanation for that." Citing the plaintiff's failure to appear at her deposition as ordered by the court and her failure to fully comply with the defendant's discovery requests, the court granted the defendant's motions for a judgment of nonsuit and dismissed the action.

On October 28, 2019, the plaintiff filed a motion to open the judgment. The plaintiff alleged, inter alia, that she was "ready, willing, and able to be deposed within the next [thirty] days" and that the materials sought by the outstanding discovery requests did not exist. In her November 4, 2019 objection to the plaintiff's motion, the defendant first argued that, because the plaintiff did not file her motion in compliance with General Statutes § 52-212, with an attached affidavit, within four months from the date that the judgment was rendered, the court did not have jurisdiction to consider the plaintiff's motion. The defendant further argued that, even if the court had jurisdiction, the plaintiff's motion did not demonstrate (1) the existence of a good cause of action by the time the judgment was rendered, and (2) that any mistake, accident, or other reasonable cause prevented her from complying with the court's orders. On November 12, 2019, the court denied the plaintiff's

motion to open. The plaintiff filed a motion to reconsider, which the court denied, and this appeal followed.

Following the commencement of this appeal, the plaintiff filed a motion for rectification with the trial court, pursuant to Practice Book §§ 60-2, 61-10, 66-2, 66-3, and 66-5, "to determine the basis for the trial court's [November 12, 2019] [o]rder denying [the plaintiff's] motion to open the judgment of nonsuit." In granting the plaintiff's motion, the court explained that, "[a]lthough captioned and presented as a motion for rectification, the court construes the plaintiff's June 26, 2020 motion as a motion for articulation seeking the basis for the court's November 12, 2019 denial of the plaintiff's motion to open [the] judgment." The court then articulated the rationale behind its denial of the motion to open the judgment: "Th[is] court denied the plaintiff's motion to open [the] judgment for several reasons. The motion was not verified by oath, nor was it accompanied by an affidavit. Although the plaintiff subsequently filed an affidavit, because she delayed filing her motion until the end of the four month statutory period within which the motion had to be filed, the affidavit was filed after the statutory period expired. The motion to open [the] judgment was denied because it did not comply with the statutory requirements. . . .

"Even if the affidavit had been timely filed, the contents of the affidavit failed to adequately establish a basis upon which the judgment should be reopened. [Section 52-212] requires the verified motion or, in this case, the affidavit '[show] reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense.' . . . Instead of 'showing' that the plaintiff had a good cause of action at the time judgment was

entered, the affidavit baldly asserts that 'the plaintiff has maintained a good cause of action.' This is inadequate. . . .

"The affidavit also did not establish that the plaintiff's failure to obey the court's orders that she comply with the defendant's discovery requests and appear at a deposition were due to 'mistake, accident or other reasonable cause.' The explanation advanced in her counsel's affidavit, that she ultimately determined that the records sought by the defendant did not exist, is belied by the fact that additional records were actually produced after judgment entered. Moreover, the fact that certain records did not exist should have been part of a response provided pursuant to the two prior orders of compliance issued by the court. The affidavit does not explain what, if any, efforts had been made to comply with the court's orders prior to the entry of judgment. The documents submitted with her November 25, 2019 motion to reconsider reflect only that a subpoena was served in an effort to obtain such records in October, 2019, three months after judgment entered. The affidavit also does not establish that the plaintiff failed to appear for her deposition, pursuant to the court's order, due to 'mistake, accident or other reasonable cause.' Counsel's affidavit states only that the 'deposition did not happen due to an error in notice between the undersigned firm and the plaintiff.' This reflects mere negligence on the part of counsel or the plaintiff and is not sufficient to establish a basis to [open] the judgment." (Citations omitted.)

On appeal, the plaintiff claims that the court erred as a matter of law in denying her motion to open the judgment. She claims that the court erred in applying the standard for opening judgments upon default or nonsuit set forth in § 52-212 as opposed to the standard

for opening civil judgments as set forth in § 52-212a.[3] We note that the plaintiff's motion before the court is captioned as a motion to open judgment of nonsuit, and, beyond referencing Practice Book § 17-4, she does not refer to any legal authority. The defendant, however, in her response to the plaintiff's motion to open, did object to the plaintiff's motion to open on the grounds that it did not comply with § 52-212. The defendant contends that the court analyzed the plaintiff's motion under the applicable statute and did not abuse its discretion in denying her motion. We agree with the defendant.

"Whether to grant a motion to open rests in the discretion of the trial court. . . . In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did." (Citation omitted; inter-

[3] Although the plaintiff does not attempt to demonstrate that she failed to raise this claim before the court, she does ask that we review her claim under the plain error doctrine. We emphasize that plain error "is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . Plain error is a doctrine that should be invoked sparingly." (Internal quotation marks omitted.) *Johnson* v. *Johnson*, 203 Conn. App. 405, 411, 248 A.3d 796 (2021). A finding of plain error requires that an error is "patent [or] readily discernable on the face of a factually adequate record . . . ." (Internal quotation marks omitted.) Id. Because we conclude that the court's application of § 52-212 to the plaintiff's motion to open the judgment was correct, the plain error doctrine is inapplicable to the present case. See *State* v. *Pierce*, 269 Conn. 442, 453, 849 A.2d 375 (2004) ("the plain error doctrine should not be applied in order to review a ruling that is not arguably incorrect in the first place").

nal quotation marks omitted.) *Pachaug Marina & Campground Assn., Inc.* v. *Pease*, 149 Conn. App. 489, 493, 89 A.3d 423 (2014). Additionally, "[t]o the extent that we need to interpret a statute, our review is plenary." *Disturco* v. *Gates in New Canaan, LLC*, 204 Conn. App. 526, 532, 253 A.3d 1033 (2021); see also *Trumbull* v. *Palmer*, 161 Conn. App. 594, 598–99, 129 A.3d 133 (2015) ("Whether a court has authority to grant a motion to open requires an interpretation of the relevant statutes. Statutory construction, in turn, presents a question of law over which our review is plenary." (Internal quotation marks omitted.)), cert. denied, 320 Conn. 923, 133 A.3d 458 (2016).

We first consider whether the court lacked statutory authority to consider the plaintiff's motion to open. This inquiry is guided by the requirements set forth in § 52-212, as well as Practice Book § 17-43. See *Opoku* v. *Grant*, 63 Conn. App. 686, 690–91, 778 A.2d 981 (2001). "[Section] 52-212 (a) provides: [a]ny judgment rendered or decree passed upon a default or nonsuit in the Superior Court may be set aside, within four months following the date on which it was rendered or passed, and the case reinstated on the docket, on such terms in respect to costs as the court deems reasonable, upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense. . . . Subsection [(c)] of § 52-212 additionally requires that [t]he complaint or written motion shall be verified by the oath of the complainant or his attorney . . . ." (Emphasis omitted; internal quotation marks omitted.) *Trumbull* v. *Palmer*, supra, 161 Conn.

App. 599. Practice Book § 17-43 contains similar requirements.[4]

In *Opoku* v. *Grant*, supra, 63 Conn. App. 686, this court addressed a similar challenge to a trial court's denial of a plaintiff's motion to open a judgment. Id., 687. Following the plaintiff's failure to follow the court's order to comply with the defendant's discovery requests, the defendant filed a motion for a judgment of nonsuit, which the court granted on March 8, 1999. Id., 688. The plaintiff filed a motion to open the judgment of nonsuit on June 2, 1999, to which the defendant objected, in part, due to the plaintiff's failure to file the required affidavit. Id., 688–89. On June 22, 1999, the court denied the motion to open and sustained the defendant's objection. Id., 689. The plaintiff did not file an affidavit until October, 1999. Id.

In affirming the trial court's denial of the plaintiff's motion to open, this court noted that "[t]he plaintiff did not meet the statutory requirements or those of the rules of practice, and there is no evidence of waiver by the defendant. The court rendered a judgment of nonsuit on March 8, 1999. The plaintiff filed his motion to

[4] Practice Book § 17-43 provides in relevant part: "(a) Any judgment rendered or decree passed upon a default or nonsuit may be set aside within four months succeeding the date on which notice was sent, and the case reinstated on the docket on such terms in respect to costs as the judicial authority deems reasonable, upon the written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of such judgment or the passage of such decree, and that the plaintiff or the defendant was prevented by mistake, accident or other reasonable cause from prosecuting or appearing to make the same. Such written motion shall be verified by the oath of the complainant or the complainant's attorney, shall state in general terms the nature of the claim or defense and shall particularly set forth the reason why the plaintiff or the defendant failed to appear. The judicial authority shall order reasonable notice of the pendency of such written motion to be given to the adverse party, and may enjoin that party against enforcing such judgment or decree until the decision upon such written motion. . . ."

open and set aside the judgment on June 2, 1999. On June 7, 1999, the defendant objected on several grounds, including the plaintiff's failure to file the required affidavit. Although the plaintiff thus received notice that the motion was procedurally flawed, he failed, even then, to file a timely affidavit. On June 22, 1999, the court denied the motion and sustained the defendant's objection. The plaintiff did not file an affidavit until October, 1999. Accordingly, the court properly denied the plaintiff's motion to open for lack of statutory authority to grant relief." Id., 691–92.

In our view, this court's holding in *Opoku* compels a similar result in the present case, as the plaintiff filed her motion without the affidavit required by § 52-212 (c). Although the plaintiff belatedly filed an affidavit on November 7, 2019, that date fell outside the four month range permitted by § 52-212. The statutory language is clear that a motion to open and the accompanying affidavit must be filed within four months of the judgment of nonsuit. Because the record before us unambiguously reflects that the plaintiff failed to timely file her affidavit, we cannot conclude that the court abused its discretion in denying her motion to open the judgment.

Additionally, even if the plaintiff had timely filed her affidavit, the court properly concluded that the affidavit did not satisfy the substantive requirements of § 52-212 (a). "To open a judgment pursuant to Practice Book § 17-43 (a) and . . . § 52-212 (a), the movant must make a two part showing that (1) a good defense existed at the time an adverse judgment was rendered; and (2) the defense was not at that time raised by reason of mistake, accident or other reasonable cause. . . . The party moving to open a [judgment of nonsuit] must not only allege, but also make a showing sufficient to satisfy the two-pronged test [governing the opening of judgments of nonsuit]. . . . The negligence of a party or his counsel is insufficient for purposes of § 52-212 to

set aside a default judgment. . . . Finally, because the movant must satisfy both prongs of this analysis, failure to meet either prong is fatal to its motion." (Internal quotation marks omitted.) *Disturco* v. *Gates in New Canaan, LLC*, supra, 204 Conn. App. 532–33.

We agree with the court's determination that the plaintiff's affidavit does not meet the statutory requirements. With respect to the showing of a good cause or defense, the plaintiff's affidavit merely states "[t]hat the plaintiff has maintained a good cause of action and is ready to continue prosecuting this action with due diligence." As we recognized in *Disturco*, the mere allegation of the existence of a cause of action is insufficient. See *Disturco* v. *Gates in New Canaan, LLC*, supra, 204 Conn. App. 533; see also *Moore* v. *Brancard*, 89 Conn. App. 129, 132, 872 A.2d 909 (2005) (motion that "included the bald assertion that a good cause of action still exists . . . failed to comply with the mandatory dictates of § 52-212" (internal quotation marks omitted)).[5] For the foregoing reasons, we do not disturb the trial court's denial of the plaintiff's motion to open.

The judgment is affirmed.

In this opinion the other judges concurred.

ANGELO REYES *v.* STATE OF CONNECTICUT (AC 43571)

Elgo, Cradle and Pellegrino, Js.

Syllabus

Pursuant to statute (§ 54-95 (a)), "[n]o appeal may be taken from a judgment denying a petition for a new trial unless, within ten days after the

[5] Having determined that the plaintiff's motion fails under the first prong of § 52-212 (a), we need not consider whether the plaintiff's motion sufficiently demonstrates that her inaction stemmed from "mistake, accident, or other reasonable cause" as required by § 52-212 (a) (2). See *Disturco* v. *Gates in New Canaan, LLC*, supra, 204 Conn App. 533.

judgment is rendered, the judge who heard the case or a judge of the Supreme Court or the Appellate Court, as the case may be, certifies that a question is involved in the decision which ought to be reviewed by the Supreme Court or by the Appellate Court. . . ."

The petitioner, who had been convicted of arson in the second degree, conspiracy to commit criminal mischief in the first degree, and conspiracy to commit burglary in the first degree, appealed to this court from the judgment of the trial court denying his petition for a new trial. After the parties had filed their initial appellate briefs, this court ordered that, at oral argument, they be prepared to address whether the appeal should be dismissed because the petitioner failed to seek certification to appeal pursuant to § 54-95 (a), and, at oral argument, the state requested a dismissal of the appeal due to the petitioner's failure to comply with that requirement. This court then ordered the parties to file supplemental briefs on the issue. *Held* that the appeal was dismissed due to the petitioner's failure to seek certification to appeal pursuant to § 54-95 (a): pursuant to *Santiago* v. *State* (261 Conn. 533), compliance with § 54-95 (a) is mandatory, and an appellate tribunal should not entertain an appeal from the denial of a petition for a new trial unless the petitioner first has sought certification to appeal pursuant to the statute; accordingly, this court declined to entertain the petitioner's appeal.

Argued September 9, 2021—officially released February 15, 2022

Procedural History

Petition for a new trial following the petitioner's conviction of arson in the second degree, conspiracy to commit criminal mischief in the first degree, and conspiracy to commit burglary in the first degree, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Alander, J.*; judgment denying the petition, from which the petitioner appealed to this court. *Appeal dismissed.*

Norman A. Pattis, with whom were *Zachary E. Reiland*, and, on the brief, *Kevin Smith*, and *Cameron Atkinson*, certified legal intern, for the appellant (petitioner).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Craig Nowak*, senior assistant state's attorney, and *Patrick J. Griffin*, state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Angelo Reyes, appeals from the judgment of the trial court, claiming that it improperly denied his petition for a new trial. The dispositive issue is whether the appeal should be dismissed due to the petitioner's failure to comply with the certification requirement of General Statutes § 54-95 (a). We answer that query in the affirmative and, accordingly, dismiss the appeal.

Following a jury trial, the petitioner was convicted of two counts of arson in the second degree in violation of General Statutes § 53a-112 (a) (2), two counts of conspiracy to commit criminal mischief in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-115 (a) (1), and one count of conspiracy to commit burglary in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-101 (a) (1).[1] From that judgment of conviction, the petitioner unsuccessfully appealed to our Supreme Court. See *State* v. *Reyes*, 325 Conn. 815, 818, 160 A.3d 323 (2017).

On June 15, 2017, the petitioner commenced the present action for a new trial pursuant to General Statutes § 52-270 (a).[2] The petition was predicated on evidence of third-party culpability that the petitioner claimed was newly discovered. The petitioner also alleged that the respondent, the state of Connecticut, had failed to disclose exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[1] The relevant facts underlying the petitioner's conviction are set forth in the decision on his direct criminal appeal. See *State* v. *Reyes*, 325 Conn. 815, 818–19, 160 A.3d 323 (2017). It would serve no useful purpose to recount them here.

[2] General Statutes § 52-270 (a) provides in relevant part: "The Superior Court may grant a new trial of any action that may come before it, for . . . the discovery of new evidence . . . ."

The trial court held a hearing on the petition, at which the petitioner presented the testimony of four witnesses. In its subsequent memorandum of decision, the court found that the evidence of third-party culpability offered by the petitioner "was not material to the issues at [his criminal] trial and certainly not likely to produce a different result in the event of a new trial." The court further found that the exculpatory evidence that the respondent allegedly failed to disclose "was known to the petitioner prior to his trial." The court thus denied the petition for a new trial and rendered judgment in favor of the respondent.

On November 1, 2019, the petitioner filed an appeal of that judgment with this court. Oral argument on that appeal was scheduled for September 9, 2021. On August 27, 2021, this court ordered: "The parties are hereby notified to be prepared to address at oral argument on September 9, 2021, whether this appeal should be dismissed because the petitioner failed to seek certification to appeal pursuant to [§] 54-95 (a). See *Santiago* v. *State*, 261 Conn. 533, 544–45 [804 A.2d 801] (2002)."

Argument before this court proceeded as scheduled on September 9, 2021, at which time the respondent requested a dismissal of the appeal due to the petitioner's failure to comply with the certification requirement of § 54-95 (a). By order dated September 10, 2021, this court ordered the parties to file supplemental briefs on that issue; both parties complied with that order.

With that context in mind, we turn to the statutory mandate at issue. Section 54-95 (a) provides in relevant part that "[n]o appeal may be taken from a judgment denying a petition for a new trial unless, within ten days after the judgment is rendered, the judge who heard the case or a judge of the Supreme Court or the Appellate Court, as the case may be, certifies that a question is involved in the decision which ought to be

reviewed by the Supreme Court or by the Appellate Court. . . ." As our Supreme Court has noted, § 54-95 (a) places "limits on when a petitioner may appeal from the denial of a petition for a new trial . . . ." *Jones* v. *State*, 328 Conn. 84, 106, 177 A.3d 534 (2018). The Supreme Court has held that, although the limitation codified in § 54-95 (a) is not jurisdictional in nature, compliance therewith is "mandatory." *Santiago* v. *State*, supra, 261 Conn. 540. For that reason, the court concluded that there is "no reason why an appellate tribunal should entertain an appeal from a denial of a petition for a new trial unless the petitioner first has sought certification to appeal pursuant to § 54-95 (a)." Id., 544.

In the present case, the petitioner never sought certification to appeal pursuant to § 54-95 (a) prior to commencing this appeal. Guided by the precedent of our Supreme Court, we therefore decline to entertain the petitioner's appeal.[3]

The appeal is dismissed.

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[3] Two weeks after oral argument was held before this court, the petitioner filed a "request for leave to file [an] untimely petition for certification to appeal [and] petition for certification to appeal" in the trial court, a copy of which he appended to his supplemental appellate brief. Because that filing, at present time, remains pending before the trial court, it is not properly before us.